



THE CALIFORNIA SUPREME COURT

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Headnotes About the Reporters, 1850-1990

BY EDWARD W. JESSEN

"Report me and my cause aright."

HAMLET, ACT V, SCENE 2

From the California Constitution of 1849 to the present day, the Supreme Court has been required to decide causes in writing with the reasons stated.¹ The resulting written opinions become precedent to be followed by all other appellate and trial courts in California. But for opinions to be followed requires they be reported reliably and made available to all, and that has been the fundamental mission of every Reporter of Decisions.



Edward W. Jessen

Thus the Constitution of 1849 authorized the appointment of a Reporter of Decisions, charged with responsibility for preparing and publishing the opinions, subject to correction and approval by the court. To ensure availability of the opinions, the Legislature enacted, and has periodically amended, statutory provisions relating to the Reporter of Decisions and publication of the California Official Reports. These provisions were first enacted in the former Political Code, but are now found in the Government Code, section 68900 et seq. As a result, there have been 24 Reporters of Decisions to date:

1. So too has the Court of Appeal been required to decide causes in writing with reasons stated since its 1904 establishment, with the Reporter of Decisions also having responsibility for publishing the opinions of that court.

1. EDWARD NORTON	1850-1851
2. NATHANIEL BENNETT	1851-1852
3. RUFUS A. LOCKWOOD	1852
4. H.P. HEPBURN	1852-1854
5. WM. GOUVERNEUR MORRIS	1855
6. H. TOLER BOORAEM	1856-1858
7. HARVEY LEE	1858-1859
8. JOHN B. HARMON	1859-1860
9. DAVID T. BAGLEY	1860-1862
10. CURTIS J. HILLYER	1862-1863
11. CHARLES A. TUTTLE	1863-1867
12. J.E. HALE	1867-1869
13. TOD ROBINSON	1869
14. R. AUG. THOMPSON	1870-1871
15. CHARLES A. TUTTLE	1871-1878
16. G.J. CARPENTER	1878
17. GEORGE H. SMITH	1879-1882
18. W.W. COPE	1883-1887
19. C.P. POMEROY	1887-1917
20. RANDOLPH V. WHITING	1917-1940
21. B.E. WITKIN	1940-1949
22. WM. NANKERVIS, JR.	1949-1969
23. ROBERT E. FORMICHI	1969-1989
24. EDWARD W. JESSEN	1989-

The second Reporter of Decisions, Nathaniel Bennett, has the distinction of an overlapping tenure as an associate justice of the Supreme Court from December 1849 through October 1851. As the story goes, the first Reporter, Edward Norton (not the colorful Emperor Norton from San Francisco's early history), was overwhelmed by the work at hand and quit after his manuscript was lost in a fire. Justice Bennett agreed to take on the additional duties of Reporter and apparently did admirable work in both capacities, at least for a while.

In the preface to the first volume of Supreme Court opinions, Justice Bennett, as Reporter of Decisions, generally described

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the statutory authorization for reporting opinions, and he also noted two important principles of California jurisprudence that have never changed: “By another statute, the decisions of the court, in *all* cases were required to be given in writing, and, by another statute, *all* decisions were required to be reported.” (1 Cal., at p. vii; see now Cal. Const., art. VI, § 14; Gov. Code, § 68902.)

But there were problems actually publishing the Supreme Court’s opinions in the first decade or so of statehood and there were also problems publishing statutes and legislative journals. In 1852, the Senate’s committee on printing reported that \$256,000 had been spent that year—more than the entire cost of state government for a year for several southern states at the time—but only two volumes of statutes and two volumes of legislative journals had been printed. So in 1861, Governor John Downey urged that proper provision be made for printing the Supreme Court’s opinions and in 1862 the California Constitution was amended to require that the Legislature provide for the prompt publication of such opinions of the Supreme Court as the court deemed expedient—a requirement that has been a cornerstone of California appellate jurisprudence for the subsequent 144 years. (See now Cal. Const., art. VI, § 14.)

Not much is known about the Supreme Court’s third through sixth Reporters of Decisions, but the tenure of the seventh, Harvey Lee, was eventful and, perhaps, typical of the rough-and-ready nature of the late 1850’s in California. This story has been told before but never better than by Jake Dear, the Supreme Court’s Chief Supervising Attorney and history maven, at a special session commemorating the court’s 150th anniversary:²

“Unlike his predecessors, Lee was appointed not by the court, but by the Legislature. The court was not very happy with this new arrangement, and there was some concern that Lee was not up to the job. Justice Steven Field later commented that Lee’s work was so defective that the judges sought to have the new law repealed and the appointing authority returned to the court. A former dean of Boalt Hall School of Law picked up the story in a 1926 article:

2. February 8, 2000, Sacramento, reported at 35 Cal.4th 1262, 1266-1267, and also available on the society’s Web site at http://www.cschs.org/02_history/02_e.html. In turn, the special session quotes a 1926 article by Orrin Kip McMurray entitled “Historical Sketch of the Supreme Court of California,” in *Contemporary Review of Bench and Bar in California*.

“This [led] to a bitter feeling on [Lee’s] part toward the judges, and in a conversation with Mr. Fairfax, the clerk of the court, [Lee] gave vent to it in violent rage. Fairfax resented the attack, an altercation ensued, and Lee, who carried a sword cane, drew his sword and ran it into Fairfax’s body, inflicting a serious wound in the chest just above the heart. A second wound, not so serious as the first, followed, and Fairfax drew his pistol as Lee raised his sword for a third thrust.

“[Fairfax] was about to shoot [in self-defense], but, restrained by the thought of Lee’s wife and children, let the pistol drop.’ Evidently, this was widely circulated news, and it was said that ‘All California rang with the story of this heroic act.’”

With regard to the work of the court and the reporting of opinions in that era, Charles A. Tuttle, the 11th reporter, wrote an introduction to 24 Cal. that includes an abstract of the Supreme Court’s work and its opinions prior to the 1862 restructuring of the court (and state government in general) by constitutional amendment. Tuttle framed his abstract in terms of the “old court” and the “new court” with candid statements as to why restructuring was needed. The opinions of the “new court” first appeared in 24 Cal., preceded by Tuttle’s introduction.

Tuttle noted that the court’s workload in the early years was “not large,” and the three justices then constituting the Supreme Court were able “with ease, to dispatch its business.” As a result, all the opinions decided through 1856 were published in just six volumes.

But in years subsequent to the Gold Rush, emigrants to California began making it their permanent home, which spawned an increase in litigation and changed the types of cases the Supreme Court had to decide. The legal principles were frequently intricate and novel and thus the court, as originally organized, was “unable to dispose of the cases brought before it with the celerity which, particularly in new communities, is desirable.” (24 Cal. at p. iii.) The strain of the workload is perhaps evident in the 17 volumes of opinions for the seven years ending in 1863, compared to the six volumes between 1850 and 1856.

Further insight into Supreme Court jurisprudence of the day, and a prescient forecast, was also part of Tuttle’s introduction to the opinions of the “new court”:

“California being the first State organized . . . out of the territory acquired from Mexico, upon its Judiciary devolves the labor of settling and establishing many important principles not before discussed in English

or American Courts. Our reports on such questions will undoubtedly be the precedent by which the young Territories and States now growing up will be guided. The present volume contains many important adjudications upon questions of this character, and also in relation to corporations, real estate titles, and constitutional law. . . . A report of the decisions rendered during the year 1864 will fill three more volumes. It is my intention to give those volumes to the profession with all possible dispatch—if possible, before the close of the present year. The questions



This page from the *Official Reports* reflects the appointment of C.P. Pomeroy taking effect on May 19, 1888. Pomeroy is the longest serving Reporter of Decisions. His 30-year term lasted until his death on March 4, 1917.

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settled in the present and forthcoming volumes will go far to quiet that feverish anxiety which is always attendant upon uncertainty as to the rights of property, and will give to the legal profession landmarks which will enable it to avoid much of the litigation which has unavoidably resulted from the former unsettled state of affairs in California.”

An interesting historical sidebar of late 19th century official law reporting in California is the emergence of a second version of the *Official California Reports* for opinions decided in the first half-century or so of statehood. While the contents and accuracy of the reprinted version are above reproach, the second version has internal opinion pagination that differs slightly from the original version.

The second reprinted version of the *Official Reports*, which is reportedly still on the shelves in various law libraries, is the editorial product of Robert Desty, a nationally renowned legal editor of that era who was a treatise writer, digest editor, and case law compiler. At that time, commercial publishers nationwide were finding opportunity and profit in reprinting older and hard to find state reports, and the Desty version of the *Official Reports* is a product of this reprinting movement to satisfy demand for the early volumes of reports.

At the turn of the 20th century, C.P. Pomeroy was roughly at the midpoint of his 30-year tenure as Reporter of Decisions from 1887 to 1917. That makes Pomeroy the longest serving Reporter of Decisions, and

it means that the Supreme Court did not appoint its first 20th century Reporter, Randolph V. Whiting, until 1917, following Whiting’s two-year apprenticeship under Pomeroy.

To Pomeroy fell the responsibility of establishing the *Official California Appellate Reports* for opinions of the Court of Appeal on its establishment in 1904. By 1917, Pomeroy had reported 102 volumes of Supreme Court opinions, and an additional 33 volumes of Court of Appeal opinions starting with that court’s first decisions in May 1905. Thus Pomeroy averaged 3.4 volumes per year of Supreme Court opinions, and about three additional volumes per year for the Court of Appeal for the years he

reported that court’s opinions, too.

But Whiting, during his 23-year run, published 210 volumes—148 volumes of Supreme Court opinions and 62 volumes for Court of Appeal opinions. Thus Whiting averaged approximately nine volumes per year. The point is how the increasing volume of appellate opinions reflected growth in general for California and its judicial system between the late 19th century and World War II.³

This brings us to the court’s 21st and most illustrious, Reporter of Decisions, Bernard E. Witkin, who served from 1940 to 1949. Although Witkin is, of course, better known for his other accomplishments as a legal scholar, editor of treatises, promoter of continuing education of judges, and counselor for more than a generation to the judicial branch, he also reformed how the Reporter’s office operated by conceiving and

3. This comparison also reflects the growing increase in the annual number of appellate opinions over the years. Concerns over this growth and the impact it was having on the bench and bar eventually led, in 1964, to implementation of selective publication of Court of Appeal opinions. Up to 1964, every Court of Appeal opinion was reported; since that time, only those Court of Appeal opinions meeting criteria specified by the California Rules of Court are officially reported.

implementing the system still used today to promptly and efficiently publish California opinions with the accuracy and enhancements necessary for the bench, bar, and public to make reliable use of the state's decisional law. It may not be coincidental that Phil Gibson was Chief Justice at the time Witkin implemented his system, but Gibson's role, if any, is unknown and the anecdotal credit has always been given entirely to Witkin.

Until the early 1940's, all aspects of preparing, editing, and enhancing opinions for publication were done by the Reporter of Decisions and staff. This was the universal way that opinions were officially published in every jurisdiction providing for appropriate dissemination of the decisional law. In California, and many other states, the actual printing was done under contract, but in other jurisdictions the state printing office was utilized.

The chronic problem created by this system—and not just in California, where Witkin's solution kept the problem in check—was lack of publishing currentness. Against an increasing volume of opinions being filed at irregular rates throughout the year, staffing, which in the best of circumstances would be gauged for an average of the volume, could not keep pace with the demand for currentness in times of heavy filings, yet left staff idle when filings were few in number.

So Witkin's concept for maintaining currentness and editorial quality against an irregular but ever-increasing rate of opinion filings was to forge a partnership with a private sector legal publisher having a large and experienced editorial department. That turned out to be the former Bancroft-Whitney Co., which by then was already the longtime publisher of the Official Reports, but not previously involved with the editorial work.⁴ The concept had Bancroft-Whitney's staff, under the general supervision of the Reporter of Decisions, performing contractually defined styling, citechecking, and enhancement for opinions to be published in the Official Reports, subject to painstaking review and approval by the Reporter of Decisions and the authoring justices before opinions were regarded as "final" and printed for posterity in the bound volumes.

The great virtue of this system for at least a couple of generations was that a good portion of Bancroft-Whitney's staff was trained and capable of working on

the Official Reports when the rate of opinion filings was heavy, but many could be deployed on less time-critical publications like jurisprudences, form books, and practice guides when filings were lighter. Thus Witkin established a public-private editorial partnership that is still today the cornerstone of how the Official Reports are produced, and it has ensured currentness and editorial quality in the Official Reports for over 60 years and many dramatic changes affecting how opinions are reported and published. In the early 1940's, for example, the annual average was about 10 volumes per year, and all opinions filed by the Supreme Court and Courts of Appeal were published. By the late 1960's, the annual average was 15 volumes per year, and by the late 1970's, despite implementation of selection publication for Court of Appeal opinions, which resulted in only a modest percentage being included in the Official Reports, the annual average was back up to 15 volumes per year.

In 1942, ancillary to the editorial reforms, Witkin issued the first California Style Manual, stating in the preface that it was intended "to state the chief rules and practices which govern the preparation, form and publication of opinions of the appellate courts of California. It is designed primarily as a guide for the courts, the Reporter of Decisions and the publishers of the official California Reports and advance sheets. It is believed, however, that law offices and law publishers and printers may find it useful in their work." Obliquely connecting the style manual to the editorial reforms occurring at that time, Witkin went on to advise that the manual "was produced as speedily as possible to meet the imperative need for standardization of these practices." The first edition contained seven chapters in 104 pages, and it was sold for \$1.50 by the state "Printing Division Documents Section."

Another historical sidebar is that Bernard Witkin was the first Reporter of Decisions to have his name omitted from the spine of the volumes he reported. Up to that time, the California Official Reports was a "nominative reporter," meaning the name of the reporter was attributed on the spine of each volume. The trend over time has been to eliminate the nominative feature of official reports, but a few states, including New York, continue the practice today.

A consequential aspect of eliminating nominative reporters was that it symbolized that the judges, not reporters, had become primarily responsible for the content of the opinions. In post-Colonial times, and apparently also in the early statehood days of California, reporters sat through the oral arguments taking notes, then consulted with the judges and examined the records to actually write the opinions. Gradually through the 19th century, starting with Georgia in 1841, judges were required to write their opinions.

4. Bancroft-Whitney was the Official Reports publisher for so long, both before and after the Witkin editorial reforms that no court records providing the inception date have ever been found. At the time Bancroft-Whitney's corporate successor-in-interest ceased being the official publisher, a San Francisco law librarian did some research and opined for a San Francisco legal tabloid that Bancroft-Whitney had been the official publisher for 105 years.

After Witkin left the Supreme Court in 1949 to devote full effort to writing his treatises, William Nankervis was appointed Reporter of Decisions and served in that capacity for 20 years, publishing 218 volumes of Supreme Court and Court of Appeal opinions and closing the second series for both the California Reports and the California Appellate Reports. Nankervis thus joined the 20th century Reporters of Decisions, except, ironically, Witkin, in serving lengthy tenures. In addition to serving 20 years as Reporter of Decisions, however, Mr. Nankervis, as he is affectionately known in the office even today, was also the assistant reporter between 1930 and 1940, and 1942 and 1949.



Robert E. Formichi

Nankervis also wrote a revised edition of the California Style Manual in 1961, noting in the preface that “[t]his manual has been out of print for a long time, and the frequent calls for copies have indicated a need for a new edition.”

But the real contribution Nankervis made to the Supreme Court may run much deeper and for much longer than his 20 years as Reporter of Decisions. Including his 17 years as Assistant Reporter of decisions, Nankervis devoted 37 years of service to the Supreme Court. In the preface to the 1942 style manual, Witkin acknowledged that the major portion of the research “was done by my colleague, Wm. Nankervis, Jr., and his long experience as Assistant Reporter of Decisions has also made possible the detailed statement of the unwritten practices of this office.”

In addition, Witkin’s biography assigns 1941 to 1943 as the time he spent writing the rules on appeal. Although impossible to now document, it is perhaps reasonable to speculate that Nankervis’s experience up to that point may have freed up a considerable part of the time Witkin likely required for drafting the appellate rules.

Maintaining symmetry with Nankervis’s tenure, the 23rd Reporter of Decisions, Robert E. Formichi served the court for 20 years between 1969 and 1989, overseeing publication of most of the third series of the Official California Reports and the Official California Appellate Reports (259 volumes). Prior to being elevated to Reporter of Decisions, Formichi worked under Nankervis in the Reporter’s office and before that in the Clerk’s office.

Formichi was also responsible for two significant revisions of the California Style Manual, the first a modest revision of Nankervis’s 1961 version, and a second

significant revision that was published in 1986 as the third edition. This continued the hope expressed by Witkin in the 1942 that “from time to time the work may be revised and improved.”

In an interview reported at the time of his retirement in 1989, Formichi described the Reporter’s work as “a quiet, backstage practice,”⁵ noting, however, that the opinions were “documents of the state, documents of the people, and tools of society. They must be quality.” In the same article, Justice Stanley Mosk described Formichi’s work as “indispensable to the court process.”

This points out that responsibilities encompassed within official law reporting are now largely taken

for granted. As far back as 1912, one writer derisively noted the reporter no longer sat in court, listening to oral argument, and making his own notes. Rather, the reporter received the opinion of the court and merely used “scissors and paste” to make volumes of the reports, as contrasted to the arduous work required of the nominative reporters of years earlier, who actually wrote the opinions. Today, appellate justices are appropriately assigned credit for the opinions attributed to them and the editorial process of publishing opinions⁶—either in the traditional paper-based reporter or in computer-based forms—seems automatic to the bench, bar, and public. Overlooked in a process that seems so automatic is the largely anonymous work of reporters throughout the Supreme Court’s history to make suggestions for clarity and accuracy before opinions are filed, then ensuring that opinions are accurately reported within a body of decisional law that is accurate, functional, and accessible for the bench and bar. In a sense, being forgotten has always been the highest of praise for California’s Reporters of Decisions.

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5. In the same article, Witkin noted that, “the reporter of decisions is a forgotten man.”

6. That is, enhancing the opinions with summaries and headnotes, adding parallel citations, ensuring the accuracy of all quotations and citations, and conforming opinions to style requirements.