HISTORY MATTERS

THE OREGON REPORTS, 1862-1900: A BRIEF HISTORY

By Thomas A. Balmer, Associate Justice, Oregon Supreme Court

Judicial opinions document the life of a society. They are a window into not only a society's laws, but also into its customs and pathologies, its commerce, its hopes and fears. A volume of 18th century English decisions tells much about the life of those times, although men of property, criminals, and the Crown are, of course, overrepresented. Similarly, the Oregon Reports, presently reaching 340 volumes (and now supplemented by 200 volumes of Court of Appeals reports and 17 volumes of Tax Court reports), provide a social history of the Territory and State of Oregon. In their pages one can trace the development of Oregon's political and economic institutions; its family structures, murders, and real estate deals; acts of discrimination and oppression as well instances of redress and remedy. This essay briefly reviews the origins of the Oregon Reports and their development from 1862 to 1900 in an effort to

shed some light on the early history of these remarkable documents of social history.

The Constitutional Requirement

The Oregon Constitution of 1857 provided that "at the close of each term [of the Supreme Court] the judges shall file with the Secretary of State, Concise written Statements of the decisions made at that term." Or Const, Art VII (Original), § 7. (The same provision now appears in Article VII (Amended), section 4.) The origins of the requirement of filing written statements are obscure. Article VII was derived primarily from the Wisconsin Constitution, but neither that document, nor the Indiana Constitution which provided the basis for much of the rest of the Oregon Constitution, contained a similar provision. Historians of the Oregon Constitution have been unable to identify another source for the provision; it appears to have been the original idea of the Committee on the Judicial Department that drafted Article VII. Although I cannot prove it, I sense in the background the presence of Matthew Deady, who chaired the Constitutional Convention. Deady's hand is virtually everywhere in the Constitution, he was soon to be elected to the Supreme Court (although he resigned almost immediately to take a federal judgeship), and his interest in (and skill at) self-promotion led him later to shower copies of his opinions on judges, friends, and others whom he hoped might advance his career. What better excuse to allow one's ego to run rampant in thoughtful, scholarly opinions than to put such a requirement in the constitution one happens to be drafting?

In 1859, of course, Oregon becomes a state. The Oregon Supreme Court holds its first term in December. The Supreme Court, as required by the Constitution, files "concise statements" of its decisions with the Secretary of State. But none of those are published.

Beginnings: The Wilson Years (Volumes 1 to 3)

The first volume of the Oregon Reports does not appear until 1862, and 1 Or appears to be to be primarily the work of one man, Joseph G. Wilson, who deserves a short digression at this point. Wilson was born in New Hampshire in 1826, graduated from Marietta College in Ohio in 1846, and taught school and practiced law in Ohio. He came to Oregon and began practicing law in 1852.

He was appointed clerk of the Territorial Supreme Court that year and, with the organization of the new state Supreme Court after statehood in 1859, he was appointed clerk of that court. Wilson became a district attorney in 1860, but apparently still continued to serve as clerk of the Supreme Court. In 1862, the Supreme Court was expanded from its initial four judges to five, and Wilson was appointed to a new fifth judicial district, which included all of the state east of the Cascade mountains. Wilson held his Supreme Court seat in an election in 1864 and served on the court until 1870, when he ran unsuccessfully for Congress. He ran again and was elected in 1872. Unfortunately, after moving his family to Washington, D.C., he returned to Marietta, Ohio to give a speech and died there in July 1873, at the age of 46. Wilson was said by his contemporaries to be a "very bright man" and "unusually jovial and pleasant as a companion."

In 1862, Wilson gathered, edited, and published the existing written opinions of the territorial Supreme Court and the state Supreme Court. It is unclear to what extent Wilson was directed in this endeavor by the court and to what extent it was his own idea, although the fact that he apparently arranged for (and took the financial risk of) publication himself indicates that this was, in important part, his personal project. In volume 1, Wilson identifies himself as "attorney at law, and clerk of the Supreme Court of Oregon," and it appears that the Court did not have a formal "reporter" until it appointed Wilson in 1867. See 2 Or at 4. Wilson copyrighted volume 1 in his own name in 1862 by filing a copy with the U.S. District Court for the District of Oregon.

Wilson arranged for volume 1 to be printed by Banks & Brothers, Law Publishers, of New York, which had been founded by David Banks in 1804. (Banks & Brothers later became Banks Baldwin Law Publishing Co. and was acquired by West Publishing Co. in 1993.) Many of Wilson's (or Banks's) original choices are still visible in the current Oregon reports—the size of the volumes, the law books' traditional red/orange and black spine plates, the selection of Century Schoolbook as the typeface. The 1862 legislature appropriated $800 for the state to purchase 100 copies of "the first volume of the reports of the decisions of the supreme court of Oregon, for the use of the state," and directed the Secretary of State to pay that amount to Wilson upon his deposit of the books with the state library. 1862 Oregon Laws at 68.

Volume 1 is a fascinating mix of cases, including what Wilson presumably thought to be all the opinions from the territorial Supreme Court (1853-58) and the state Supreme Court (through the end of 1861), as well as several long opinions written by Matthew Deady as a federal district judge. As to the territorial Supreme Court, which had been organized when Oregon became a United States Territory in 1848, Wilson notes that "No written opinions were given previous to the December term, A.D. 1853." He would have been in a position to know, of course, having served as clerk of that court beginning in 1852. As noted, the State Supreme court sat for the first time at a December 1859 term, and Wilson included in volume 1 the first opinion issued by that court, *Howell v. State of Oregon*, 1 Or 241 (1859), and subsequent opinions from the court's terms through December 1861.

Although Wilson may have included all the written opinions of the territorial Supreme Court, he missed at least one important earlier opinion, a June 1847 decision issued by the Supreme Court of the provisional government of Oregon. That court, which had its origins in the 1841 appointment of Dr. Ira Babcock as "supreme judge with probate powers," had become a trial and appellate court consisting of a supreme judge and two justices of the peace. The 1847 opinion, *Knighton v. Burns*, by Chief Justice J. Quinn Thornton, would have been of great interest to Oregonians at the time, as it involved a debtor's effort to pay with "Oregon scrip" authorized by an 1845 statute an obligation that had been incurred before the statute was passed. In a careful exposition of the prohibition on the impairment of contracts, with citations to the *Dartmouth College* case and Kent's Commentaries, among other state and federal authorities, the court rejected the debtor's argument, holding that he must pay in currency that was legal tender at the time the debt was incurred. The opinion was apparently located by a later reporter, T.B. Odeneal, who published it in 1883 as an appendix to volume 10 of the Oregon reports, and it can now be found at 10 Or 548. Odeneal states in a note that the opinion was published in the *Spectator*, Oregon's only newspaper in 1847, and he asserts that it was "the first [court decision] ever printed west of the Rocky Mountains." In any event, *Knighton* did not make it into Wilson's volume 1.

Many aspects of the cases that were reported in volume 1 would not be out of place in volume 340. Dissent was not unusual. In *Howell*, the first reported Supreme Court case, the court held that

the sentence imposed by the trial court was not authorized by law and reversed for a new trial. The opinion was written Chief Justice Wait, and Justice Stratton is identified as "not concurring," although Stratton wrote no opinion explaining why. In a later case written by Justice Stratton, *Zachary v. Chambers*, 1 Or 321 (1860), Wait dissented, but wrote no opinion. Separate opinions also appear. In *United States v. Tom*, 1 Or 26 (1853), the issue was whether Oregon was "Indian country" for purposes of an 1834 statute regarding sale of liquor to Indians; each of the three members of the territorial Supreme Court wrote separately.

We now come to an interesting detour in the publication of Supreme Court decisions, for the next volume containing those decisions is not volume 2 of the Oregon Reports, as one might expect, but instead is the Oregon session laws for 1866. "1866 Oregon Laws" contains not only the statutes enacted by the1866 Legislature, but also all decisions of the Supreme Court "as filed in the office of the secretary of state since the publication of 1862," that is, since volume 1 of the Oregon reports. (The opinions reported in 1866 Oregon Laws later appeared in volume 2 of the Oregon reports, published in 1869.) No judicial opinions appeared in the biennial session laws in 1868, but they are included in the 1870, 1872, and 1874 laws. By 1874, supreme court opinions accounted for more than 600 of the approximately 1,000 pages of the volume of session laws, with another 50 pages taken up by findings of the ubiquitous Judge Deady, then sitting as a "referee" in a Marion County Circuit Court case, presumably because state judges likely to hear the case would have had a conflict of interest. (The case was a suit by the state against the Secretary of State and his sureties for financial misconduct, including selling copies of Oregon statutes and keeping the proceeds for himself.)

In 1869, seven years after he had published volume 1, Wilson, now a member of the court, finally came out with volume 2 of the Oregon reports, again published by Banks & Brothers of New York, and including cases decided between 1862 and 1869. In a short preface, Wilson explained some of the reasons for the delay, as well as for the appearance of five opinions from cases decided in 1860 and 1861 that should have been in volume 1. He noted that the Supreme Court justices sat as trial judges except during the brief Supreme Court terms, and because those terms were mostly taken up with "hearing the arguments and deciding the cases," the Supreme Court terms "afforded no leisure for the preparation of

written opinions." The judges were required to write and file them later, sometimes more than two years after the decision was rendered.

Wilson's preface to volume 2 made two other noteworthy points. First, he observed that before 1865 there was no rule as to the filing of briefs, which explained why, in contrast to other court reports of the time, early Oregon cases contained no summaries of the parties' arguments. Even with access to the briefs, however, Wilson wanted to make sure that references to the briefs were limited "to the real points in issue" and the "particular authorities bearing upon the same." As he put it, "The aim is to make the volumes books of *decisions* rather than of *briefs*, otherwise the Oregon Reports might have been respectable in *number*, containing only occasional pages of what is of real value." 2 Or at 4 (emphasis in original).

Second, Wilson, who, as noted, had been named the official court reporter in 1867, took it upon himself to report some decided cases which ruled on "questions of practice," but in which no opinion had been written. 2 Or at 4. Those included decisions on topics of perennial interest to appellate lawyers, such as proper service of a notice of appeal and the deadline for filing an extension of time to file a transcript. See 2 Or at 202, 204.

Wilson's final compilation, volume 3, was published in 1872, the year he was elected to Congress. He now was, as he identified himself in the book, "Ex-Justice of the Supreme Court, and Official Reporter." Volume 3 has its own idiosyncrasies. Unlike earlier and later volumes of the Oregon reports, volume 3 contains many decisions of the judges sitting as circuit judges. (The volume includes circuit decisions issued between 1867 and 1872 and Supreme Court opinions from 1869 to 1870.) Indeed, the circuit court decisions, which include jury instructions and rulings in equity cases and on motions, take up more than two-thirds of the book. By volume three, Wilson had changed publishers, and the copyright holder and publisher was A.L. Bancroft & Co., of San Francisco, which had been founded in 1856 and had begun publishing law books in 1857. (In 1886, Bancroft merged with another San Francisco law publisher, Sumner Whitney, to become Bancroft-Whitney. Bancroft-Whitney became a subsidiary of Lawyers Cooperative Publishing in 1919, which was acquired by Thomson Corporation in 1989.)

Steps Towards Stability: 1872 to 1889 (Volumes 4 to 18)

With Wilson's departure to Washington, C.B. Bellinger was appointed reporter, beginning with volume 4. Bellinger again used A.L. Bancroft as the publisher, and volume 4, covering the years 1870 to 1873, appeared in 1875. (It contained one case from 1869 with a note that the case "was probably overlooked.") With volume 5, regularity seems to have been established. The volume includes decisions from 1873 (picking up where volume 4 ended) to 1875 and was published in 1876. Interestingly, volume 5 includes of list of more than 80 "cases not reported," 5 Or xiii-xiv, mostly "judgment affirmed"—foreshadowing the AWOP—but some modifications and reversals. Bellinger reported, and Bancroft published, volumes 4 through 8. (As demand for the reports grew, Bancroft Whitney reprinted the entire set in 1887, again, with added notes and tables of cases cited, in 1911, and several more times; many extant copies of the early volumes are from those reprint series, rather than the originals.)

T.B. Odeneal, who had been appointed clerk of the court in 1880, succeeded Bellinger as reporter with volume 9 (1881). Odeneal appears to have had difficulty settling on a printer. For volume 9, he used George H. Himes of Portland; volume 10 (1883) identifies E.M. Waite and W.H. Byars as the copyright holders, Waite (of Salem) as the printer, and Sumner Whitney & Co. of San Francisco as publisher; volume 11 (1885) is similar to volume 10, but shows Waite and Byars, of Salem, as the publishers rather than Whitney. J.A. Stratton served as clerk from 1884 to 1887 and reported volumes 12 through 14. With volume 12 (1886), Waite and Byars disappear, and the copyright, printing, and publishing was returned to Sumner Whitney. Whitney merged with Bancroft in 1887, and that firm published volumes 13 (1886) and 14 (1887). W.H. Holmes, appointed clerk and reporter in 1888, continued the same practice with volumes 15, 16, and 17 (1888-89).

"Radical Change" and Rebalance: 1889 to 1900

The press of other business has prevented the writer from doing the archival research necessary to determine exactly what happened to cause the 1889 legislature to seize control of the reporting of Oregon Supreme Court decisions. In part, the

complaint was the "present inefficient and costly system of reporting." Act of February 15, 1889, § 9, 1889 Or Laws at 6. The legislature may also have been aroused by Bancroft Whitney's 1887 reprinting and sale of volumes 1 through 17, and the profits the company presumably made by selling the public writings of state officials. In any event the 1889 Legislature decisively inserted the state into the business of publishing and selling Oregon Reports. By act of February 15, 1889, the legislature provided that it was the "duty of the Judges of the Supreme Court to prepare or cause to be prepared their opinions in duplicate," with one copy to be delivered by the clerk to the Secretary of State, as required by the Constitution, and one to the State Printer; that the printer was to "print and bind the same in the best style of law book binding, reporting and binding [sic]," and transmit them to the Secretary of State for distribution and sale; that the printing plates "shall become the property of the state and may be used in printing further editions of said books, when necessary, for all of which the State shall pay [the State Printer] four dollars per copy." 1889 Or Laws at 5. Recall that the state had paid Wilson $8 per volume in 1862. (The 1889 act also required the justices the "prepare a concise syllabus of the points decided, to be printed with the opinion," and provided them additional compensation of $1,500 for the "duties required by this Act.")

Pursuant to that legislation, the State Printer, Frank C. Baker, published volume 18, although an identical volume was published by Bancroft Whitney. With the responsibility for publishing the reports now resting squarely on the shoulders of the court, the court designated the Chief Justice as the court's reporter. Volumes 18 and 19 therefore (in most editions) identify Chief Justice Thayer as the reporter of those volumes, and his successor, Chief Justice Strahan, reported volume 20.

The court seems not to have been entirely happy with the legislature's action. In a preface to volume 19 (1890), which appears in the state printer's editions, but not in the Bancroft Whitney edition, Chief Justice Strahan describes the 1889 legislation as a "radical change in the method of reporting and printing the opinions of this court." 19 Or at iii. And the number of errors seems to have increased dramatically. Volume 19, as published by the state printer, for example, lists almost 40 errors in the volume, although the printer pointedly states that "[b]y far the larger number of errors noted below were made by copyists; not by

the printer." The Bancroft Whitney edition of volume 19 does not include those errors, either because it appeared later or because the publisher caught them before printing.

Perhaps it was the discontent of the court that led to a slight modification of the reporting statute at the next legislative session. The 1891 legislature established the office of "supreme court reporter," to be appointed by the court and to have responsibility for "faithfully report[ing] all the decisions of the court as rapidly as they are published [sic] and sufficient to accumulate to make a volume of six hundred pages." Act of February 21, 1891, 1891 Laws at 165-66. The reporter was to deliver the manuscript to the State Printer and to "read and correct the proof of the work of the printer" and "superintend and direct" the work of publishing the reports. Following that statutory change, the court appointed George Burnett as reporter. Burnett reported volumes 21 and 22 (1891 to 1892) and was succeeded by Robert Morrow, who reported volumes 23 through 49 (1894 to 1908).

In 1899, the legislature, perhaps believing it was not getting a fair deal from the state printer, again took action, directing the state printer to print 800 copies of the reports and deliver them to the Secretary of State, for which the printer would be paid $2.50 per copy (down from $4 per copy in the 1889 legislation). The Secretary of State was authorized to sell "said reports, and any others he may now have on hand, to the public at $3 per copy." 1899 Laws at 233, 234.

As the century came to a close, reporter Robert Morrow was supervising the publication of the Oregon Reports. By directing the State Printer to publish Supreme Court opinions, the legislature had broken the Bancroft Whitney monopoly and, presumably, reduced the cost of purchasing reports for judicial and other government use. Responsibility for editing and publishing the decisions had, after a few rocky years, been returned from the judges themselves to a reporter appointed by the court. Bancroft Whitney was continuing to publish its own editions of the reports, virtually identical to those of the state printer, and private publishing houses, including Bancroft Whitney and George Bateson, of Portland, were busy reprinting and selling earlier volumes of the reports to the state's growing legal community.