

Blazing Trails in a New Kentucky Wilderness: Early Kentucky Case Law Digests *

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The three stages of the history of case law digest publishing in Kentucky are discussed: the early period where digests were the product of individualistic lawyer-scholars; a middle period where state and regional legal publishers began to professionalize digest making; and the final commercial triumph of West's American Digest System. Appendixes provide a bibliography and a chronology of Kentucky digests.

¶1 The historical development of a uniquely American common law is inextricably linked to the rise of the nation's legal publishing history.¹ Without native law reporters and tools to organize and provide access to the precedents within them, the United States would not easily have loosed its bonds to the English legal tradition. The history of state digest making illustrates this transformation, which started with the efforts of frontier lawyers to organize and use the growing number of legal precedents and culminated in the creation of the sophisticated American Digest Classification Scheme by the West Publishing Company. The digest, a tool that collects and organizes the reported precedents of a jurisdiction into a scheme that facilitates intellectual access to case law, served for over a hundred fifty years as the premier legal research tool in the United States. Its creation heralded the end to the sway of Blackstone and the beginning of a truly American body of law.

¶2 At the start of the nineteenth century, the legislature of Kentucky, one of the new American commonwealth's most fiercely democratic states, increasingly

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** Legal Reference Librarian, University of Louisville, Louis D. Brandeis School of Law Library, Louisville, Kentucky. I would like to dedicate this article to Herb Cihak, Director of the University of Kentucky Law Library, who first read this paper in its infancy, and to Ebba Jo Sexton, the recently retired technical services maven of the same institution, whose vigilance in protecting these forgotten books made it possible for me to tell their story.

1. ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* (1990), is the best introduction to the role of legal publishing in the creation of the American legal tradition, but M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995), has perhaps the most insightful look into how the format of legal information helps to create the prevailing legal paradigm. Robert C. Berring has also examined this topic and has gone so far as to suggest that the creation of the West National Reporter System and the American Digest Classification Scheme, together with the case method of legal education developed by Christopher C. Langdell, dean of the Harvard Law School, defined the development of American law in the 19th and early 20th century. Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 21–22 (1994).

insisted that the state's own case law be the sole basis for legal decisions by Kentucky courts. For the first several decades of its existence, Kentucky drew heavily on the published opinions of its appellate courts as the primary source of civil law and criminal law.² Kentucky's strongly populist and anti-British nineteenth-century lawmakers and jurists consciously nurtured the development of a distinctly Kentuckian common law tradition by encouraging the publication of its own court opinions in nominative case reporters and discouraging the use of foreign precedents in the state's courts. After it became obvious that the private market could not sustain the production of case reports (even James Hughes's excellent volume lost money³), the legislature began subsidizing the printing of case reports.⁴ In a celebrated exchange with a young Henry Clay, Chief Justice Ninian Edwards refused to allow Clay to cite a British case, even though he sought to use it not as primary authority but merely to illustrate a general legal principle.⁵ This ruling was based on a strict and decidedly nationalistic interpretation of a state statute that sought to narrowly define the received common law of Kentucky as only those British precedents in effect at the time of the founding of Virginia in 1640 as they were amended by Virginia courts and statute law up to the establishment of Kentucky as a state in 1790.⁶

¶13 With case law so important to the development of Kentucky law, it soon became apparent that some tool was needed to assist lawyers attempting to find relevant judicial precedents in the growing number of volumes of Kentucky

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2. It was not until 1852 that the legislature authorized the codification of the state's legislative enactments. The Kentucky legislature commissioned Charles S. Wickliffe, Squire Turner, and S.S. Nicholas to revise and arrange a statutory code in early 1850. Act to Simplify the Rules of Practice in Civil and Criminal Cases, and to Provide for Revising and Codifying the Statute Laws, 1849 Ky. Acts, ch. 122. As there was no provision for publication, Wickliffe and Turner engaged the Frankfort printer A.G. Hodges to privately publish the code in 1852 as *The Revised Statutes of Kentucky*. See Robert K. Cullen, *The History of Compilation of the Kentucky Statute Laws*, 28 FILSON CLUB HIST. Q. 134 (1954).
 3. According to Martin D. Hardin's introduction to his own set of reports, Hughes lost "several hundred dollars" in the endeavor. 3 Ky. (Hard.) iii (1810).
 4. In 1804, the legislature ordered that clerk of the court of appeals Achilles Sneed's order book be published as *Sneed's Reports*. Act Concerning the Promulgation of the Opinions of the Court of Appeals, 1804 Ky. Acts, ch. 71. The legislature later began to subsidize the publication of nominative reports. Act to Procure Reports of the Decisions of the Court of Appeals, 1807 Ky. Acts, ch. 15.
 5. Hickman v. Boffman, 3 Ky. (Hard.) 356, 372–73 (1808). Some readers may be interested in an oddity associated with this citation. I originally cited to the pagination in my personal edition of *Hardin's Reports* in its original 1808 version (which matches other first editions in the University of Kentucky Law Library). Apparently when the nominative reports were reset in uniform modern typefaces in the 1869 Robert Clarke & Co. edition of the *Kentucky Reports* known as the Century Edition, the pagination changed (not surprising given the idiosyncratic type used in the old reporters). Since all subsequent editions are based on plates from the Century Edition of the *Kentucky Reports*, and the citation format followed by *Law Library Journal* requires citation to the *Kentucky Reports* rather than individual nominative reports, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 204 (17th ed. 2000), we have chosen to use the pagination listed above. For those consulting the original version of *Hardin's Reports* (published in a single volume), however, you will find the cited material at Hard. 348, 364 (1808).
 6. Act Prohibiting the Reading of Certain Reports in This Commonwealth, 1807 Ky. Acts, ch. 7.

reports. This need was met in Kentucky, as it was in other states, by the development of legal digests. Following a pattern typical for early American legal publishing,⁷ the task of creating these tools in Kentucky fell first to individuals, typically local attorneys without any experience in bibliographic classification. Their inevitably idiosyncratic efforts ranged from excellent to barely competent. Later, after the complaints of attorneys happily intersected with the development of a national legal publishing industry, large publishing firms entered the Kentucky digest market to provide the stability and professional indexing methods long sought by the working bar. The purpose of this article is to describe the particulars of the development and progress of case law digests in Kentucky.

Brief History of the Legal Digest

¶4 Efforts to provide intellectual access to case law began soon after collections of judicial decisions were first published in England. The first means of managing the mass of reported decisions was the abridgment. An abridgment summarizes and extracts portions of selected judicial decisions and arranges the material thematically. The first abridgment was published by Nicholas Statham in 1490.⁸ Later abridgements of English law by William Sheppard⁹ and Matthew Bacon¹⁰ were widely reprinted and used in colonial and early republican America.¹¹ Nathan Dane's *General Abridgement and Digest of American Law* in 1823 was the most prominent early attempt at abridging the law of the new United States.¹² With Dane's commentary on a topic preceding an iteration of rules and cases, the work was as much a legal encyclopedia as a digest or abridgment and, despite its title, was mostly based on cases from New England.

¶5 While an abridgement is an effective means for condensing selected ruling case law in a form that can substitute for the complete case reports (especially when the original reports are hard to obtain), it is not designed to provide intellectual access to *all* cases in a jurisdiction or subject area. When case reporters began to be published more frequently, a new tool was needed—the digest. The digest serves the purpose of providing access to primary legal texts, while continuing, to

7. In one of the rare article-length treatments of state digest making, Joel Fishman, *The Digests of Pennsylvania*, 90 LAW LIBR. J. 481 (1998), discusses how the same process played out in that state. SURRENCY, *supra* note 1, at 114–18, 123–24, briefly discusses state digests, with more detail on New York, where brothers Benjamin Vaughan Abbott and Austin Abbott established the classification scheme that evolved into the American Digest System.

8. SURRENCY, *supra* note 1, at 112.

9. WILLIAM SHEPPARD, GRAND ABRIDGEMENT OF THE COMMON AND STATUTE LAW (1657).

10. MATTHEW BACON, NEW ABRIDGEMENT OF THE LAW (1809).

11. SURRENCY, *supra* note 1, at 112.

12. NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW WITH OCCASIONAL NOTES AND COMMENTS (1823). For a discussion of the import of this publication and its author, see SURRENCY, *supra* note 1, at 113; Andrew Johnson, *The Influence of Nathan Dane on Legal Literature*, 7 AM. J. LEGAL HIST. 29 (1963).

a more limited degree, to condense legal rulings. A digest, at its most elementary level, indexes the leading legal points in a defined body of case law, usually a set of case reports. A digest has an entry and access point for each legal rule decided in a case, which in turn are arranged and indexed individually. It covers *all* cases in a defined set of books and time period, although some digests omit entries regarding areas of law patently obsolete.¹³

¶16 One of the first digests in the United States exclusively devoted to the case law of a particular state was William Johnson's 1815 digest of New York State cases.¹⁴ Within a few years, digests in Massachusetts and Pennsylvania had been prepared.¹⁵ The most influential state digests were those prepared by Benjamin Vaughan Abbott and his brother, Austin, who prepared digests of New York cases,¹⁶ Supreme Court cases,¹⁷ and federal cases.¹⁸ The classification system that the brothers created for their New York digest is considered by historians of legal publishing to be the inspiration of the American Digest System.¹⁹

Early Nominative Kentucky Digests, 1833–1876

¶17 Given the high value that Kentucky's lawmakers and judges placed on the state's own judicial decisions, it is not surprising that one of the earliest attempts at digesting case law covered Kentucky cases. Indeed, when William Littell published his *Principles of Law and Equity* in 1808, he stated in his preface that "since all English decisions subsequent to the area of American independence have been excluded, by a late act of the assembly, there is an imperious necessity for an immediate promulgation of the decisions of our supreme court of judicature, as it is certain there are some counties where not a single book can be found, exclusive of the acts of the assembly, which under this law [can] be introduced as authority."²⁰ Littell was a remarkable legal scholar and wit who is most renowned

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13. For example, cases upholding miscegenation laws are omitted from many digests, because that area has been so clearly foreclosed by both constitutional law and contemporary mores that those cases are no longer of interest to today's lawyers.
 14. WILLIAM JOHNSON, A DIGEST OF THE CASES DECIDED AND REPORTED IN THE SUPREME COURT OF JUDICATURE AND THE COURT FOR CORRECTION OF ERRORS, IN THE STATE OF NEW YORK (1815).
 15. SURRENCY, *supra* note 1, at 114.
 16. BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, DIGEST OF NEW YORK STATUTES AND REPORTS (1860).
 17. BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, DIGEST OF THE REPORTS OF THE UNITED STATES SUPREME COURT (1863).
 18. BENJAMIN VAUGHAN ABBOTT & AUSTIN ABBOTT, DIGEST OF THE REPORTS OF UNITED STATES COURTS AND ACTS OF CONGRESS (1867).
 19. SURRENCY, *supra* note 1, at 121; John Doyle, *WESTLAW and the American Digest Classification Scheme*, 84 LAW LIBR. J. 229, 232; *Benjamin Vaughan Abbott*, 3 GREEN BAG 1, 1–2 (1891) (describing unique approach to digesting developed by the Abbott brothers, leading to "features . . . [that] have been largely approved by the labors of subsequent compilers of Digests, particularly in reference to methods of analysis and classification").
 20. WILLIAM LITTELL, PRINCIPLES OF LAW AND EQUITY, RECOGNIZED AND ESTABLISHED BY THE COURT OF APPEALS OF KENTUCKY vii (1808).

for publishing the first compilation of Kentucky laws,²¹ but who also edited six volumes of *Kentucky Reports*²² and wrote the first book of political satire published west of the Alleghenies, *Festoons of Fancy*.²³

¶18 Littell's *Principles of Law and Equity* fall between an abridgement and a digest in arrangement. As his preface indicates, the work was intended to substitute for the few case reports published at that time, but in arrangement the short entries more closely resemble a digest. The work itself is slight, running only 101 pages, and covers only those cases from 1792 to the 1805 October term of the court of appeals. (Before 1976 the court of appeals was the highest state court in Kentucky. The creation of an intermediate appellate court in 1976, named the court of appeals, necessitated renaming the highest court as the supreme court.) Moreover, the work specifically excludes the land cases published in the reports of James Hughes and any case later overruled. All in all, only a single volume of published reports, *Sneed's Reports* (2 Ky.), and an undetermined number of unpublished reports fell under Littell's editorial purview. Littell used nearly 160 subject terms to arrange the entries, and it is apparent that the terms were suggested by the subject matter of the cases and did not follow any predetermined classification scheme. The entries cite to decisions by the page in *Sneed* (if the case was reported), the case name, and the date. Littell's preface promises a second volume, but one was never published.

¶19 Despite the example of Littell's initial effort, it was not until thirty volumes of reported cases had been published that another digest attempted to negotiate this growing mass of law. In 1833, Henry Pirtle published *A Digest of the Decisions of the Court of Appeals*,²⁴ a two-volume digest of the reports of Hughes, Sneed, Hardin, Bibb, A.K. Marshall, Littell, T.B. Monroe, and J.J. Marshall.²⁵

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21. WILLIAM LITTELL, *STATUTE LAWS OF KENTUCKY* (Frankfort, Ky., William Hunter 1809–1819). WILLIAM LITTELL & JACOB SWIGERT, *A DIGEST OF THE STATUTE LAW OF KENTUCKY* (Frankfort, Ky., Kendall and Russell 1822) updated the original compilation. The work, with its supplements, was the standard edition of statute laws and is to be accorded recognition “in the courts and tribunals . . . [of Kentucky], as evidence of the statute laws in force at the time of . . . [its] publication.” KY. REV. STAT. ANN. § 447.030 (LEXIS L. Publg. 1999).
 22. LITTELL'S REPORTS (11–15 Ky.), in five volumes, covered cases from 1822–1824. LITTELL'S SELECTED CASES (16 Ky.) covered older cases from 1795 through 1821 that had not been published before (including some of those digested in his *Principles of Law and Equity*).
 23. WILLIAM LITTELL, *FESTOONS OF FANCY, CONSISTING OF COMPOSITIONS AMATORY, SENTIMENTAL, AND HUMOUROUS IN VERSE AND PROSE* (Univ. of Kentucky 1940) (1814). The work is distinguished by perhaps the earliest satire on the topic of the public's right to legal information, *An Epistle to the People of Kentucky: Littell's Application for Re-Printing the Acts of the Assembly*. This mock-biblical satire concerns Littell's unsuccessful attempt to have the state republish those laws of Virginia still binding in Kentucky. Despite Littell's warning that the state was “ensnaring [the people of Kentucky] with laws we will not suffer them to see or hear,” the laws were not made available until Littell's own *Statute Laws of Kentucky* was privately published. Law and legal reform is a theme in many of the satires, one of which supports the right of women to seek a divorce by pointedly contrasting the Kentucky gentleman's public claims for the sanctity of marriage against his private sexual exploitation of his slaves.
 24. HENRY PIRTLE, *A DIGEST OF THE DECISIONS OF THE COURT OF APPEALS OF KENTUCKY* (1833).
 25. These nominative reporters comprise volumes 1 through 30 of the *Kentucky Reports*.

Pirtle, a successful Louisville attorney, served from 1825 to 1829 as judge of the Jefferson County circuit court.²⁶ From 1846 until his death in 1880, he was professor of equity, constitutional law, and commercial law at the University of Louisville School of Law.²⁷ Judge Pirtle dedicated his digest to his friend and patron John Rowan, who had invited him into his Bardstown home (a residence that would later inspire Stephen Foster's "Old Kentucky Home") to read the law.²⁸ Rowan, a former Kentucky Court of Appeals judge and United States senator, was a prominent Kentucky jurist and apprenticed many prominent attorneys, including United States Supreme Court Justice John McKinley.²⁹

¶10 Pirtle's digest runs about 1100 pages and is published in two volumes. In his preface, Pirtle stated that it is "important that the matter of such a book as this should . . . be placed under general heads," noting that if a rule is placed under too specific a heading, "in application to analogous instances, [it] will not be so ready" to the user.³⁰ Following this principle, Pirtle arranges his entries under only 217 headings. For example, all cases falling under equitable jurisdiction are classed under the equity heading. In general, Pirtle's rule is sound and well applied, but in some areas (court procedure, for example), cases on similar topics are still scattered. There are no subheadings, but notes in the margins make it somewhat easier to skim the many entries under each heading. Each entry is concise, consisting of no more than eight lines summarizing the legal rule, with references to the cited case and, occasionally, to treatises or material from other jurisdictions.³¹

¶11 Twenty years passed before James Harlan and Benjamin Monroe followed Pirtle's effort with their *Digest of Cases at Common Law and in Equity Decided by the Court of Appeals of Kentucky*.³² The 1853 work digested all the reports covered by Pirtle and added Monroe's own reports and those of James Dana. James Harlan, best known as the father of Supreme Court Justice John Marshall Harlan, was a respected prosecutor, attorney general of Kentucky (1850–1855), and U.S. congressman.³³ In 1859, he was appointed by the legislature as one of three commissioners charged with drafting a code of civil and criminal practice.³⁴ Benjamin Monroe, like Harlan a prominent Frankfort attor-

26. THE LAWYERS AND LAWMAKERS OF KENTUCKY 167 (H. Levin ed., 1897).

27. *Id.* at 167–68.

28. RANDALL CAPPS, THE ROWAN STORY: FROM FEDERAL HILL TO MY OLD KENTUCKY HOME 10 (1976).

29. LAWYERS AND LAWMAKERS OF KENTUCKY, *supra* note 26, at 167.

30. PIRTLE, *supra* note 24, at [v].

31. One entry had both a reference to a legal treatise and a citation to a case reported in *Salkeld's King's Bench Reports*—an English legal decision that Kentucky law would bar an attorney from citing in court.

32. BENJAMIN MONROE & JAMES HARLAN, DIGEST OF CASES AT COMMON LAW AND IN EQUITY DECIDED BY THE COURT OF APPEALS OF KENTUCKY (1853).

33. See LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 7–10 (1992).

34. M.C. JOHNSON, JAMES HARLAN, & J.W. STEVENSON, CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF KENTUCKY (1854).

ney, had been publishing reports of the Kentucky courts since 1840 and would continue as court reporter until 1857, producing volumes 40–57 of the *Kentucky Reports*.

¶12 The Monroe and Harlan digest consists of nearly 1050 pages in two large volumes. In their introduction, the authors proclaim an aim to not only digest Kentucky cases, “but also to state those principles that the Court has recognized as law, in coming to the several conclusions which constitute the main and leading doctrines of the case.”³⁵ To this end, a much larger number of headings—over four hundred—is employed in the work than in Pirtle’s digest, and in many cases a heading is subdivided into over a dozen subheadings, some of which are also subdivided. The digest proper is preceded by a useful table of titles that employs the subheads and acts in a similar manner to the topical outlines in modern digests. The entries are very brief, typically no more than five lines, and have references only to the digested case.

¶13 Monroe and Harlan’s digest was updated in 1867 by Martin H. Cofer, who digested only the cases from 1853 to 1867.³⁶ Cofer, named for his relative, the court reporter Martin D. Hardin, served in the Sixth Kentucky Division of the Confederate Army, was wounded at Shiloh, and rose to the rank of colonel.³⁷ After the war he built a successful law practice in Elizabethtown. In 1874, Cofer was named to the court of appeals and in 1881 was named chief justice of that body.³⁸

¶14 Cofer’s digest is a single volume of about 550 pages. The author, with slight modification, uses the headings employed by Monroe and Harlan. Cofer’s preface expresses his desire to “state all the facts”³⁹ of the case upon which each rule rests and, in general, his entries do describe the facts behind each case to a greater degree than previous digests. One helpful addition to the work is a table of digested cases.

¶15 A further updating of the Monroe and Harlan digest was undertaken in 1867 by Covington attorney William W. Trimble.⁴⁰ Trimble was the son of former Kentucky Court of Appeals Justice John Trimble and the nephew of United States Supreme Court Justice Robert Trimble.⁴¹ His digest covers the decade between 1866 and 1876. The size, makeup, and organization of Trimble’s digest mirrors

35. MONROE & HARLAN, *supra* note 32, at iii.

36. MARTIN D. COFER, A SUPPLEMENTAL DIGEST OF THE DECISIONS OF THE COURT OF APPEALS OF KENTUCKY, 1853–1867 (1867).

37. LAWYERS AND LAWMAKERS OF KENTUCKY, *supra* note 26, at 92–93.

38. John C. Doolan, *The Court of Appeals of Kentucky* (pt. 3), 12 GREEN BAG 458, 462 (1900).

39. COFER, *supra* note 36, at iii.

40. WILLIAM W. TRIMBLE, DIGEST OF THE DECISIONS OF THE COURT OF APPEALS OF KENTUCKY, 1866 TO 1876 (1876).

41. BIOGRAPHICAL CYCLOPEDIA OF THE COMMONWEALTH OF KENTUCKY 149-50 (John M. Gresham ed., 1896).

that of Cofer. The entries are briefer, often no more than a sentence, and are often poorly written.⁴²

Commercial Publishers Enter the Digest Market

¶16 The end of the nineteenth century brought a new professionalism to the legal publishing industry⁴³ and, as the key legal finding aid, it is not surprising that the digest would be both the focus of reform and of commercial competition. The nominative digest, with its author-generated idiosyncrasies and casual updating schedules, would be replaced in this period by logically organized and regularly updated multivolume digests, devised and directed by publishers, not authors. The culmination of this trend would be the West digest—authorless, rigorously organized, and uniform. Lawyers, looking for cases, not literature, typically hailed the development.

¶17 Despite the fact that Trimble's 1876 update of Monroe and Harlan had created a relatively up-to-date digest, the market was ripe for a new integrated Kentucky digest, and within two years two local publishers—Robert Clarke and Company of Cincinnati and John P. Morton and Company of Louisville—offered products to fill that void. The first of these works was Richard H. Stanton's appropriately titled *New Digest of the Decisions of the Court of Appeals of Kentucky*.⁴⁴ Stanton, a Maysville attorney, was an appropriate choice by Robert Clarke and Company to author its new digest. He had edited the company's edition of the 1859 code of civil and criminal practice,⁴⁵ and had compiled revised statutes for the commonwealth that were published by the company in 1860 and 1867.⁴⁶

¶18 According to his preface, Stanton was guided in his work by the "great advances . . . made in the last few years, both in England and this country, in the method of making Digests," and he sought to incorporate "every commendable feature, and thus make it, in all respects, thorough, systematic, and convenient."⁴⁷ He advertised that he had completely redigested the reported decisions of all seventy-four volumes of the *Kentucky Reports*, carefully examining each case. At

42. A word on standards is perhaps relevant here. The digests discussed in this paper were first compared generally by "spot checking" various entries. In addition, I carefully read the entry for "wills" in each digest for comparison purposes. (Wills was chosen because the common law rules have evolved slowly and evenly and thus the entries are still roughly comparable after two centuries). Any conclusions about style, usability, etc., are based on this review.

43. For a general discussion of the rise of legal publishing companies, see SURRENCY, *supra* note 1, 211–45.

44. RICHARD H. STANTON, A NEW DIGEST OF THE DECISIONS OF THE COURT OF APPEALS OF KENTUCKY: EMBRACING ALL THE REPORTED CASES FROM THE ORGANIZATION OF THE COURT IN 1792 TO 1876 (1876).

45. RICHARD H. STANTON, CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF KENTUCKY (1859).

46. RICHARD H. STANTON, REVISED STATUTES OF KENTUCKY (1860 & 1867).

47. STANTON, *supra* note 44, at iv.

least one entry was referenced for every reported case, even those of the discredited New Court.⁴⁸

¶19 Like many of the new digest editors, he was guided by a desire for brevity and sought to keep the work to two volumes. To avoid repetition of entries, Stanton employed the largest number of headings yet used by a Kentucky digest maker, more than nine hundred, and these headings were further subdivided. Each entry was headed by a synoptic heading and numerous subheadings. Two useful features were appended: a table of cases and a table of all “overruled, disapproved and doubted cases.”⁴⁹ The digest entries are well written and the layout effectively varies typefaces to further clarify the subdivisions and cross-references.

¶20 Richard Stanton had begun the preface to his *New Digest* with the following unintentionally ironic statement: “The probability that no one in the future would undertake the great labor of re-digesting the decisions contained in the seventy-four volumes of reports from which this work has been compiled, has been a constant stimulating incentive to make it thorough and accurate.”⁵⁰ Stanton’s confident prediction could not have gone more awry—a mere two years after his digest was issued, Joseph Barbour of New Castle compiled a competing work that was published by John P. Morton and Company of Louisville.⁵¹

¶21 Like the Stanton digest, Barbour’s work applied new principles of abstraction and classification to the reported case law. What would ultimately mark the John Morton and Company digest from all those that preceded it was that it was regularly updated using the same principles and subject headings. In 1896, an additional two volumes were published under Barbour’s name. In 1903, Frederick P. Caldwell, a Louisville attorney and a prolific legal writer,⁵² would officially take over the project, publishing an additional six supplemental volumes using Barbour’s system.

¶22 Redigesting the body of Kentucky case law, Barbour did not “fe[el] at liberty to omit a single case.” Even cases on the law of slavery were included. Noting that “our Codes and Statutes treat the criminal law and civil law differently,”⁵³ he divided the digest into two sections, criminal and civil. Like digesters stretching back to Pirtle, Barbour proclaimed that “general” headings were the most useful, but he created over seven hundred titles, some of them divided into as many as

48. As that court was later repudiated by the legislature, these decisions, found in 18 Ky. (2 T.B. Mon.) are not considered part of the common law of Kentucky. *Smith v. Overstreet’s Admr.*, 81 S.W.2d 571, 573 (Ky. 1935).

49. STANTON, *supra* note 44, at iv.

50. *Id.* at iii.

51. JOSEPH BARBOUR, *KENTUCKY DIGEST EMBRACING ALL THE REPORTED CASES DECIDED BY THE COURT OF APPEALS FROM ITS ORGANIZATION TO THE YEAR 1878* (1878).

52. Prior to updating his digest, Caldwell worked with Barbour in editing an edition of revised statutes. JOSEPH BARBOUR & JOHN D. CARROLL, *KENTUCKY STATUTES* (1894–1936). Caldwell may have edited the last two volumes published under Barbour’s name in 1896. He would go on to author several widely used legal reference works.

53. BARBOUR, *supra* note 51, at iii.

three dozen subheadings. Often this intention is foiled in the execution. For example, there is a separate heading for “Ballot-Box, Stuffing,” despite a general heading on “Elections, Political,” and a heading for “Billiard-Tables,” despite a general heading on “Gaming.” In general, however, the headings appear appropriate and well subdivided.

¶123 The digest has a number of useful features. Because of the great number of subheadings, the title index acts roughly like a topical outline and is a useful finding tool. In addition, each paragraph in an entry is preceded by either black letter or italic subheading phrases to show its place in the synoptic scheme. There is a table of cases and a table of overruled precedents. The entries in the Barbour-written volumes are well written and very concise. One flaw of this editorial restraint is that few facts of the digested cases are given. From a general comparison, it appears that the Caldwell volumes have fuller entries.

The Emergence of West Digests

¶124 Despite the professionalism of the Clarke and Morton-produced digests of Kentucky case law, the two local publishers would eventually fall prey to the biggest success story in American legal publishing history, the West Publishing Company. In 1905, West published a five-volume work, *A Digest of the Decisions of All the Courts of Kentucky*, reportedly “in response to numerous and repeated requests from members of the Bar of Kentucky who wanted a Kentucky digest compiled on the well-known and standard American Digest Classification system.”⁵⁴ The editors noted that Caldwell’s *Kentucky Digest* had tried, “to a limited extent,” to apply the method, but “[i]t goes without saying that the editors of the American Digest System . . . know how to apply the scheme better than any other body of men.”⁵⁵ In actuality, the West Publishing Company had purchased the American Digest Classification System in 1889 from Little, Brown and Company, which had developed it for the *United States Digest*. West enhanced it by wedding it to the topic-key number system used in its National Reporter System.⁵⁶

¶125 It is not within the scope of this paper to outline the rise of the West Publishing Company⁵⁷ or to explain the complicated history and evolution of the

54. A DIGEST OF THE DECISIONS OF ALL THE COURTS OF KENTUCKY iii (1905).

55. *Id.*

56. See WILLIAM W. MARVIN, WEST PUBLISHING CO.: ORIGIN, GROWTH, LEADERSHIP 69–74 (1969). The deal included all copyrights and subscription lists. West also purchased and absorbed another national competitor, the *Complete Digest*, whose editor became a key player as a West employee in developing the American Digest Classification System. *Id.* at 70–71. West debuted its famous key symbol in 1907 in its first *Decennial Digest*, SURRENCY, *supra* note 1, at 121–22, two years too late for its first Kentucky digest.

57. Surprisingly, the epic rise of the West Publishing Co. has yet to attract an objective book-length treatment, but Thomas A. Woxland, “Forever Associated with the Practice of Law”: The Early Years of the West Publishing Company, LEGAL REFERENCE SERVICES Q., Spring 1985, at 155, is a good survey

American Digest Classification Scheme,⁵⁸ but as Kentucky was one of the first states where West attempted to capture the state digest market,⁵⁹ it is important to briefly document how West won the Kentucky digest war. In Kentucky, as in most of the states, three key factors aided West's success: the publisher's tight, logical, and rigorously applied classification scheme; the fact that the classification scheme was directly tied to headnotes in published reporters; and West's practice of regularly updating the digest.

¶126 The West key number classification system truly delivered what other digesters promised—a concise, general schedule of headings consistently applied by the editors. Because of the reputation of the national system, users knew that a particular topic would be handled the same way in all West publications and that headings would not change with each edition. In addition, because the topic was keyed to a particular headnote in the West reporter system, they could quickly find the pinpoint citation or could use that topic for research in other West digests.

¶127 The last major selling point was West's policy of consistent and rapid updating of its products. The first West digest was updated almost every other year (and could be further updated using the digest portion of the *South Western Reporter*).⁶⁰ The multivolume *West's Kentucky Digest*, first published in 1931, simplified the updating process for users even further by using annual pocket parts and replacement volumes to keep the set current. The 1931 digest also introduced the use of an analytical outline at the beginning of each digest topic that made it possible to see each key number within the larger context of the entire classification system. The *West's Kentucky Digest, 2d*, published in 1985, streamlined the digest by omitting all cases prior to 1930, but maintained the same overall organization and appearance.

¶128 The main competitor to West, Louisville-based John P. Morton and Company, surrendered the digest market within a decade of the appearance of the first West digest, shifting the attention of the company to general legal supplies and nonlegal publishing.⁶¹ Morton's digest editor, Frederick P. Caldwell, joined

introduction. William W. Marvin's in-house history of West Publishing provides a good chronological framework and some important details, but suffers from its company-centered perspective. MARVIN, *supra* note 56.

58. See SURRENCY, *supra* note 1, at 111–27, for an account of the early roots of the American Digest Classification System in the early New York digests of the Abbott brothers through its purchase and revamping by the West Publishing Co.

59. *Id.* at 823 n.58.

60. See *infra* Appendix B, Chronology of Kentucky Digests.

61. Through 1908, the publisher's advertisements in the state-produced *Official Manual of Kentucky/Kentucky Directory*, a popular advertising medium for Kentucky legal publishers, had promoted a wide variety of legal publications; by the second decade of the century, its ads exclusively promoted its blank-book, stationary, and brief-printing services. FRANK K. KAVANAUGH, OFFICIAL MANUAL FOR THE USE OF COURTS, STATE AND COUNTY OFFICIALS, AND GENERAL ASSEMBLY, OF THE STATE OF KENTUCKY (1896-1912); KENTUCKY DIRECTORY FOR THE USE OF COURTS, STATE AND COUNTY OFFICIALS, AND GENERAL ASSEMBLY, OF THE STATE OF KENTUCKY (1914-1930). The firm, like most local legal publishers, had always had a strong nonlegal business and merely shifted its attention to other lucrative areas like school book publishing.

the W. H. Anderson Company of Cincinnati where he edited *Notes to The Kentucky Reports*, an early citator,⁶² as well as a legal dictionary and a popular set of form books.⁶³ The W. H. Anderson Company, like other regional law publishers,⁶⁴ avoided direct competition with the West *Kentucky Digest*.

Conclusion

¶29 In almost two hundred years of Kentucky legal digest production, authors and publishers grappled with the problem of making the mass of published case law intellectually accessible to attorneys trying to find precedents to win cases. Early digests were the product of often brilliant, but individualistic lawyer-scholars. Later, more pedestrian legal thinkers, but better classifiers and digesters took up the task. Finally, a system, not a particular person, was found to produce the surest and most cost-effective means for lawyers to find the Kentucky case law they needed to help their clients, the ultimate beneficiaries of the development of the digest as a precise and reliable tool for legal research.

¶30 With the advent of electronic case-finding tools like Westlaw and LEXIS, one is perhaps tempted to predict the imminent death of the digest.⁶⁵ Certainly these services have revolutionized legal research since they were introduced in the 1980s. However, the central principles of abstraction and classification represented in digests appear to be making a comeback as the limitations of full-text, natural language searching become apparent. For example, the new Web-based version of Westlaw includes the “Key Number Center,” a feature that attempts to make topic-key number searching easier. Moreover, recently LEXIS hired a new group of editors to attach “Case Summaries” and “Core Concepts” to its electronic cases that are very reminiscent of the West headnotes and topics.⁶⁶ It is still possible to envision a lawyer consulting the *Kentucky Digest* sometime in the mid-twenty-first century, perhaps running a stylus over the headnotes on an e-book.

62. FRED P. CALDWELL, *NOTES TO THE KENTUCKY REPORTS* (1907, with frequent updates), was a hybrid tool consisting of alphabetically arranged tables of cases, each annotated with subject terms and references to cases citing them.

63. FRED P. CALDWELL, *THE KENTUCKY JUDICIAL DICTIONARY* (1916); FRED P. CALDWELL, *THE COMPLETE KENTUCKY FORM BOOK OF BOTH LEGAL AND BUSINESS FORMS* (1922).

64. The Baldwin Law Book Co. of Cleveland, the publisher of *Carroll's Kentucky Statutes*, was the only other major law book publisher in Kentucky, but the Courier-Journal Job Printing Co. and the Standard Printing Co., both of Louisville, continued to publish an occasional legal treatise and regularly won contracts for state printing. Interestingly, Baldwin competed product-by-product with Anderson, publishing treatises, citators, and a judicial dictionary, but avoided the areas dominated by West Publishing.

65. In *A History of American Law Publishing*, Erwin C. Surrency did just that in the last paragraph of the chapter on digests. SURRENCY, *supra* note 1, at 127. Both Berring and Katsh have argued that a paradigm shift in legal research is inevitable as the legal community absorbs the computer revolution. See generally Berring, *supra* note 1; Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 BERKELEY TECH. L. J. 189 (1997); KATSH, *supra* note 1, at 65–91.

66. See *LEXIS Publishing Releases Case Summaries and Core Concepts*, BUS. WIRE, Jan. 24, 2000, available at LEXIS, News Library, BWire File.

**Appendix A:
Bibliography of Kentucky Digests**

Nominative Digests

- Littell, William. *Principles of Law and Equity, Recognized and Established by the Court of Appeals of Kentucky, in the Various Cases Determined in that Court, Commencing with Its First Existence, and Concluding with the Close of the October Term, One Thousand Eight Hundred and Six (Except the Land Cases Published by James Hughes, Esq.), Digested and Arranged in Alphabetical Order.* Frankfort, Ky.: William Gerard, 1808.
- Pirtle, Henry. *A Digest of the Decisions of the Court of Appeals of Kentucky.* Louisville, Ky.: S. Penn, Jr., Wall-Street. 1832. 2 vols.
- Monroe, Benjamin, and James Harlan. *Digest of Cases at Common Law and in Equity, Decided by the Court of Appeals of Kentucky, from Its Organization in 1792 to the Close of the Winter Term of 1852-3.* Frankfort, Ky.: A.G. Hodges & Co., 1853. 2 vols.
- Cofer, Martin H. *A Supplemental Digest of the Decisions of the Court of Appeals of Kentucky, 1853-1867, Embracing 14th, 15th, 16th, 17th, and 18th Ben. Monroe; 1st, 2nd, 3rd, and 4th Metcalfe; 1st and 2nd Duvall.* Cincinnati: Robert Clarke & Co., 1867.
- Trimble, William W. *Digest of the Decisions of the Court of Appeals of Kentucky: 1866 to 1876, Embracing 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and 11th Bush.* Covington, Ky.: Richard H. Collins & Co., printed at the Frankfort Yeoman Office, 1876.

New Digest (Robert Clarke & Co.)

- Stanton, Richard H. *A New Digest of the Decisions of the Court of Appeals of Kentucky: Embracing All the Reported Cases from the Organization of the Court in 1792 to 1876.* Cincinnati: Robert Clarke & Co., 1876. 2 vols.

John P. Morton & Co.

- Barbour, Joseph. *Kentucky Digest Embracing All the Reported Cases by the Court of Appeals From Its Organization to the Year 1878.* Louisville, Ky.: John P. Morton & Co., 1878. 2 vols.
- Barbour, Joseph. *Kentucky Digest Embracing All the Cases Reported by the Kentucky Reports and the Kentucky Law Reporter Decided by the Court of Appeals and the Superior Court From the Year 1878 to the Year 1896.*

Louisville, Ky.: John P. Morton & Co., 1896. 2 vols., numbered Vol. III and Vol. IV.

Caldwell, Frederick P. *Kentucky Digest Embracing All the Cases Decided by the Court of Appeals from the Year 1895 to the Year 1902, with a Table of All Cases from 1879 to 1902, and Table of Constitutions, Codes and Statutes Construed From 1895 to 1902*. Louisville, Ky.: John P. Morton & Co., 1903. 2 vols., numbered Vol. V and Vol. VI.

Caldwell, Frederick P. *Kentucky Digest Embracing All the Cases Decided by the Court of Appeals from the Year 1902 to the Year 1908, with a Table of All Cases Digested, and Table of Constitutions, Codes and Statutes Construed From 1902 to 1908*. Louisville, Ky.: John P. Morton & Co., 1909. 2 vols., numbered Vol. VII and Vol. VIII.

Caldwell, Frederick P. *Kentucky Digest Embracing All the Cases Decided by the Court of Appeals from the Year 1908 to the Year 1912, with a Table of All Cases Digested, and Table of Constitutions, Codes and Statutes Construed From 1908 to 1912*. Louisville, Ky.: John P. Morton & Co., 1913. 2 vols., numbered Vol. IX and Vol. X.

West Publishing Co.

Digest of the Decisions of All the Courts of Kentucky Reported in the Kentucky Reports, the Southwestern Reporter and the Kentucky Law Reporter, to July 1904, Compiled under the American Digest Classification Scheme, With Annotations to the Century Digest, the Lawyers' Reports Annotated, the American Decisions, and the American State Reports, and a Table of Cases Digested, and Table of Statutes Construed. St. Paul, Minn.: West Publishing Co., 1905. 5 vols. Updated with hardbound, two-volume supplements in 1912, 1920, 1927, 1930, and softbound supplements in 1914, 1916, 1922, 1925, 1928, 1929.

Digest of the Decisions of All the Courts of Kentucky Reported in the Kentucky Reports, the Southwestern Reporter and the Kentucky Law Reporter, from July 1904 to 1908, Compiled under the American Digest Classification Scheme, Being Volume One of the Kentucky Cumulative Digest, A Current Digest of all Kentucky Decisions. Indianapolis: Bobbs-Merrill Co., 1908. 1 vol. Update of West Publishing Co.'s 1905 Digest.

Digest of the Decisions of All the Courts of Kentucky Reported in the Kentucky Reports, the Southwestern Reporter and the Kentucky Law Reporter, Compiled under the American Digest Classification Scheme. Indianapolis: Bobbs-Merrill Co., 1912. 1 vol., numbered Vol. 2. Update of West Publishing Co.'s 1905 Digest.

Digest of the Decisions of All the Courts of Kentucky Reported in the Kentucky Reports, the Southwestern Reporter and the Kentucky Law Reporter, Compiled under the American Digest Classification Scheme. Indianapolis: Bobbs-Merrill Co., 1915. 1 vol., numbered Vol. 3. Update of West Publishing Co.'s 1905 Digest.

Digest of the Decisions of All the Courts of Kentucky Reported in the Kentucky Reports, the Southwestern Reporter and the Kentucky Law Reporter, Compiled under the American Digest Classification Scheme. Indianapolis: Bobbs-Merrill Co., 1917. 1 vol., numbered Vol. 4. Update of West Publishing Co.'s 1905 Digest.

West's Kentucky Digest. St. Paul, Minn.: West Publishing Co., 1931. 46 vols. Updated with annual pocket parts.

West's Kentucky Digest, 2d. St. Paul, Minn.: West Publishing Co., 1985. 29 vols. Updated with annual pocket parts.

Appendix B: Chronology of Kentucky Digests

Publication Date	Author(s) of Digest	Dates Covered	Reports Digested
Traditional Nominative Digests			
1808	Littell, William	1790–1806	2 Ky.
1833	Pirtle, Henry	1790–1832	1 Ky.–29 Ky.
1853	Monroe, B., & Harlan, J.	1790–1852	1 Ky.–52 K
1867	Cofer, Martin H.	1853–1867	53 Ky.–63 Ky.
1876	Trimble, W.W.	1866–1876	64 Ky.–74 Ky.

New Digest of the Decisions of Court of Appeals of Kentucky (Robert Clarke & Co.)

1877	Stanton, Richard H.	1792–1878	1 Ky.–74 Ky.
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Kentucky Digest (John P. Morton & Co.)

1878	Barbour, J. (vols. 1–2)	1792–1878	1 Ky.–78 Ky.
1896	Barbour, J. (vols. 3–4)	1878–1896	78 Ky.–96 Ky.
1903	Caldwell, Fred P. (vols. 5–6)	1896–1902	97 Ky.–105 Ky.
1908	Caldwell, Fred P. (vols. 7–8)	1902–1908	106 Ky.–127 Ky.
1912	Caldwell, Fred P. (vols. 9–10)	1908–1912	128 Ky.–148 Ky.

(cont. on next page)

Chronology of Kentucky Digests (*cont.*)

Publication Date	Author(s) of Digest	Dates Covered	Reports Digested
<i>Kentucky Digest (West Publishing Co.)</i>			
1905	<i>Kentucky Digest</i> (5 vols.)	1790–1905	1 Ky.–117 Ky.
1912–1930	<i>Kentucky Digest</i> supplements	1906–1930	118 Ky.–246 Ky.
1912	Vols. 6–7	1906–1912	118 Ky.–143 Ky.
1914	Vol. 7A*	1912–1914	n/a
1916	Vol. 7B*	1914–1916	n/a
1920	Vols. 8–9	1912–1920	143 Ky.–185 Ky.
1922	Vol. 9A*	1920–1922	185 Ky.–195 Ky.
1925	Vol. 9B*	1922–1925	195 Ky.–206 Ky.
1927	Vols. 10–11	1920–1927	185 Ky.–217 Ky.
1928	Vol. 11A*	1927–1928	217 Ky.–225 Ky.
1929	Vol. 11B*	1928–1929	225 Ky.–234 Ky.
1930	Vols. 12–13	1927–1930	217 Ky.–246 Ky.
1908–1917	<i>Kentucky Cumulative Digest</i> (licensed update of 1905 West Kentucky Digest)		
1908	Vol. 1	1904–1908	114 Ky.–124 Ky.
1912	Vol. 2	1908–1912	125 Ky.–145 Ky.
1915	Vol. 3	1912–1915	145 Ky.–159 Ky.
1917	Vol. 4	1915–1917	160 Ky.–171 Ky.
1931–1984	<i>West's Kentucky Digest</i> [†]	1790–1984	1 Ky.–314 Ky. 1 S.W.–662 S.W.2d
1985	<i>West's Kentucky Digest</i> 2d [†]	1985–	662 S.W.2d–

*Temporary update volumes

†Updated annually by pocket parts