# Legal Records in English and American Courts

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BY DEFINITION, legal records are records generated during the course of, and in connection with,[1] legal proceedings in judicial tribunals. All public record repositories at the federal, state, and local level, and many private institutions as well, encounter these documents. Archivists, manuscript curators, and historians, however, lacking formal legal training and unfamiliar with the subtleties of procedural and substantive law, do not fully perceive the richness of this material. A discussion of the judicial environment and of the documents which it generates should help the archivist more fully appreciate his role as keeper of the record of his society's pursuit of justice. Excluded from consideration here are the extensive data which can be gleaned from registered vital statis-

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1 As is said in Seymour V. Connor, "Legal Materials as Sources of History," *American Archivist,* 23 (1960): 158: "This paper is restricted to a discussion of records that were created by or involved in litigation of any kind." Thus newspaper accounts of trials or correspondence by litigants (such as letters to his daughter Theodosia written by Aaron Burr during his incarceration at Richmond [see Albert J. Beveridge, *The Life of John Marshall* (Boston, 1919), 3:479]) would not be considered to be legal records. Similarly, it is not a legal record when a medieval chronicler belonging to a religious house or order refers to lawsuits involving the property of the house or order. Sir Frederick Pollock, *A First Book of Jurisprudence* (London, 1896), p. 276. On the other hand, David Robertson, *Reports of the Trials of Colonel Aaron Burr,* 2 vols. (Philadelphia, 1808), being a stenographic account of the proceedings at Burr's trial, would fall within the category of legal records. Similarly, Thomas Jefferson's volume prepared on the Batture controversy for the use of counsel, *The Proceedings of the Government of the United States in Maintaining the Public Right to the Beach of the Missisipi* [sic] *Adjacent to New-Orleans, against the Intrusion of Edward Livingston* (New York, 1812), would fall within the category of legal records, as it consists of superfluous material gathered by the illustrious defendant for use (but which was not needed or used) in the trial of *Livingston* v. *Jefferson,* 1 Brockenbrough 203, Fed. Cas. No. 8411 (1811). On the Batture controversy, see Frederick C. Hicks, *Men and Books Famous in the Law* (Rochester, N.Y., 1921), pp. 163–68.

tics. Also omitted are recorded deeds and probated wills, which often contain data regarding births, deaths, and marriages affecting the course of the transmission of property.[2] The discussion will be confined strictly to documents and records which are the outgrowth of litigation.

The nature and extent of useful historical information obtainable from legal records depend, of course, upon recordkeeping practices of the tribunal in which the litigation occurs. The volume and character of available records thus vary greatly in accordance with the habits of the particular court, as affected by time and place.

At one extreme, the record in early English courts consisted of routine formalized entries written in Latin upon parchment rolls. These included, in a criminal case, the indictment and the verdict of the jury but omitted the evidence presented to the jury and the judge's instructions and rulings during the course of the trial. It is a manifestation of the genius of Frederic William Maitland as a historian that from such meager data he could reconstruct vivid and captivating portraits of English life and fascinating accounts of historical development.

At the other extreme, in a federal court today, where every word uttered in the courtroom, including the oral arguments of counsel, must be recorded "verbatim by shorthand or by mechanical means,"[3] inexhaustible treasures of information are created daily. Enshrined for posterity are the testimony of expert medical witnesses concerning the treatment which should have been or was in fact administered to patients at a given time and place; the opinions of engineers in products liability cases regarding defective construction of automobiles or other machinery and merchandise; the state of the art at the time when an inventor claims to have developed a patentable innovation; the observations of undercover agents concerning the methods prevalent in the narcotics traffic; the philosophical ruminations of conscientious objectors; eyewitness accounts of the behavior of policemen and protesters during a riot; the geologic structure of land condemned for a dam or highway; the impact of competition and monopoly in the shoe or shoe machinery business; and innumerable other interesting topics.

Accordingly, I shall endeavor to outline the characteristic features of available legal records at various stages of the development of Anglo-American judicial institutions. There are two major types

2 Similarly excluded are financial data derived from the files of bankruptcy proceedings, though technically these are court records.

3 28 U.S.C. 753(b).

of records: (1) the "record" of a case in the strict legal sense, documenting in chronological sequence the actions taken by litigants, judges, and jurors; and (2) the reported decisions containing opinions of the judges setting forth applicable rules of law.[4]

It seems appropriate to begin with the businesslike methods introduced in the English Royal Courts under the energetic oversight of King Henry II.[5] A formal Latin record inscribed on parchment rolls (as well as its own seal) was essential to the existence of a court of record.[6] But in a historian's eyes the meager content of the record leaves much to be desired.[7] In a criminal case, for example, the record states the commission of the judges, the indictment, the arraignment and plea of the defendant, the acceptance of jury trial as the mode of determining guilt or innocence, the summons of the jury, the verdict, and the judgment. But it omits reference to the evidence and the instructions of the judge to the jury.[8] "The jury is regarded as a formal test to which the parties have submitted. The judgment follows, as under the old system [of ordeal or trial by battle], the result of that test. But to ask in what manner one of the old tests worked, to lay down rules for its working, would have been almost impious; for are not the judgments of God past finding out? The record tells us that when the jury was first introduced

4 On this basic distinction see Sir Frederick Pollock, *Essays in the Law* (London, 1922), p. 233. It marked a notable advance in the study of English history when, in 1885, L. O. Pike began the practice of comparing or collating the Year Books with the plea rolls (i.e., the report with the record). William S. Holdsworth, *A History of English Law,* 3rd ed. (Boston, 1923), 2:531.

5 Helen M. Cam, ed., *Selected Historical Essays of F. W. Maitland* (Cambridge, 1957), p. 103; Sir Frederick Pollock and Frederic W. Maitland, *The History of English Law,* 2nd ed. (Cambridge, 1898), 1:136. Henry II ruled from 1216 to 1272, during which time the systematic issuance of writs became customary. Elsa de Haas and G. D. G. Hall, *Early Registers of Writs,* Publications of the Selden Society, vol. 87 (London, 1970), p. xv.

6 Holdsworth, *History of English Law* (Boston, 1927), 5:157–61; Pollock and Maitland, *History of English Law,* 1:190; 2:666. It was a privilege of royalty that the king's own word as to acts transacted in his presence was incontestable. This characteristic is extended in the course of time to the king's courts. Lack of a proper Latin plea roll was one of the irregularities charged against the Court of Star Chamber by its critics. Cam, *Essays,* p. 90.

7 Pollock, *Essays,* p. 233, says that "in the middle of the thirteenth century the Westminster record may tell us a good deal of what the case was really about, but in the middle of the eighteenth century it will, oftener than not, tell us nothing." Chancery pleadings do embody in a cumbrous and confusing form an intimation of the facts involved in the case. Ibid., p. 234.

8 Holdsworth, *History of English Law,* 4th ed. (Boston, 1931), 1:215, 317. In Austin W. Scott and Sidney P. Simpson, *Cases and Other Materials on Judicial Remedies* (Cambridge, Mass., 1938), pp. 23–27, 28–72, an actual specimen of a record from Lord Coke's time is conveniently reproduced, followed by a 1928 record from the New York Court of Appeals.

the method by which it arrived at its verdict inherited the inscrutability of the judgments of God."[9]

This magical power of juries to resolve difficult or insoluble questions still persists. In personal injury cases where a permanent disability is proved, the court cheerfully confides to the jury the task of determining what pecuniary loss a plaintiff has suffered by reason of impairment of his future earning power. The jury must thus determine how long the plaintiff would have continued to live and earn money in the absence of any injury and what the amount of his future earnings would have been, taking into account inflation, depressions, technological change, prospect of physical deterioration due to age, and all the other hazards and uncertainties of human affairs. Truly the infallibility of the jury is an indispensable institution in the administration of justice.

The skimpiness of the data contained in a record necessitated the use of bills of exceptions in order to bring up for review by a higher court any allegedly erroneous rulings of the trial judge which did not appear on the face of the record.[10] "Because they were not entered on the record they could not, though both material and erroneous, be assigned as errors. To remedy this a clause in the statute of Westminster II (1285) enacted that if one of the parties to an action alleged an exception which the judge refused to allow, such party might write it down and require the judge to seal it. The ruling upon such an exception could then be assigned as an error, though it was not upon the record. This writing was called a Bill of Exceptions."[11] Within my memory, it was necessary in Pennsylvania to take exceptions, and after each adverse ruling the court would utter the magic words "Bill Sealed." Many old-time practitioners still persist in requesting an exception after an adverse ruling during the course of a trial, although under modern practice if a timely objection is made the litigant automatically is entitled to bring up the point in the reviewing court.

Appellate review at common law was confined to writ of error, which brought up only defects appearing upon the face of the record and in the bill of exceptions. This type of review resulted in what Dean Pound has called trying the record rather than trying the case.[12] In that branch of law called equity, the method of appellate review was by "appeal" which permitted what was in fact a trial *de novo* in the appellate court, resulting in review of all phases

9 Holdsworth, *History of English Law,* 1:317.
10 Ibid., 1:214–15, 223–24.
11 Ibid., 1:223–24.
12 Roscoe Pound, *Jurisprudence* (St. Paul, 1959), 5:492, 504, 516.

of the case. The equitable type of appeal supplanted the writ of error when the English court system was reformed by the Judicature Acts of 1873 and 1875. In the United States Supreme Court practice, writ of error was abolished and appeal substituted in 1928.[13]

In properly interpreting and understanding the contents of early judicial records (as well as judicial opinions, of which I shall speak subsequently), it is important to remember the influence of writs and the forms of actions. The writ was a written command from the king to his judges, sheriffs, or other officials, authorizing them to proceed with various steps in the trial of a case. "The courts of law can in general only entertain such questions as are laid before them by a writ issued from the chancery."[14] The Register of Writs was a form book in the royal chancery setting forth the various types of writs which could be issued.[15] If there was no available form of writ to fit a particular litigant's case, he had no legal remedy. The law suit began by "impetration of the writ" by the plaintiff.

The common law developed certain specific "forms of action" which constituted the only types of legal remedies available to litigants.[16] The several forms of action may be regarded as weapons in an arsenal. It was important to the litigant to make sure that he selected the proper weapon for the particular occasion and used it in the proper manner. To choose the wrong form of action was fatal.[17]

The most frequent[18] forms of action at common law are the following: (1) Replevin, for recovering possession of chattels or personal property wrongfully taken or withheld from plaintiff; (2) Detinue, for obtaining compensation for the wrongful withholding of chattels or personal property; (3) Debt, for collection of a specific sum of money due and owing; (4) Covenant, for breach of a sealed agreement other than for the payment of money; (5) Trespass, for recovery of damages for injuries inflicted by force and violence, for carrying away chattels or personal property, or for trespass to real estate; (6) Trespass on the case, for recovery of damages due to negligence but not involving direct action or contact (the distinction between trespass and trespass on the case is often very delicate and

13 Ibid., 1:638, 643; Act of January 31, 1928, 45 Stat. 54.

14 Cam, *Essays,* p. 80.

15 The collection of writs resembled a hymn book, with many differences in different copies. There seems to have been no single official version which could be called *the* register of writs. De Haas and Hall, *Early Registers,* pp. cxvi, cxx; T.F.T. Plucknett, *Early English Legal Literature* (Cambridge, 1958), p. 32.

16 On forms of action and pleading, see Pollock and Maitland, *History of English Law,* 2:558–73, 598–674.

17 Ibid., 2:561.

18 There were thirty or forty actions in common use. Ibid., 2:565.

difficult to draw); (7) Assumpsit, an offshoot of trespass on the case, to remedy violations of an agreement or undertaking (it influenced the development of the law of contracts); (8) Trover, for conversion of property to the taker's own use, or otherwise exercising acts of dominion over the property inconsistent with the true owner's right of ownership (the complaint in trover and conversion contains a fictitious allegation, which the defendant is not permitted to deny, that the defendant "found" the plaintiff's property before converting it); (9) Account, for collecting the balance due as the result of mutual dealing between the parties; and (10) Ejectment, for recovery of real estate where the defendant is in possession.[19]

It should be noted that the papers filed with the court by the respective parties in a litigation are called pleadings. The first pleading, filed by the plaintiff, is called the declaration. The defendant is then required to demur or plead. To demur is to request the court to determine that even if plaintiff's declaration be accepted as true, it is nevertheless insufficient in law to support a judgment for the plaintiff. A plea sets up facts which are claimed to relieve the defendant from liability. To the plea, plaintiff may demur or reply, and to the replication the defendant may demur or file a pleading designated as a rejoinder. The plaintiff may then demur or file a pleading denominated a surrejoinder. The defendant may then demur or file a pleading called a rebutter. To this the plaintiff may demur or file a pleading known as a surrebutter. No distinctive names exist for pleadings after the surrebutter, as they seldom extend further than that stage before resulting in a joinder of issue.

The effect of a demurrer at any stage of the pleadings is to cause the court to enter judgment against the party whose pleading was the earliest in the chain of pleadings to be legally deficient. Thus if the plaintiff demurs to defendant's answer and the answer is defective, but the plaintiff's declaration was also defective, then judgment would be rendered for the defendant.[20]

When a party does not demur, his pleading, if a denial (known as a "traverse" of the previous pleading), must tender issue ("and of this he puts himself upon the country," i.e., he proposes that a jury try the issue). The other party "joins issue" by a *similiter* ("And

[19] Many practical treatises for lawyers discuss in detail the forms of action and pleading. Perhaps the most celebrated are Joseph Chitty, *Treatise on Pleading* (London, 1808) and Henry J. Stephen, *Principles of Pleading* (London, 1824), both of which ran through many subsequent editions. For a simpler treatment see Benjamin J. Shipman, *Handbook of Common Law Pleading* (St. Paul, Minn., 1923); and Edmund M. Morgan, *Introduction to the Study of Law* (Chicago, 1926).

[20] This effect of a demurrer is epitomized by the expression that a demurrer "searches the record." Pound, *Jurisprudence*, 5:476–77.

the said John Smith doth the like"). If, instead of denial, the pleading alleges new matter ("in confession and avoidance") it concludes with the formula "and this he is ready to verify." The opponent then (if he does not demur) tenders issue with the words "and this he prays may be inquired of by the country," after which issue is joined. Thus the pleadings always end either in a demurrer, which raises a question of law for the court, or in a specific issue joined between the parties, which goes to the jury for determination.[21]

The foregoing complex and artificial rules must be borne in mind in attempting to determine the historicity of facts set forth in pleadings under the common law system of forms of action. For the most part, the allegations are traditional formulas, what we would today call "boiler plate." It is natural and in accordance with human nature for the pleader, in order to establish his case, to state the facts so that they will constitute compliance with the requirements of the system of pleading.

In fact, under any system of pleading, it must be remembered that the parties in their pleadings will certainly endeavor to make out a case in their own favor. A better test of historical truth is found in examination of the evidence submitted to the trier of the facts than in the formal and frequently fictitious allegations advanced in the pleadings. In any event the historian, like the jury, when weighing evidence, must take into account the possibility of bias, mistake, poor communication, and downright perjury.

The courts in which these actions could be brought must also be understood by keepers and users of legal records. The earliest extant plea rolls date from 1194.[22] As early as 1178, Henry II ordered that some of his judges should sit permanently at the court, while others followed him in his movements throughout England. This practice led to division of the royal judiciary into two separate courts. The Court of Common Pleas was required in 1215 by Magna Carta[23] to maintain a fixed seat, usually at Westminster, while the Court of King's Bench followed the sovereign "wheresoever we shall be in England."[24] Beginning in 1234 we find two clearly separated tribu-

21 Early English lawyers were chiefly interested in the science of skilful pleading. After the issue was framed, no one cared what determination the jury reached, and the outcome is often omitted from the report of a case. John P. Dawson, *The Oracles of the Law* (Ann Arbor, 1968), p. 54; Holdsworth, *History of English Law,* 2:538, 554; T.F.T. Plucknett, *Early English Legal Literature,* pp. 102–04.

22 Pollock and Maitland, *History of English Law,* 1:168–69. The first statute roll begins in 1278; the first Parliament roll in 1290. Ibid., 1:180. As to other types of rolls, see ibid., 1:195.

23 Cap. XVII: "Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo." William S. McKechnie, *Magna Carta* (Glasgow, 1914), p. 216.

24 Pollock and Maitland, *History of English Law,* 1:198.

nals with separate rolls: the *rotuli placitorum coram rege* for the King's Bench and the *rotuli placitorum de banco* for the common bench or Court of Common Pleas.[25]

Note should also be taken of a third English common law court, the Court of Exchequer, which dealt primarily with the collection of royal revenue. The Exchequer in the twelfth century was the earliest department of government to be organized separately. Late in the thirteenth century the financial and judicial sides of the Exchequer were differentiated, and the Court of the Exchequer became a recognized judicial tribunal with its own plea rolls, which begin in 1236–37 and are practically continuous after 1267–68.[26] There was also a curious tribunal known as the Court of Exchequer Chamber, composed of all the judges and barons of the Exchequer, which exercised appellate review over all three common law courts.[27]

The judicial powers of the House of Lords (as the ultimate appellate tribunal)[28] and of the equitable or Chancery courts[29] should also be mentioned. Likewise important, particularly with reference to appeals from the American Colonies,[30] was the jurisdiction of the Judicial Committee of the Privy Council.[31] Of the courts of specialized jurisdiction, the courts of admiralty and the ecclesiastical courts had particular significance in connection with the development of the law relating to maritime matters and domestic relations.[32]

The English court system, as previously mentioned, was radically reformed by the Judicature Acts of 1873 and 1875. The forms of action were abolished, and the various tribunals were consolidated into one Supreme Court of Judicature. It was composed of the High Court of Justice (which for convenience was subdivided into the five divisions of Chancery; King's Bench; Common Pleas; Exchequer; and Probate, Divorce, and Admiralty) and of the Court of Appeal.[33]

In the United States, during the colonial period, each colony must be considered separately. There was no uniform pattern of judicial

25 McKechnie, *Magna Carta,* p. 267; Pollock and Maitland, *History of English Law,* 1:198.

26 Holdsworth, *History of English Law,* 1:231–32.

27 Ibid., 1:242–46.

28 Ibid., 1:351–94.

29 Ibid., 1:394–476.

30 See the excellent treatment by Joseph H. Smith, *Appeals to the Privy Council from the American Plantations* (New York, 1950).

31 Holdsworth, *History of English Law,* 1:516–25.

32 Ibid., 1:526–632.

33 Ibid., 1:638–45. In 1881 the King's Bench, Common Pleas, and Exchequer divisions were merged into the King's Bench division. Ibid., 1:641.

organization. Often the governor and council constituted the highest tribunal, as was the case in Virginia, where it was called the General Court and for the most part was composed of prominent planters without legal training.[34]

After independence and under the new Constitution, a dual system of courts was established. Each state freely molds its own court structure as it sees fit,[35] while Congress has created a distinct and separate system of federal courts.[36] The Supreme Court of the United States is the summit of both hierarchies. At the present time,[37] the inferior federal courts are District Courts (which are trial courts) and the Courts of Appeals (which are appellate tribunals). These (together with the Supreme Court) are courts exercising judicial power under Article III of the Constitution. By virtue of powers vested in Congress by other provisions of the Constitution (such as the power to govern territories and the District of Columbia, or to collect revenue, or to pay the debts of the United States, or to govern the armed forces) Congress, from time to time as occasion might require, has established special "legislative" courts, such as the courts in territories before statehood, the Court of Claims, the Court of Customs and Patent Appeals, the Tax Court, military tribunals, international claims commissions, and other special types of courts.[38]

In the United States the common law forms of action were replaced by modern systems of pleadings.[39] The reform took place gradually, at different times in different states. The last state to abandon the common law forms of action was Illinois, whose new procedure went into effect in 1933. In the Pennsylvania Practice Act of 1915, all types of action were consolidated into the three forms

34 In general, see Anton-Hermann Chroust, *The Rise of the Legal Profession in America* (Norman, Okla., 1964), 1:265–66; Joseph H. Smith, "New Light on the Doctrine of Judicial Precedent in Early America: 1607–1776," in John N. Hazard and Wenceslas J. Wagner, eds., *Legal Thought in the United States of America under Contemporary Pressures* (Brussels, 1970), p. 22.

35 Edward Dumbauld, *The Constitution of the United States* (Norman, Okla., 1964), p. 390.

36 Ibid., pp. 318–21. For a succinct account of English and American court systems, see Edson R. Sunderland, *Judicial Administration,* 2nd ed. (Chicago, 1948), pp. 1–38.

37 The first federal court system was created by the Act of September 24, 1789, 1 Stat. 73. See Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Review,* 37 (1923): 49. Later landmarks are the Circuit Courts of Appeals Act of March 3, 1891, 26 Stat. 826, and the Judiciary Act of February 13, 1925, 43 Stat. 936. For a good study of the history and development of the federal judicial system, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (New York, 1927).

38 Dumbauld, *Constitution,* p. 322; Charles A. Wright, *Handbook of the Law of Federal Courts,* 2nd. ed. (St. Paul, Minn., 1970), pp. 10–13.

39 Pound, *Jurisprudence,* 5:484–503.

of trespass, assumpsit, and replevin. Massachusetts adopted contract, tort, and replevin as the names of their forms of action. In New York and many western states which followed the movement for codification led by David Dudley Field, there was adopted a system known as "code pleading." Under this system the pleadings were supposed to contain a simple, concise statement of the facts in plain language, and relief was to be given by the court in accordance with the facts established, disregarding legal formalities.[40]

Another important landmark was the adoption of the Federal Rules of Civil Procedure prescribed by the Supreme Court of the United States in pursuance of legislation[41] enacted through the efforts of Attorney General Homer S. Cummings. Before the new Federal Rules went into effect on September 16, 1938, practice in federal courts had been conducted in conformity "as near as may be" with that of the state in which the federal court sat.[42] Following the adoption of the Federal Rules, many states amended their own procedures along the same lines.

One of the principal features of the Federal Rules was emphasis upon "discovery." This term refers to taking the deposition or testimony of the parties and other witnesses under oath and requiring production of documents or exhibits in advance of trial. Discovery works to eliminate as much surprise as possible and to facilitate settlement of litigation when each party is fully apprised of the evidence available to the other party. In view of the emphasis on discovery, the pleadings became unimportant and are again relegated to the status of routine, formal allegations in skeleton form.[43] Historical data are therefore more likely to be found in the pretrial discovery materials or in the evidence as presented at the trial. Typewritten transcripts of pretrial depositions and other documents

40 The New York Code of Civil Procedure was adopted in 1848 and copied in some thirty other states, according to Charles M. Haar, ed., *The Golden Age of American Law* (New York, 1965), pp. 200, 215, 218. In its latest form the "fact pleading" which had replaced common law "issue pleading" gave way to "notice pleading" designed merely to inform one's opponent of the contentions with which he will be confronted at the trial of the case. Pound, *Jurisprudence,* 5:486, 491–92.

41 Act of June 19, 1934, 48 Stat. 1064.

42 This was required by the "Conformity Act" of June 1, 1872, 17 Stat. 196. Senator Thomas J. Walsh of Montana had, until Attorney General Cummings entered the fray, prevailed in his battle to maintain the conformity system for the convenience of lawyers familiar with their own state practice. Henry M. Hart and Herbert Wechsler, *The Federal Courts and the Federal System* (Brooklyn, 1953), pp. 581–89.

43 An eminent jurist says of the Federal Rules of Civil Procedure: "Today they permit a litigant who suspects he has a good case as either plaintiff or defendant to file a complaint or an answer without knowing whether the allegations are true or not, and then use the process of discovery to find out if he is right." Thurman W. Arnold, *Fair Fights and Foul* (New York, 1965), p. 266.

are filed in the office of the clerk of the court, as are typewritten transcripts of testimony taken at the trial.

When an appeal is taken to a higher or appellate court, the customary practice is to print the record made in the lower court. Counsel then file written arguments, called briefs, with the appellate court. It is customary for some forty copies of the brief and record to be filed, and copies not required for use by the judges of the appellate court are deposited in principal law libraries in the country, such as the Harvard Law School Library, the Library of Congress, and the Library of the Department of Justice in Washington.

With the increase in the cost of printing in recent years, there has been a tendency to modify the rules of appellate courts so as to permit the unprinted, original typewritten transcript to be forwarded to the appellate court or to permit the parties to print only such portions of the transcript as they rely upon as relevant to support their contentions in the appellate court. Although unquestionably beneficial to the parties saddled with high printing costs, these practices are perhaps unfortunate from the standpoint of the historian for whom the records are less available for research. For the archivist with custody of both trial and appellate court records, the practice may mean some elimination of duplicate transcripts among his holdings. He must remember, however, that a portion of the lower court records may be filed in a separate series.

It should be noted that rules of court often require, and in any event a well-written brief would necessarily contain, a statement of the facts of the case. This synopsis of the facts must be documented by references to the page numbers in the typewritten transcript or printed record. Any inaccuracy in the "Statement of Facts" would be considered a gross breach of professional propriety.[44] Arguments and controversial contentions as to the inferences and conclusions to be drawn from the evidence belong in another portion of the brief, under the heading "Argument."

It is normal to expect that lawyers will set forth and emphasize facts which militate most strongly in behalf of the contentions of their respective clients. For an archivist or historian, therefore, the portions of the briefs containing statements of the facts of the case should provide a useful index to the transcript or printed record. It is of course possible that inept counsel may have overlooked something important, and page by page examination of the original transcript or record might prove rewarding to the researcher.

[44] It is likewise a gross breach of propriety to advance an argument based on facts not contained in the record.

There is a Latin maxim *ex facto jus oritur,* the law emerges from the fact. What we have been discussing up to the present point is merely the raw material of law, the written records contained in the files of the courts, containing testimony of witnesses, documents, photographs, or other exhibits. The other major group of written legal records available to historians is composed of those containing statements of the law itself, as embodied in the written opinions of judges. Today many cases are disposed of by a brief order (or short statement of reasons for the decision) filed in the clerk's office in typewritten form. In more important or difficult cases, the court's opinion will be recorded at length, often available in published volumes. All appellate court opinions are normally published.

The availability of judicial opinions is important to lawyers and judges because Anglo-American law is uniquely based upon the doctrine of precedent, or *stare decisis.* The rule of *stare decisis* is a genuine use of historical processes within the legal system itself. One judge or court truly seeks to decide a particular question the same way it has previously been decided. Vast digests and encyclopedias embalm the accomplishments of prior generations of jurists. Lawyers search these repositories diligently to find a case in point. This process, though historical in nature, is internal to the legal system itself. It seeks to determine what other courts (or the same court) did on a prior occasion.[45]

In England the judges expressed their opinions orally, and at first they were recorded privately by bystanders. Even now the English Law Reports are not official government publications, although since 1865 they have been issued by the Council on Law Reporting, a committee representing the various branches of the legal profession in England.[46]

The earliest form of reported judicial decisions is that presented by the Year Books.[47] These seem to have been based on notes taken

[45] On the doctrine of *stare decisis* in Anglo-American law, see Eugene Wambaugh, *The Study of Cases,* 2nd ed. (Boston, 1904), pp. 15, 104–08; Holdsworth, *History of English Law* (Boston, 1938), 12:146–62; Arthur L. Goodhart, "Precedent in English and Continental Law," *Law Quarterly Review,* 50 (1934): 40–65; T. Ellis Lewis, "The History of Judicial Precedent," *Law Quarterly Review,* 46 (1930): 207–224, 341–60; 47 id. (1931) 411–27; 48 id. (1932) 230–247; Smith, "New light on the doctrine of judicial precedent," in Hazard and Wagner, eds., *Legal Thought in the United States,* pp. 9–39.

[46] Pollock, *Essays,* pp. 242–44. Upon the basis of a statement by Plowden [see Frederick C. Hicks, *Materials and Methods of Legal Research,* 3rd ed. (Rochester, 1942), p. 117], it was formerly thought (by Coke, Blackstone, and Bacon, among others) that the Year Books had been compiled by official reporters; but this view is now abandoned by scholars. Holdsworth, *History of English Law,* 2:532.

[47] For a good treatment of the Year Books, see Holdsworth, *History of English Law,* 2:525–56.

by listeners in the courtroom, either students or practitioners.[48] They were called "Year Books" because the cases collected were grouped by regnal years. The earliest begin with the twelfth year of the reign of Edward I in 1283; the last end with the twenty-seventh year of Henry VIII in 1535.[49] As one historian of English law appraised the Year Books:

> Written by lawyers for lawyers, they are by far the most important source of, and authority for, the mediaeval common law. . . . If we except the plea rolls they are the only first-hand account we possess of the legal doctrines laid down by the judges of the fourteenth and fifteenth centuries, who, building upon the foundations which had been laid by Glanvil and Bracton, constructed the unique fabric of the mediaeval common law. Because they are contemporary reports they are of the utmost value, not only to the legal historian, but also to the historian of any and every side of English life. . . . No other nation has any historical material in any way like them.[50]

At first these reports of court proceedings circulated in manuscript form. Later, in the fifteenth and sixteenth centuries, they were printed in crabbed black-letter Law French. Since the latter part of the nineteenth century, Maitland and other legal scholars, with the sponsorship of the Selden Society, have issued carefully prepared editions of the earlier extant manuscripts.[51] The earliest printed Year Book is of the year 1292.[52]

After the anonymous Year Books, there was a transition in the sixteenth century to published reports written by, or ascribed to, named reporters, most of whom were eminent judges or lawyers.[53]

48 Dawson, *Oracles,* pp. 54–55.

49 Hicks, *Materials and Methods,* pp. 115–16; Cam, *Essays,* p. 106.

50 Holdsworth, *History of English Law,* 2:525. See also ibid., 2:546–48. Justice Holmes acknowledged "having done my share of quotation from the Year Books." Mark Howe, ed., *The Occasional Speeches of Justice Oliver Wendell Holmes* (Cambridge, Mass., 1962), p. 84. On another occasion he said: "The rational study of law is still to a large extent the study of history. . . . For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of the statistics and the master of economics." Oliver Wendell Holmes, Jr., *Collected Legal Papers* (New York, 1930), pp. 186–87. This foreshadowed the Brandeis technique. See n. 78 below.

51 Holdsworth, *History of English Law,* 2:526–32.

52 Ibid., 2:536.

53 On the reporters, see Holdsworth, *History of English Law,* 5:355–74; 6:551–73; 12 (1938): 102–146; 13 (1952): 424–43; 15 (1965): 257–68; Dawson, *Oracles,* pp. 65–80; Hicks, *Materials and Methods,* pp. 114–29. For fuller treatment see John W. Wallace, *The Reporters,* 4th ed. (Boston, 1882); W.T.S. Daniel, *The History and Origin of the Law Reports* (London, 1884); John C. Fox, *A Handbook of the English Law Reports* (London, 1913); Van Vechten Veeder, "The English Reports, 1587–1865" [in *Select Essays in Anglo-American Legal History* (Boston, 1908), 2:123–68, reprinted from *Harvard Law Review,* 15 (1901): 1–24, 109–117]; Holdsworth, *Sources and Literature of*

Edmund Plowden was the pioneer whose cases were well selected (turning upon points of law decided by the court) and thoroughly and accurately documented. The first of his two volumes appeared in 1571.[54] Then in 1585, three years after the death of Sir James Dyer, Chief Justice of the Court of Common Pleas, there were published three volumes from notes of cases which he had prepared for his own use.[55]

The year 1600 is significant to legal records because it saw the first of the eleven volumes of reports that Sir Edward Coke was to publish in his lifetime; the last volume appeared in 1615.[56] A second edition was issued before Coke's death on September 3, 1634. Parts Twelve and Thirteen were published posthumously, in 1656 and 1659 respectively, after most of Coke's papers (which the Crown seized as seditious while he lay on his deathbed) had been returned to his heir in 1641. Coke's acknowledged preeminence as an erudite expounder of the law and doughty champion of constitutional rights is such that when a lawyer cites simply "the Reports" (or, more briefly, "Rep."), the reference is to Coke's reports. When any other reports are cited, the name of the reporter, or of the jurisdiction referred to, must be given. After Coke, numerous other reports, of varying degrees of reliability and usefulness, appeared prior to the establishment of the Council of Law Reporting in 1865.

In the United States, the first published volume of law reports was that brought out by Ephraim Kirby in 1789, covering cases adjudged in the Superior Court of Connecticut from 1785 to May 1788.[57] In 1790, Alexander J. Dallas began his four-volume series of reports of cases heard by courts sitting in Philadelphia; thus his reports stand today in two sets on a lawyer's shelves: at the beginning of the reports of the Supreme Court of the United States, and at the beginning of the reports of the Supreme Court of Pennsylvania. From 1790 to 1803 about a dozen other private reporters published reports of cases from various state courts. Massachusetts then passed a law approved on March 8, 1804, authorizing the Governor of the Commonwealth to appoint, at a salary of $1000 a year, "some suitable person, learned in the law, to be a reporter of the decisions of the Supreme Judicial Court."[58] Other states adopted the same

*English Law* (Oxford, 1925); Holdsworth, "The Named Reporters," N. Y. U. School of Law, Anglo-American Legal History Series, series 1, no. 8 (New York, 1943).

54 Holdsworth, *History of English Law,* 5:372; Dawson, *Oracles,* pp. 65–67; Hicks, *Materials and Methods,* pp. 116–119.

55 Dawson, *Oracles,* p. 67.

56 Ibid., p. 68.

57 J. C. Bancroft Davis, Appendix to 131 U.S. xv. Francis Hopkinson's *Judgments in the Admiralty of Pennsylvania* seems to have preceded Kirby's volume by about a month but contained only six cases filling 131 pages. Hicks, *Materials and Methods,* p. 132.

58 Hicks, *Materials and Methods,* pp. 135–36.

practice. Not until 1817, however, was an official reporter appointed for the Supreme Court of the United States (at a salary of $1000 a year).[59] Meanwhile (following Dallas) William Cranch and Henry Wheaton had continued to publish as a private enterprise the reports of that court.

Wheaton's successor, Richard Peters, undertook in 1830 to issue a condensed publication furnishing in six volumes for $36 the cases contained in the twenty-five volumes already published by preceding reporters and selling for $180. Cranch, who still lacked $1000 of recovering his investment, protested, while Wheaton and his publisher Donaldson brought suit against Peters.[60] In 1834 the Supreme Court, being "unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right,"[61] remanded the case to the court below for determination by a jury of the question whether the requirements of the copyright law had been complied with by plaintiffs.

The practical effect of this decision was to make it necessary for official reporters to be appointed and fully compensated by the public for all courts. Although comments, notes, and other editorial matter supplied by the reporters remained copyrightable, the one major indispensable feature of a law report, namely the judicial opinions themselves, could not be protected by copyright. Hence it became financially impossible for reporters to continue to publish their reports as a private venture with any hope of profit.[62]

It is important to note that in the Anglo-American legal system judicial opinions themselves are recognized as a source of law.[63] The rule of *stare decisis* is followed. So firmly has the doctrine of judicial duty to follow precedents been ingrained in Anglo-Ameri-

59 Act of March 3, 1817, 3 Stat. 63. Since 1922, beginning with 257 U.S., the Government Printing Office has handled the publication of the official Supreme Court reports. Reporting the decisions of lower federal courts (except for the insignificant official reports in the District of Columbia) is a private monopoly in the hands of the West Publishing Company of St. Paul, Minnesota. These include *Federal Cases* (thirty-one volumes); *Federal Reporter* (three hundred volumes; continued since 1924 as *Federal 2nd*); *Federal Supplement* (since 1924 containing District Court reports only); and *Federal Rules Decisions*. Hicks, *Materials and Methods*, pp. 140–42. West also publishes a National Reporter System which duplicates the official reports of state courts.

60 *Wheaton and Donaldson* v. *Peters and Griggs*, Federal Case No. 17486 (Eastern District of Pa., 1832). Judge Francis Hopkinson held that plaintiffs had not proved compliance with the copyright law by depositing a copy in the office of the Department of State.

61 *Wheaton* v. *Peters*, 8 Pet. 591, 668 (1834). See Hicks, *Men and Books*, pp. 198–211; Dumbauld, *Constitution*, p. 155.

62 Hicks, *Materials and Methods*, p. 139.

63 John Chipman Gray, *The Nature and Sources of the Law*, 2nd ed. (New York, 1931), pp. 211–12, 216, 218, 241. See n. 45 above.

can legal thinking that the instability evidenced by abnormally frequent overruling of previous decisions has occasioned much uneasiness on the part of lawyers and given rise to considerable criticism of the Supreme Court of the United States in recent years.[64]

With the doctrine of judge-made case law in Anglo-American jurisprudence should be contrasted the primary importance given to legislative codification in the continental or civil law systems.[65] In those systems, based upon the Roman Law tradition and influenced by the example of the Corpus Juris of the Roman Emperor Justinian,[66] comprehensive and systematic legislative enactments are ordinarily resorted to as the source of legal development. Judicial decisions in specific cases are regarded, not as lawmaking precedents, but simply as "one-shot" solutions of particular problems by means of the application of rules derived from the statutory code. In expounding the code, three assumptions were generally made: (1) the legislature possessed a monopoly of lawmaking power, which was not shared with judicial tribunals; (2) the legislature had achieved complete coverage, so that for every problem there was an answer to be found in the code; and (3) the whole body of legislation contained in the code was internally consistent and harmonious.[67]

In the Anglo-American system, on the other hand, statutes are ordinarily regarded as isolated or sporadic encrustations upon the rationally developed body of judge-made common law.[68] From time

64 Frederick B. Wiener, *Uses and Abuses of Legal History: A Practitioner's View* (Selden Society Lecture, London, 1962), p. 25; Philip B. Kurland, "Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government," *Harvard Law Review,* 78 (1964): 143, 144; Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis, 1962), pp. 51–59; Herbert Wechsler, *Principles, Politics, and Fundamental Law* (Cambridge, Mass., 1961), p. 21.

Of course, besides criticism based on departure from accepted standards of craftsmanship, there has been some criticism based upon disagreement with the policy or content of the new rules enunciated by the Court. This is particularly true of decisions expanding the constitutional protection of freedom of speech and religion so as to prohibit public prayer and prevent prosecution of draft-dodgers and purveyors of pornography; it also applies to decisions upsetting or disrupting the delicately balanced division of powers between federal and state governments that constitutes a distinctive feature of the federalism which has always been characteristic of the American system of government.

65 For an excellent and thorough discussion of the role played by the judiciary in various legal systems, see Dawson, *Oracles.*

66 On Justinian's legislation, see Pound, *Jurisprudence,* 3:683–87; and Dumbauld, *The Life and Legal Writings of Hugo Grotius* (Norman, Okla., 1969), pp. 164–69.

67 Dawson, *Oracles,* p. 393.

68 *Pope* v. *Atlantic Coast Line R.R. Co.,* 345 U.S. 379, 390 (1953). Since before the time of Lord Coke, the common law has been regarded as "the perfection of reason." Dawson, *Oracles,* p. 58; John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, Mass., 1927), pp. 87–88, 94, 113–14; Philip B. Kurland, ed., *Of Law and Life* (Cambridge, Mass., 1965), p. 250; Pound, *Jurisprudence,* 1:497; 2:13; Blackstone, *Commentaries,* 1:70.

to time, of course, there are wide-ranging statutory schemes enacted into law, such as the Interstate Commerce Act,[69] which are intended to "occupy the field" and to provide a complete and self-contained pattern of legal regulation covering a particular field of activity. Where such legislation exists, amendatory statutes must be interpreted in accordance with the nature of the basic design. The entire body of legal precepts dealing with the subject matter must be construed together. The rule *noscitur a sociis* applies. A court dealing with an amendment should not attribute to the legislative body an intent to add to the statutory structure an incongruous feature.[70] In these instances, a common law court adopts *pro hac vice* the attitude with which a civil law court regards a code.

When utilizing published judicial decisions in connection with historical research, it should be noted that judicial opinions, although largely consisting of legal reasoning and analysis, normally contain at the outset of the opinion a statement of the facts of the case. These statements might be useful to the historian, even if the legal argumentation seems confusing and unintelligible. In the event that any pertinent facts are ignored or overlooked or suppressed in the majority opinion, they will normally be emphasized in dissenting opinions, if there are any in the case. Adjudication by the Supreme Court of the United States frequently gives rise to several dissenting opinions per case.[71] There are published anthologies of the celebrated dissenting opinions of Justice Oliver Wendell Holmes, Jr.[72] On the recent court, Justice John Marshall Harlan was a frequent dissenter[73] who often had occasion to point out the "fabricated history"[74] relied upon in majority opinions. In connection with constitutional questions in the Supreme Court, historical analysis is often important.[75] The intent of the framers of particular provisions is often relevant or controlling.[76]

69 Act of February 4, 1887, 24 Stat. 379, as amended.

70 In the language of Justice Frankfurter, the legislators "did not inadvertently add a colonial wing to a gothic cathedral." *I.C.C.* v. *J–T Transport Co.*, 368 U.S. 81, 115 (1961).

71 A comprehensive review of this topic is found in Percival E. Jackson, *Dissent in the Supreme Court* (Norman, Okla., 1969).

72 Alfred Lief, ed., *The Dissenting Opinions of Mr. Justice Holmes* (New York, 1929); Max Lerner, ed., *The Mind and Faith of Justice Holmes* (New York, 1943) [includes other material besides dissents].

73 David L. Shapiro, ed., *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan* (Cambridge, Mass., 1969).

74 See *Negrich* v. *Hohn*, 246 F. Supp. 173, 176 (W.D. Pa. 1965).

75 An interesting discussion of this subject is found in Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, Mass., 1969).

76 A masterly handling of historical data combined with thoughtful analysis of the "weight to be accorded in constitutional adjudication to evidence of the framers'

The importance of the facts in a case is shown by the practice of Justice Louis D. Brandeis, who usually himself prepared with care the part of an opinion which contained the statement of the facts of the case. His law clerks were relied upon to collect the applicable legal authorities.[77] In my own judicial experience, in doubtful cases where it is uncertain what the decision should be, I have often found it helpful to begin work by preparing a careful and comprehensive statement of the facts. Usually from such an analysis of the facts, the controlling principles of law will gradually emerge and become discernible.

Brandeis is also noted for having introduced the so-called "Brandeis brief."[78] In the case involving the constitutionality of an Oregon statute establishing minimum wages for women,[79] the controlling legal principle was that state regulation of this character was permissible only if such regulation were reasonable. Brandeis undertook to demonstrate the reasonableness of the legislation by amassing a vast compilation of facts from economic publications and other non-legal sources. This type of Brandeis brief became popular in subsequent constitutional controversies in which the propriety of the legislative action turned upon the facts necessitating the type of remedy adopted by the legislature for dealing with an existing evil.

In the foregoing outline of the nature of court records and reports of judicial opinions at different stages of the development of Anglo-American law, what I have sketched may well seem superficial and elementary to scholars in the field of legal history who today carry forward the work of Maitland, Holdsworth, Ames, and others like them. But I hope that I have said something that will be useful to archivists, who, without formal legal training, are nevertheless responsible for preserving the rich heritage that lies buried in the prolix and prosaic legal documents which the professional efforts of lawyers and judges have engendered in the course of their perennial quest for justice according to law.

original understanding" with respect to the scope of the Fourteenth Amendment is found in Professor Bickel's article "The Original Understanding and the Segregation Decision," *Harvard Law Review,* 69 (1955):1, reprinted in Alexander M. Bickel, *Politics and the Warren Court* (New York, 1965), pp. 211–61, 276–91.

77 Paul A. Freund, *On Understanding the Supreme Court* (Boston, 1949), p. 50: "This was his assurance that he would not be seduced by the fascination of legal analysis until he had grounded himself in the realities of the case as they were captured in the record."

78 Frederick B. Wiener, *Briefing and Arguing Federal Appeals* (Washington, 1961), p. 188.

79 *Muller* v. *Oregon,* 208 U.S. 412, 415–16 (1908).