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APPROACH TO LEGAL RESEARCH: A STUDY IN SOURCES AND METHODS

In the average lawyer's office the books with which he surrounds himself are not too often visited; his efforts being primarily in the practical give-and-take of everyday practice. As a result, the more abstract problems of legal research, when they finally confront him, present a most formidable hurdle. The multitude of the reports, the complexity of the search-books, no less than the labor of the investigation itself, are most discouraging; and it is small wonder that frequently he is satisfied with only a cursory investigation, relieved at finding a single case in point when there may be hundreds, or that he is eager to shift the burden of the search upon younger, less-experienced associates.

It may be some comfort to know, however, that the situation is not a new one. Over a century ago, before our forty-nine jurisdictions started grinding out the thousands of cases which today make legal research such a laborious task, English lawyers, handling the common law of a single jurisdiction, raised their voices in loud protest against the "great collection"¹ and "vast accumulation"² of decided cases. This ever-recurring complaint, calling almost for a Hitlerian "burning of the books," has received the considered attention of the American Bar Association, in a most illuminating report.³

Since, even under the best of circumstances, the difficulties of research are inevitably with us, and in fact multiply as each year's production of cases is added to the already burdensome bulk of our case-law, it behooves the practitioner, even though he may regard himself as ordinarily far

¹ As long ago as 1786 this complaint was made by Justice Buller in *Birch v. Wright*, 1 T.R. 383, 15 Eng. Rul. Cas. 626.

² The law was thus described in 1788, in the preface to Tomlin's *Repertorium Juridicum*.

³ Report of Special Committee on Legal Publications and Law Reporting, 1940, Annual Report of American Bar Association, 65; 263-300.

removed from the realm of books and research, to have at least a passing acquaintance with the sources and methods of research. To lighten the load a little, by giving, with the aid of a few simple analogies, a brief description of our more common source-books, and by pointing out a few of the more general touchstones and cautions to be observed in their use, is the object of the present article.

I

While there are many other fine aids to "getting at" the Law, including the ever-helpful citators and (for the specialist) the invaluable loose-leaf services,⁴ it may be said that, for the purposes of the general practitioner, there are at the present time three principal methods of organization of our case law. These may be described as:

- Pigeon-hole digests
- Fluid encyclopedias
- Specific annotations

To use another analogy: Let us assume that the field of Law is literally a "field," and that in it is a small object for which, in complete darkness, we are making a most careful search. To facilitate that search, we use three different types of light, representing each of the above three methods of organization of the Law. These three types of light would be:

- Countless pin points of light digests
- A diffuse glow encyclopedias
- Spotlights annotations

Just as in the physical world, each of these three types of "light" has, to the searcher in the legal field, its own special function and purpose — with its own peculiar advantages and limitations. No one of them represents an exclusive method of approach to the Law; although, in arguments

⁴ For description of citators and loose-leaf services, see *Materials and Methods of Legal Research*: Hicks, p. 300, 328.

over their relative merits, such a claim may inadvisedly be made. Obviously, the type to be used in a given instance depends upon the nature of the particular problem at hand.

II

In America, as in no other country, the digests⁵ of the Law have had their highest development. This is due, no doubt, to the pressure of two conflicting forces: (1) the great multitude of reports, and (2) the demand of the practitioner for a case "on all fours." The immediate practical objective of the digesters has been to furnish, to those who buy their books, the means of finding a case in point; but, in doing this, they also serve the profession generally by bringing the great mass of case-law into some kind of intelligible organization. Thus has private gain, in the world of law-books, been the occasion of great public good.

Digests, representing the "pigeon-hole" or "pin-point" approach to the Law, are built on the basis of a logical or analytical break-down of the Law into divisions and compartments. The entire body of the Law — whether it be that of the whole country or of a single jurisdiction — is split up among certain grand divisions,⁶ arranged alphabetically. If the subject matter is quite extensive, the grand divisions are further subdivided; but this time on an analytical, not alphabetical, basis. The grand divisions, with their subdivisions, form the skeleton of the digest. Within this framework are located, also on an analytical basis, the specific sections (sometimes referred to as "key-numbers"). These consist of thousands of tiny, preconceived compartments, into which are filed (digesters would say "classified")

⁵ The most prominent of the digests is the American Digest System (Decennial or "Key-Number" Digest). Others include the LRA and ALR Digests, the U. S. Supreme Court Digest, and various local and special digests. The principal English digest is the English and Empire Digest.

The American Digest System is described at length in two excellent articles on Finding the Law, and A Formula for Finding the Law, by Urban Lavery, in 25 Am. Bar Asso. Jour. 383, 911.

⁶ There are 415 grand divisions in the American Digest System.

the digest paragraphs. These digest-paragraphs, usually identical with the headnotes at the beginning of each digested case, give in succinct form the holdings of the courts on the specific points decided in the cases digested. Thus is created, on a grand scale, a complex filing system for the disposition of the multitudinous products of the courts.

The primary use of this "pigeon-hole" or "pin-point" approach to the Law is in the finding of exact cases in point. In their capacity to bring up to the surface, and to precisely reflect, the thousands of minute specific holdings which lie buried in the reports, the digests are unexcelled, and in this respect have some advantages over their rivals, the encyclopedias and annotations. They are particularly useful in two situations: (1) where the searcher, already knowing the background and principles of his subject, desires only quickly to find cases exactly in point, perhaps to bolster a brief or argument, or (2) where the searcher, having ample time and library facilities, desires a complete collection of cases, which he will afterwards read in full, determining for himself what the law is, without the aid of secondary sources. In both of these instances the searcher is not interested in general principles or pre-assimilated material; hence the "pin-points" in the digests, reflecting simply the minute holdings of specific cases, may for him be the best starting point.

However, excellent as they are as depositories of the total case-law, the digests are not usually the best starting point in research. The reason is obvious. In the digests there is neither fusion nor assimilation. Indeed the word "digest," in the sense of dissolving and assimilating an object, is almost a misnomer; since, although they separate their material into parts, they do nothing to transform it into a new product. Each "pin-point" is an isolated speck of light; its relationship, if any, to the specks around it is no concern of the digester. Hence the average searcher, not having in advance any special knowledge of his subject, will probably

feel more at home if he starts out with the encyclopedias and annotations, written in the more familiar, fluid type of discussion. The information thus gained will also have the salutary effect of preparing him for the rigors of the digest-search, which, to one familiar neither with his subject nor with the complex ramifications of the digests, may very well present an almost hopeless task.

One caution to be observed, in using the digests, is not to rely too heavily upon the sectional compartments or "pigeon-holes" as being exclusive depositories for the material they purport to contain.⁷ While the principle of air-tight compartments, each untainted by any other, may have a certain "scientific" appeal, its too rigid application to that diffuse and disjointed thing we call the Law is fraught with pitfalls. The ever-expanding "seamless web" of the Law, with its criss-cross threads and unpredictable offshoots, is not to be so easily regimented. This is particularly true also because, unfortunately, digesters are quite human, and what Digester A regards today as the proper pigeon-hole may not at all be the same as what Digester B will choose ten years later. Unhappy then will be the lot of the too-hurried searcher who, enamoured with the ease of an "automatic" search, fondly believes, as some have actually advanced,⁸ that all that needs to be done is to push the magic button of the digest-section and out will pop, as from the modern business machine, all the material he will ever need on his subject.

III

In general arrangement the encyclopedias,⁹ representing the "fluid" or "diffuse glow" approach to the Law, are very

⁷ It has been the experience of professional research-men that the average number of sections which must be examined, in searching a digest, is between 5 and 10. An examination of 1 or 2 sections is seldom sufficient; in extreme cases it may be necessary to examine as many as 30 to 40 sections.

⁸ See *Formula for Finding the Law*: Lavery, 25 *Am. Bar Asso. Jour.* 911 at 917.

⁹ The two principal encyclopedias in general use at the present time are: *Corpus Juris Secundum*; and *American Jurisprudence*.

much like the digests. They are comprehensive in scope, purporting to cover the entire body of the Law, and in them we find the same hierarchy of: grand divisions, subdivisions, and sections; the first arranged alphabetically, the second and third logically or analytically. This similarity, however, which was much more pronounced in the earlier "encyclopedic digests,"¹⁰ extends only to the scope and arrangement. Beyond this, the modern well-written encyclopedia is altogether different than the digests, constituting a completely distinctive genus, having its own special purpose and functions.

The difference between a digest and a encyclopedia lies principally in their objectives. In the former the object is to file or pigeon-hole, preserving for the profession an accurate and painstaking record, but nothing more than just a record, of the individual decisions; in the latter the object is to mould and transform, treating the decisions as a whole, and bringing them into the proper perspective. The digester deals in holdings; the encyclopedic writer in principles. The digester compiles the map; the encyclopedic writer paints the mural.

The distinctive feature of the encyclopedia is in the "fluidity" of its treatment. Although he may, and in fact frequently does, indulge in specific illustrations of his general statements, the encyclopedic writer's main concern is in sifting out of the cases the general principles which lie behind the specific holdings. These principles, with the dissenting views, exceptions, and peculiar applications which invariably attach to them, are then worked up into a cohesive whole, and emerge finally in the fluid, easily read form of a running commentary.¹¹

¹⁰ For a description of this type of encyclopedia, see *Materials and Methods of Legal Research*: Hicks, p. 273.

¹¹ The term "commentary," when used to describe a set of books—e.g. Blackstone's or Kent's "Commentaries"—has a somewhat different connotation than "encyclopedia," although the two types of books have much in common. See *Materials and Methods in Legal Research*: Hicks, p. 176.

This "fluidity" of treatment, combined with comprehensiveness of scope, make the encyclopedias an excellent "starter" in legal research. This assumes of course, as is usually the case, that the investigation is commenced without any definite knowledge of the subject in advance, but, on the other hand, with the desire to acquire something more than just a case in point or a bare collection of authorities. The value of the encyclopedias to such a searcher is their capacity to give him the setting of his subject. The picture, laid before him in broad, bold strokes, furnishes him with a vista not generally found in his other books.

However, although orientation is perhaps the primary function of the encyclopedia, it performs an important secondary function in furnishing the searcher with cases in point. This is done by the extensive use of footnotes and the expansion of the text to include applications of the principles expounded.

The extent to which an encyclopedic writer can go in stating the detail of the cases, without abandoning his primary function of presenting the broad vista, is, of course, limited. The encyclopedias, therefore, are not substitutes for the digests. Obviously, one cannot expect to find, within the bounds of a single set of books, the "diffuse glow" of a general treatment and at the same time the precise "pin-points" of specific detail. Hence, for an exhaustive search, the examination of the encyclopedias should always be completed by a thorough investigation of the digests.

IV

Annotations,¹² representing the "spotlight" approach to the Law, constitute a third and entirely different class of

¹² The term "annotation" is used in law books in a variety of senses. For example, we have "annotated" statutes, "annotated" rules of court, "annotated" textbooks, in all of which the term means merely a collection of isolated headnotes, or digest paragraphs, each representing the holding of a particular case, without any attempt at correlation or fusion into a systematic whole. This article, however, uses the term in the strict sense of a monograph or legal article attached

legal source-books. Something about their history may help to illustrate their distinctive purposes and methods.

Originally, in the early common law, lawyers made up their own annotations, in the so-called "commonplace books."¹³ The real origin of annotations, however, as a distinct type of legal writing, seems to have been in the early "notes" of the reporters.¹⁴ Lord Coke, who made liberal use in his reports of the caution "Note, reader, that—," followed by a comment on the point at issue, and who has even been accused of "improving" the reports by his notes,¹⁵ was probably the first annotator. Saunders' reports also contained extensive notes, which in time became even more famous than the reports themselves. Henry Clay assisted in the preparation of notes in an early American report.¹⁶ In later years, however, when the publication of reports was taken over by the state, instead of being left to private initiative, the reporters, ensconced in public office, became somewhat less ambitious; and it was not long before they gave up altogether the task of inserting "notes" in their reports. Apparently their absence was missed since it was not long (about 1870) before several series of "annotated" reports began to appear. At first the annotations were only minor appendages to the reported cases, but, as their popularity grew, the tail began to wag the dog, until now it can truly be said of the annotated reports, as Holdsworth says of some of Coke's reports, that "the case is a mere peg upon which the law relating to a particular topic is hung."¹⁷

Annotations may be defined as a collection of treatises on specific legal problems. Although published together in the

to a reported case, as in the "annotated reports system," familiarly known as "L.R.A.," "A.L.R." etc.

¹³ Holdsworth's *History of English Law*. Vol. 6, p. 496; Vol. 12, p. 102.

¹⁴ It is interesting to observe that, in the annotated "American Reports" (1869-1887), the annotations are specifically designated "Note by the Reporter."

¹⁵ Lord Holt, in *Coggs v. Bernard*, 2 *Ld. Raym.* 909, 5 *Eng. Rul. Cas.* 247, at 252. Cf. Holdsworth's *Sources and Literature of English Law*, p. 95.

¹⁶ Warren: *History of the American Bar*, p. 330.

¹⁷ *Sources and Literature of English Law*: Holdsworth, p. 91.

same volume or volumes, they are separate, independent units. In method and appearance, an "annotation" is very much like a scientific "paper,"¹⁸ a law-review "article," or a lawyer's "brief," although it has probably somewhat less of the critical approach, and more the element of exhaustive research, than usually appears in any of these. The arrangement, altogether different than in the digests and encyclopedias, is on a seriatim (as written) basis, access to the annotations being afforded by separately published digests (analytical approach) and indices (alphabetical approach).

The leading characteristic of an annotation is, to borrow a term from Justice Frankfurter, its "specificity." Unlike either a digest or encyclopedia, but combining some features of both, its aim is to give, both generally and in detail, a concentrated review of all the case-law on a specific problem. The encyclopedic writer's ideal of total coverage, in the sense of furnishing a discursive treatment of all subjects, is not as important to the annotator as having an intensive coverage on a variety of important specific problems. On the other hand, he does not care to waste his efforts by dealing in certain things which the digester, as the depository of the total case-law, is obliged to perpetuate. Somewhere between the two he steers a middle course. The result is a valuable collection of "spotlights," any one of which may, when once focussed on a particular subject, render further research almost unnecessary.

¹⁸ The steps involved in the scientific method of research (See *Research and Thesis Writing*: Almack, pp. 63-65) are strikingly like those involved in writing an annotation.

They are:

1. Formulation of a working hypothesis.
2. Accumulation of facts or data (cases).
3. Classification of these facts (cases).
4. Discovery of relationships, or lack of relationships, between them.
5. Generalization.
6. Statement of results.

Basically, this is the same as the method used by Lord Coke 300 years ago. He also "goes at length into all the authorities, ancient and modern, explains, distinguishes, and when possible, reconciling conflicting decisions and dicta." *History of English Law*: Holdsworth, vol. 5, p. 463.

Another claim which the annotator makes for his product is its "practicality." This arises out of the way in which annotations are made. The appending of the annotations to currently reported cases, on the basis of the actual problem presented in the case, has a tendency to bring up to surface the practical aspects of the problem, to the exclusion of the merely academic or theoretical. This, of course, has its disadvantages too, in that some of the broader problems of the law do not always get full coverage.

Annotations, equally with encyclopedias, are an excellent "starter" in research. Although the latter are superior in giving a broader vista, the former, because of the intensity of their treatment, may enable one to get everything on the subject, both general conclusions and detail, all in one place. The necessity of carrying the encyclopedic search on into the digests in order to get all the detail does not exist in the case of the annotation, which, once located, furnishes both the general picture and the specific holdings. The time and labor thus saved give the annotation a special value, not possessed by either the digest or the encyclopedia, as a "short-cut" in research.

Because the annotation-system is not one huge "spotlight" which, turning on a swivel, gives the searcher a complete view in one operation, but rather a collection of intense "spotlights" rigidly trained on a great variety of specific objects, it behooves the searcher, in using an annotation, to determine carefully its exact scope. This is usually outlined at the beginning of the annotation, sometimes under the express heading "Scope" or, more frequently, under "Introductory."¹⁹ These preliminary statements serve a double purpose: first, in letting the searcher know whether he has the right "spotlight," and, secondly, in furnishing him with a sort of "check-list" of closely-related problems. By this comparative analysis, the annotator

¹⁹ See, for examples: 149 ALR 9; 4 NCCA 627.

holds the searcher to the exact problem at hand, at the same time calling his attention to those related, but distinguishable, problems which invariably crowd around the periphery of every subject.

V

The three principal methods of "getting at" the Law, developed and perfected by able writers and digesters over a long period, have done much to lighten the load of the practising lawyer in the field of legal research. Indeed, it is appalling to consider the hopeless confusion and utter chaos which would result if we were suddenly deprived of these indispensable aids to research. It can be a source of pride to the members of the profession that their research-materials, probably greater in bulk and complexity than in any other field of learning, have been so successfully harnessed and made available for their everyday use.

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