A BRIEF HISTORY OF THE OREGON REPORTS (PART 2 OF 2)

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THE STORY THUS FAR . . .

As we saw in part 1 of this article (1 Oregon Appellate Almanac 157 (2006)), although the Oregon Constitution requires that the Supreme Court file "concise written statements" of its decisions with the Secretary of State "at the close of each term," early legislatures made no provision for publication of those decisions. Credit for publication of volume one of the Oregon Reports goes to Joseph G. Wilson, who had been appointed clerk of the territorial Supreme Court in 1852 and of the new state Supreme Court in 1859. In 1862, Wilson gathered, edited, and published all the written opinions of both courts that he could find, through the December 1861 term of the state Supreme Court, as well as several long opinions by Oregon federal district court Judge Matthew Deady. Wilson personally arranged for the publication of volume one by Banks & Brothers, Law Publishers, of New York, and Wilson's choices as to typeface (Century Schoolbook), size, and traditional lawbook colors (light brown covers; red/orange and black spine plates) are still followed in the current Oregon reports. The 1862 legislature provided at least a bit of help to Wilson, appropriating $800 for the state to purchase 100 copies of volume one from him. Wilson, who himself had been appointed to the Oregon Supreme Court in 1862 (and had been designated as "reporter" in 1867) also edited volume 2 (1869), again published by Banks & Brothers, and volume 3 (1872), published by A.L. Bancroft & Co., of San Francisco.

We also saw in part 1 how later reporters followed Wilson's lead in the style of the Oregon reports and in using A.L. Bancroft as the primary publisher, although some volumes in the 1880s identify various private Portland or Salem book publishers as the "printer," "publisher," or "copyright holder." In 1889, the legislature, complaining about the "present inefficient and costly system of reporting," put the state in the business of publishing the Oregon reports and required that the judges prepare the opinions for publication. Thus, volume 18 (1889) was published by the state printer, with Chief Justice Thayer identified

as the court reporter. (At that time, the state printer was an elected officer who published official state documents on his own equipment and with his own employees.) But Bancroft-Whitney of San Francisco (A.L. Bancroft having merged in the 1870s with another San Francisco law publisher, Sumner Whitney & Co.) brought out an identical volume 18, and that competition continued for some years. By the turn of the century, the legislature had returned responsibility for publication of the Oregon reports to a "supreme court reporter" and identical volumes were being published on an ongoing basis both by the state printer and by Bancroft-Whitney. Meanwhile, Bancroft-Whitney and Portland publisher George Bateson were busy reprinting and selling earlier volumes of the reports to Oregon's growing legal community.

OTHER "REPORTS" OF OREGON DECISIONS

Before we take up the story of the Oregon Reports after 1900, we digress briefly to remind the reader that the official reports were not the only source available to those interested in Oregon Supreme Court opinions. As noted in part 1, perhaps the first Oregon decision to be "published" was the June 1847 decision of the Supreme Court of the provisional (pre-Oregon Territory) government, *Knighton v. Burns,* which appeared in the *Oregon Spectator* newspaper around the that time it was issued and later was reprinted in 1883 in volume 10 of the Oregon Reports. The more significant development, however, was the extraordinary growth in the late 1800s of printed legal materials, particularly reports of appellate cases from around the country. Oregon cases, while small in number and impact compared to those from the courts of New York, Massachusetts, and other heavily populated states, began to be included in those compiliations.

The first great wave of law books came not from West Publishing Company, but from Bancroft-Whitney of San Francisco. In 1871, a year before the founder of West even began publishing summaries of Minnesota cases for local lawyers, Bancroft-Whitney embarked upon the unprecedented task of publishing a series of "reports [that] will contain all cases hereafter adjudicated in the courts of last resort in United States, unincumbered by practice cases and those of local interest only." Or, as the title page of "American Reports" describes the volume, "the American Reports, containing all decisions of general interest decided in the courts of last resort of the several states, with

notes and references by Isaac Grant Thompson." An Oregon decision first appeared in American Reports two years later, in volume 8, apparently because Mr. Thompson considered *Weise v. Smith*, 3 Or 445, 8 Am Rep 620 (1869) – a case involving riparian rights and whether the Tualatin River was navigable – to be the only case in volume three of the Oregon reports to be of "great general importance," rather than of merely local interest. Two more Oregon cases, drawn from volume 4 of the Oregon Reports, were included in volume 18 of the American Reports (1878).

Perhaps buoyed by strong sales of the American Reports (which, after 80 volumes, were succeeded by Bancroft-Whitney's "American State Reports" (140 volumes, 1888-1911), and then Lawyers Reports, Annotated, eventually to be followed, in 1919, by the more familiar American Law Reports (ALR) published by Bancroft-Whitney and Lawyers Cooperative Publishing Co.), the company undertook to cover the ground it had missed when it started the American Reports in 1871: the thousands of reported cases issued before that date. Beginning in 1878, Bancroft-Whitney brought out 100 volumes of "American Decisions," which purported to include all the important cases prior to 1869. Beginning with the cases from the 1700s, it is perhaps not surprising that the first Oregon cases in this retrospective collection do not appear until volume 62 (1886), which reprints three cases decided by the territorial Supreme Court in the mid-1850s and that appear in volume one of the Oregon Reports.

West Publishing began its national reporter system with the Northwest Reporter in 1879, and published the first volume of the Pacific Reporter in 1884 (although that volume includes some cases from 1883). Unlike Bancroft-Whitney, which selected what it saw as the important cases, from the beginning West apparently was of the view that more was better, undertaking to publish every available reported appellate court decision. Oregon makes its first appearance in volume one of the Pacific Reporter, with *Davidson v. O. & C. Railroad Co.*, 11 Or 136, 1 P 705 (1883), a case involving such timeless legal issues as whether a complaint is deemed amended when the proof at trial goes beyond the complaint, but is not objected to, and whether a railroad could be liable for damages to a neighboring landowner for improper construction of drainage ditches. (The answer is yes.)

We therefore see that, in addition to the Oregon Reports that were

being published by the state printer and by Bancroft-Whitney, an Oregon lawyer at the turn of the 20th century also could have obtained at least some Oregon Supreme Court decisions through the two major competing law publishers, Bancroft-Whitney, with its American Reports and then American State Reports, and West, through the Pacific Reporter.

SHIFTING RESPONSIBILITIES AND LEGISLATIVE TINKERING

In the years immediately following 1900, the Oregon reports were published by the state printer and separately by Bancroft-Whitney in almost identical editions. In addition, Bancroft-Whitney reprinted entire sets of the Oregon reports in 1887, 1906, and 1911 and other years, and George Bateson of Portland reprinted at least some volumes. Demand for the volumes was apparently difficult to predict, as evidenced by the frequent reprinting of volumes only a few years after they appeared and the Oregon legislature's varying directives as to the number to be produced by the state printer. A 1901 statute, for example, specified that the state printer was to print 600 copies of each volume, while in 1913 the number was increased to 900. In 1913, according to minutes of the newly established State Printing Board (consisting of the Governor, the Secretary of State, and State Treasurer), the state had exhausted its inventory of volumes 14, 37 to 41, and 43 to 52 of the Oregon Reports.

For reasons that are not altogether clear, the state printer apparently ceded responsibility for the publication of the reports to Bancroft-Whitney in 1913. This may have resulted from a substantial restructuring of the state printing function, which had long been associated with corruption and mismanagement and which, through a constitutional amendment in 1906 and legislation in 1911 and 1913, was turned over to the State Printing Board. As a result, while elected state printers had published official editions of the Oregon Reports, as directed by the legislature, from volume 18 (1889) through volume 64 (1913), with the advent of the state printing board, official publication abruptly ceased in 1913. The state did, however, contract with George Bateson of Portland to print at least several volumes during this period. Bancroft-Whitney thus prevailed, and was (so far as the author can determine) the sole publisher of volumes 65 (1913) through 130

(1930) of the Oregon Reports. Although the state had withdrawn from the publication of Oregon Reports, the state printing office, in at least one way, retained a close relationship with the Supreme Court: the organizational changes in 1913 led the state to purchase its own printing equipment and hire its own employees – and the state established its printing department on the first floor of the new Supreme Court building in 1914, where it remained until 1928.

In 1930, the State Printing Board "upon the request of the Supreme Court and the recommendation of the Secretary of State" decided to resume its own publication of the Oregon Reports and "to inform Bancroft-Whitney of its action." Volume 131 (1930) was published by the State Printing Department in Salem, and the volume describes Bancroft-Whitney as "Official Distributors" – a designation that continued through volume 164 (1940). Beginning with volume 139, pursuant to an agreement with West Publishing Co., the Oregon Reports began including syllabi and indices prepared by West and a notation was added on the title page indicating that those parts of the reports were copyrighted by West.

During the early decades of the 20th century, the legislature continued to tweak the style, publication, and distribution of Supreme Court opinions. In 1901, for example, the legislature specified that opinions should contain "the names of counsel on each side of the case" and a "concise syllabus of the points decided," and that volumes of the reports should have "not less than 700 pages." In 1903, the judges were told to prepare opinions in quadruplicate and to deliver them to the court clerk for transmittal to counsel, the secretary of state, and the court reporter (with the reporter directed to send a copy to the state printer). By 1909, the opinions were to be prepared in quintuplicate, with the additional copy to go to the trial court judge for the case.

The legislature also frequently weighed in on the cost of printing, sales, and other details related to the state's versions of the Oregon Reports. For example, the court reporter was paid $500 per volume in 1901, but only $400 in 1921. In 1901, the legislature specified that the state printer be paid $3 per copy for new volumes during the following biennium and that the secretary of state should sell those volumes at $3.50, but also provided that the secretary of state could sell "any other reports of the Supreme Court of Oregon that he may now have on hand to the public at $3.00 per volume." Statutes also

directed who should receive volumes of the reports at state expense – generally judges, clerks, district attorneys, the legislature, and other state officials.

In the 1920s the legislature addressed for the first time the topic of advance sheets. The court had always prepared and distributed a few copies of individual slip opinions before sufficient opinions had been produced to warrant a new volume of the Oregon Reports. By this time, however, the court had instituted a practice of preparing advance sheets as an intermediate step between the slip opinion and the bound volume. In 1927, the legislature authorized the sale of advance sheet subscriptions for $4.50 per year. Ten years later sales apparently were sufficiently strong (or the general fund's need for operating funds sufficiently great) that the legislature ordered that all receipts for the sale of advance sheets in excess of a reserve balance of $500 be transferred to the state's general fund.

Slowly but surely during the middle years of the century, the legislature gave greater authority to the Supreme Court and the state's Department of Finance and Administration over the details of publishing the Oregon reports. In 1935, the legislature, which for 75 years had specified the price of the Oregon reports, provided instead that the sales price be set at a level that covered the actual cost of printing, binding, and shipping, and in 1961 it authorized the state administrative department to sell copies of the reports at the prices that the department determined. By 1967, the legislature was no longer dictating which individuals and offices should receive how many copies of the reports and instead directed the state Department of Finance and Administration to produce the number of copies it deemed appropriate and distribute them as it saw fit. Even in that year, however, the legislature found it necessary to set the price of advance sheet subscriptions, raising the annual price to $13.50.

THE EVOLUTION OF THE MODERN OREGON REPORTS – IN PRINT AND ON-LINE

In the later decades of the 20th century, the legislature devoted its attention to other matters, amending the statutes regarding the Oregon reports only to reflect administrative changes, such as creation of the Oregon Judicial Department and the office of State Court Ad-

ministrator and the replacement of the Department of Finance and Administration with the Department of General Services and later the Department of Administrative Services (DAS).

The last 200 plus volumes of the Oregon Reports have been published exclusively by the state, Bancroft-Whitney apparently deciding not to try to compete with the state printing department, perhaps assuaged initially by its designation as "official distributor" and later by an understanding of the limited profits available from the enterprise. The state printer of the 1880s to 1913 gave way to the "state printing department," and, by volume 333, to "DAS [Department of Administrative Services] Publishing and Distribution." In 2004, the state began contracting out the actual printing of the Oregon Reports (having divested itself of its larger printing presses), and beginning with volume 340 (2006), the printing and binding has been done by Lynx Group Inc., of Salem.

Responsibility for the reports, however, continues to rest with the Court, the State Court Administrator's office, and – perhaps most importantly – with the official editor. Although the 1973 legislature eliminated the official position of Supreme Court Reporter, vesting the responsibilities of that position instead in the state court administrator, the key position is that of editor of the Oregon Reports. Mary Bauman, now in her 24th year as editor, is the latest in a long line of outstanding reporters and editors, supervising the editing and production of each volume.

Although strong themes of continuity and tradition are visible in the nearly 150-year history of the Oregon Reports, change – sometimes gradual, sometimes sudden – is also a constant. Probably the most significant change in recent years is the impact of the internet and the increasing use of on-line legal resources, including the Oregon Reports. The Supreme Court publications office began putting opinions on the Oregon Judicial Department website in 1997. That step, of course, makes the opinions broadly available to the public and practitioners at little or no cost, but it also has reduced demand for the advance sheet subscriptions. Advance sheet subscriptions fell from almost 2000 in 1991 to not quite 1000 in 2007. Demand for the bound volumes of the Oregon Reports is steady, but also down from the 1980s, when older volumes were being reprinted and 1200 copies of new volumes were being produced (although many of those

remained in inventory). The print run currently is 620 copies per volume. Oregon, along with about half of the other states, continues to publish its own versions of its reports, declining to give what is now Thomson/West a monopoly over print versions of Oregon appellate decisions.

The Oregon Reports are a vital source of the state's law, an indispensable tool for lawyers, judges, and legislators. Users now have many options, from the free, electronic versions on the OJD website (and the various free legal databases that make use of the OJD version) to the Westlaw and Lexis commercial services and Thomson/ West's Pacific Reporter, both in the full version and in the green "Oregon Cases" version. But all users, and particularly those who still enjoy the heft of a book in their hand (even if the covers are no longer leather), owe a large debt to the Oregon Supreme Court's first reporter (and, later, justice), Joseph G. Wilson, who in 1862 took the initiative to compile and publish volume one of the Oregon Reports.