PREFACE.

No volume of reports with whose history I am acquainted, can claim more full indulgence, so far as the reporter's work is concerned, than the one here put forth. With the exception of half a dozen cases—cases, too, of inferior importance,—it has been prepared without the reporter's having heard what he attempts to present, and generally speaking without any knowledge of what passed in court beyond that which, after the adjournment of the court itself, and when separated from the judges and the counsel, he has been able to put together from judicial records, and from briefs of argument.

The reporter's appointment dates from the 21st March, 1863. On that day, being in a very private station, and engaged in studies having but slight relation to the law, he was gratified, quite unexpectedly to himself, by an invitation from the Supreme Court of the United States, to become the reporter of the decisions of that august tribunal. An invitation thus flattering it was not easy to resist. He repaired, with but little delay, to the seat of Government. Four months, however, of the judicial term then current, had already passed away; leaving fifteen or sixteen days only as a residue for the argument of causes.

It was his expectation that all cases heard *prior* to the date of his entering into office would be prepared by the Honorable Mr. Black, the former reporter; a gentleman whose fine mind, extensive knowledge in the law, and elegant literary taste qualified him above the common—if his engagements had allowed such a disposal of his talents—to this special department of legal labor. With Mr. Black's retirement, however, in 1861, from

the first law office of the Executive Government, an impression had gone forth that he might continue to reside during a portion of the year at least, at the capital. And the importunities of clients from all quarters of the country, which at once placed him in the front ranks of private counsel at the Federal bar—as he had just previously been its official head—rendered it impossible for him, with the new accumulation of duty thus forced upon him, to report these cases at all. Mr. Black had, in fact, with the kindest expressions of regard from the court, completely taken leave of the office. It was necessary, therefore, that the late decisions should either remain unreported, or be reported by the new appointee. Conceiving that as a general thing it is indispensable that a reporter should at least *hear* that which he attempts to present, the office of reporting past decisions was one repugnant to the author's inclination. But it was undesirable that the decisions of a whole term, and that of a term characterized by many important adjudications, should be left without report at all. He resolved, accordingly, to present them in a volume of the usual form, but to present them without his name. This intercalation, however, within a range of reports distinguished, in general, by long and regular successions, of one interposited and unacknowledged book, was distasteful wherever mentioned. Indeed, except as disconnecting his name from a book of his own, but which from its nature was certain to dissatisfy even that one person whom most books are sure to please—the author—he could not much approve of it himself. The remaining resource was that which is indicated in the form and title of the present work.

Besides the great disadvantage of not having heard the cases, the reporter has been driven by a necessity to publish the volume within a given time. Congress, indeed, at the kind instance of the judges, and on the recommendation of the Judiciary Committees of both houses, was good enough, in view of the difficulties of the case, to enlarge by six months the term usually allowed for the appearance of these reports, and to agree to a delivery

at any time before May, 1865.* But except in so far as it relieved the reporter of a consciousness of obligation to deliver his work by a near and stated day, the kindness was not of practical value; since, at the expiration of the *usual* term, the court would be again convened, and the reporter, if remaining in office, would be fully occupied with the duties of the *new* session, the session, to wit, of December, 1864. The volume has accordingly been written, stereotyped, and printed within the old and usual term of six months; two of those months having been months of summer, and months, therefore, which, in the latitude and city of the reporter's residence are hardly months for work at all. This has been accomplished, too, at a time when, as is known, great difficulties have existed in regard to all agencies of the printing-house, and even more in the departments of paper manufacture. One or two cases of a certain interest, decided during the term, are necessarily omitted from this volume; among them *Fossat* v. *United States*. A full report was prepared and partially printed; but the case being one of boundary simply, a map was found to be indispensable to convey to the reader any understanding of the case. This necessary map, it would seem, did not accompany the copy of the record left with the clerk for the reporter; and though a copy was ultimately sent, it did not arrive in time to be used in this first volume.

The late eminent Mr. Justice STORY,† in a letter to a former reporter of this court, has expressed certain views—his own undoubtedly, and, from the extent to which they were acted upon by Mr. Wheaton, I presume the views of the court of that day—as to the mode of preparing books of reports. That learned justice thus writes:

"In respect to the duty of a reporter, I have always supposed that he was not a mere writer of a journal of what occurred, or of a record of *all* that occurred, or of the manner and time in which it occurred. This duty appears

* See Joint Resolution No. 26, of April 22d, 1863; 13 Stat. at Large, 405.

† Story's Life and Letters, vol. ii, p. 231.

to me to involve the exercise of a sound discretion as to reporting a case; to abridge arguments, to state facts, to give the opinions of the court substantially as they are delivered. As to the order in which this is to be done, I have supposed it was a matter strictly of his own taste and discretion, taking care only that all that he states is true and correct, and that the arrangement is such as will most readily put the profession in possession of the whole merits of the case, in the clearest and most intelligible form.

"In regard to the statement of facts, I have always thought the best method to be, where it could conveniently be done, *to give the facts at the beginning of the case*, so that the reader might at once understand its true posture.

"If the court state the facts, the true course is to copy that very statement, because it is the ground of the opinion, and to remove it from the place in the opinion which it occupied (taking notice that it is so removed and used), and then proceed to give *the rest* of the opinion in its proper order, *after* the argument. Upon any other plan, either the reporter must make a statement of facts of his own, which it seems to me would be improper, or *repeat* the statement of facts by the court, which would be wholly useless, and burden the volume with mere repetitions. This course has been constantly adopted by the reporter of my Circuit Court opinions, and I have always approved it. I believe that it is adopted by all the *best* reporters, both in England and America. If I were a reporter, I should think it my duty to adopt it, unless expressly prohibited from so doing. Whenever it is not done, there is (to be sure) a much easier labor for the reporter, *but his reports always wear a slovenly air.*"

This extract expresses, in the main, my own ideas; and the views it enforces have the approval, I see, of one of the first law journals of our country, which has lately given to them currency with expressions of its commendation.* Almost the first thing, therefore, which I did, after my reaching Washington, was to seek an interview with each member of the court, in relation to what I deemed a matter necessary to be attended to in the style of reporting, and without an attention to which I apprehend we can never have clean and satisfactory reports. I was able, however, from the lateness of my arrival in Washington prior to the adjournment and separation of the court, to have less full

* The Law Reporter, vol. xxv, p. 693.

conferences with the judges on this matter than I could have desired. Certain of the reports are not in as clean a form as others.

In all cases, however, where, after an interview with the judge, I deemed my authority clear, I have acted on the principle asserted as the true one by Judge STORY and continually adopted by that good reporter, Mr. Wheaton. I have taken, I mean, the *facts* stated by the court, in the opening or narrative parts of the opinion, as either the substantial basis or the very form of my own statement, leaving them off in the opinion itself. And I have in every case—whether facts are or are not subsequently repeated in the opinion—presented what is meant to be a complete statement of the case; making such statement the first thing in the report, and a matter separated from both arguments and opinion. Indeed, if the arguments of counsel are given at all, I can conceive of no good reporting in which the "case," as the old books call it,—by which I mean the whole statement of facts on which the controversy turned,—is not presented in this primary and fundamental form. Hereafter, should I remain in office, my hope is to have the manuscript of each report completed soon after the opinion is given, and so to be able to confer frequently, and as I go along, with the respective judges as to the exact *form throughout* which the *report* is to take; and also as to what cases or parts of cases can be properly omitted altogether; so that decisions of value, or decisions on points of value shall not, as they now too much are, both in England and with us, be overlaid and buried by reports of matter, sometimes often previously decided, and sometimes so perfectly plain as not to be worthy of either litigation or report at all. In no other way, I think, can the *class* of cases reported secure, for any term of years, a distinguishing reputation and authority; and in no other way,—except by the reporter's exercise of a discretion which he may not find it perfectly agreeable to assume, even when allowed,—can the reporter's work, and the superior labors of the court—his statement of facts, I mean, and

their more valuable *opinion* upon them—be, as they ought to be, correlates only, and not repetitions; and the whole report—statement, arguments, and opinion—go forth to the profession, as, in the departed STORY'S idea, they ought to go forth, and "in all the *best* reporters, both in England and America," as he asserted, do go forth, separate in form, as distinct in nature, each from the other; each completed in itself, but having, one with all, exact and reciprocal adaptation, and presenting *so* a full, harmonious, consecutive, but never redundant whole.

I have given the names of the cases in as short a form as possible. The title of the case is, after all, only designed for facility of reference, and the shorter it is the more convenient I think it proves. The older books frequently do nothing but *number* the cases. Certainly all writers or annotators of text-books will admit that, in the present effusion of citations, cases having long titles are very unwelcome to the pen; especially if it be a hastened or an impatient pen. I presume that it is not much better for judges. Indeed we constantly find authors, counsel and judges alike seeking refuge from these long names in the use of initial letters only, or in a citation of part only of the name; sometimes the first part, sometimes the last; producing, so, a citation of the same case in ways so different that the quotation cannot at all times be recognized as pointing to the same authority.*

I have given the arguments occasionally at a certain length; not, I hope, at too great a length. It is considerable chiefly in cases of a certain kind, in *Cross* v. *De Valle*,† for example, where

* I have seen one case—that, to wit, of "*Philadelphia, Wilmington and Baltimore Railroad Company* v. *Philadelphia and Havre de Grace Steam Towboat Company*" (23 Howard, 209), cited in the same suit in almost as many ways as it has words in its title; not quite as many, indeed, for only twelve varieties could be counted in the form of quotation. In some of the English books the names of cases are still longer, and the inconvenience, of course, greater.

† Page 1.

it seemed desirable to show that if we sometimes follow an English case, itself unsupported, we do not do so without a severe examination of the precedent brought up; OR in *Clearwater* v. *Meredith*,* where a principle of pleading—a sort of principle not often discussed in this court—was involved; and where, for the benefit of the junior bar, it seemed well enough to have the learning of the case exfoliated; OR in *Bridge Proprietors* v. *Hoboken Company*,† where a great question of jurisdiction and of constitutional law was concerned; matters always fittingly exhibited, when fully; OR in *Gelpcke* v. *The City of Dubuque*,‡ where high moral duties were enforced upon a whole community, seeking apparently to violate them; OR in *Niswanger* v. *Saunders*,§ in which a vast power given to this court was called into exercise, and the decision of a tribunal, supreme, for ordinary, within a State, reversed and made of no effect. The space which the arguments occupy in each case is, however, marked by running titles which arrest the eye. Readers who care for no full discussion can therefore readily pass them all. Those more interested will find in them, as the record of preceding studies, I hope, a source of profit. The whole volume, however, as already stated, has been prepared under unpropitious circumstances; and if I shall find any one whose estimate of it, as now completed, is lower than mine, I promise him, here in advance, that I will exchange my opinion when I meet him and hear it, for his. In reporting cases which he did not hear, any man's ambition may be satisfied if he escape having committed serious errors; errors, serious in their results. "A few wild blunders, or risible absurdities," incident, says Dr. Johnson, to every work of multiplicity, are equally to be expected in one of haste; a work where "copy" was prepared in the morning to be corrected as "proof" at night. In some respects of the mechanical arrangement, wherein this volume differs from preceding reports in this court, the book is experimental merely. All suggestions from the

* Ib. 26. † Ib. 116. ‡ Ib. 175. § Ib. 424.

judges about these or about anything will be happily and most respectfully received; while of course any intimation which comes from the court in its corporate capacity will be of controlling influence.

The reporter must not conclude without expressing his grateful sense of the kindness received from every member of the court during the very short time of the December Term, 1863, that he occupied his place in their tribunal. To the learned justice of the California Circuit he was largely indebted for assistance in preparing several of the California cases; cases which, with the peculiar system of original titles prevailing in regions obtained by us from the Mexican republic, would otherwise have been unintelligible in the first instance to him. The difficulties of any one not bred to the California law comprehending this class of cases is indeed strikingly set forth by Mr. Justice MILLER in this very volume.* To the Senior Associate, Mr. Justice WAYNE, who exercised the office of Presiding Justice during a portion of the Term from which temporary indisposition withheld the official Chief, he is under particular obligations and of another kind. It was not possible to think of any matter which could contribute to the reporter's external comfort in connection with his office, or which could be agreeable to a stranger, that did not seem to have been previously the subject of provision from this eminent person; and it was all directed with an elegant grace which was equalled only by the substantial service.

PHILADELPHIA, September 30, 1864.

* Rodrigues *v.* United States, *infra*, 582.