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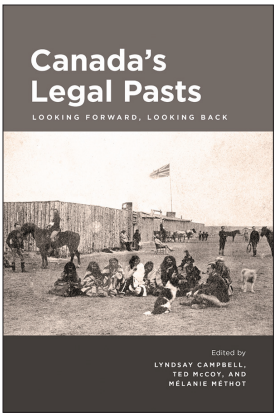

CANADA'S LEGAL PASTS: Looking Forward, Looking Back

Edited by Lyndsay Campbell, Ted McCoy, and Mélanie Méthot

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6

The Text Book Edition of James Kent's *Commentaries* Used in *Canada v. Gerring*

Angela Fernandez[*]

Nova Scotia judge Alexander Stewart wrote to American judge and jurist James Kent in 1847, the year Kent died: "[y]our Commentaries are the textbook we put into our students' hands and next to Blackstone . . . are our most esteemed works."[1] As if to prove the point was still true nearly fifty years later, the Nova Scotian lawyer who argued the *Gerring* case for the government, W.B.A. Ritchie, cited both famous works in his factum when arguing that the fish caught by the *Gerring* were "qualified property" and hence her captain and crew were indeed fishing inside the three-mile limit when the ship was apprehended by the Canadian authorities. In his factum, submitted in 1896 to the Supreme Court of Canada defending the government's action, Ritchie wrote:

> It is submitted that fish caught in a net on the high seas and still in the water are not in the possession in any sense of the fisherman; but assuming that they are to be so regarded, and that property in them is thereby vested in the fisherman his title is qualified, a special interest liable to be divested before they are killed by the escape of the fish.
>
> See Blackstone's Commentaries, 15th edition, page 403.
> Kent's Commentaries Text Book Series, page 348.[2]

Both sets of Commentaries used a version of the "institutes" form derived from the Roman legal thinker Gaius, who divided everything into three fundamental social categories: persons (subjects), things (objects), and actions (the interrelation between subjects and objects), creating a system of ordering reality and of perceiving and constructing the world probably rivalled only by Aristotle's.[3] In doing so, "Gaius formulated (if he did not create) one of the most distinctive enduring systems of thought in Western history," imitated in influential legal works by the Roman Emperor Justinian and much later the German jurist and historian Friedrich Carl von Savigny.[4] Civil law countries such as France and Spain, where formal state law was used in order to solidify the nation state in the seventeenth and eighteenth centuries, employed versions of the tripartite Gaian arrangement, e.g., in the order and structure of the civil code and in choosing how to organize the study of national law in their universities and the attendant text book commentary.[5]

In the 1760s, William Blackstone created a very influential four-volume version for English common law, *Commentaries on the Laws of England*, in an environment in which Roman and civil law had dominated university-taught legal education (as opposed to the Inns of Court, where teaching the common law prevailed).[6] Blackstone was widely used in the United States (and Canada) even after James Kent produced a home-grown American version in the 1820s, *Commentaries on American Law*, which itself became an influential contributor to variations on the Institute theme.[7] Both were common law works patterned on the Gaian dialectical method and arrangement, aimed at bringing clarity, order, and elegance to the chaos of the common law by presenting its elemental (i.e., foundational) aspects in a format that—unlike the formerly used institute-work for the common law, *Coke Upon Littleton*—was easy to read.[8]

Blackstone's discussion of qualified property occurs in the second (1766) volume on property in a section on acquiring "title to things personal by occupancy," and specifically how occupancy is established in wild animals (*ferae naturae*).[9] He wrote that unless restrained by some municipal law, all mankind has the right to pursue and take wild animals and "when a man has so seized them, they become while living his *qualified* property, or, if dead, are absolutely his own."[10] Kent, who was providing an American version of Blackstone's text, wrote, in a section entitled

"Property in chattels personal is either absolute or qualified," that like air, light, and water, which "are the subjects of qualified property by occupancy," animals *ferae naturae* "are also the subject of a qualified property."[11] The fish in the *Gerring* were still alive in the purse seine net and so were not absolute property, which according to Blackstone required that they be dead. The fish had not yet been reduced to possession. They were still qualified property that could escape because they were still alive, or so the argument went according to these two august and regularly relied upon authorities.

Kent's text was originally published in 1827. The nineteenth century saw multiple editions of the text, the first five in Kent's lifetime and then, after he died in 1847, his son William published the following three editions.[12] The publisher changed to Little, Brown in the ninth edition in 1858.[13] By the last quarter of the nineteenth century, the most famous edition was undoubtedly the twelfth, completed by Oliver Wendell Holmes Jr., then a practising lawyer and legal scholar.[14] Yet Ritchie used something called the "Text Book Series" edition in his *Gerring* factum.[15] What was this edition and why was a lawyer as eminent as Ritchie using it, rather than the fancier Holmes edition? This short essay seeks to answer these questions.

According to Philip Girard, Ritchie was a "member of . . . Nova Scotia's best-known legal dynasty."[16] His uncle, Sir William Johnstone Ritchie, was one of the first six Supreme Court of Canada judges appointed in 1875 and chief justice from 1879–1892;[17] W.B.A.'s son, Roland Almon Ritchie, Oxford educated, would go on to sit on the Supreme Court of Canada from 1959–1984. W.B.A. attended Harvard Law School in 1881–82 (following in the footsteps of an older brother who received a Harvard LL.B. in 1877 and four cousins who also studied there).[18] W.B.A. Ritchie returned to Nova Scotia where he was called to the bar in June 1882.[19] In 1889, future Canadian Prime Minister Robert Borden asked him to join his law firm. As Girard puts it, W.B.A. Ritchie was "an exemplar of the Maritime lawyers who in the 1890–1920 period migrated to the western provinces, where they soon rose to positions of power and influence."[20] Indeed, "he and Borden were two of the most sought-after counsel in Nova Scotia appeals before the Supreme Court of Canada in the years 1890–1905."[21] The *Gerring* in 1897 falls squarely in this period.[22]

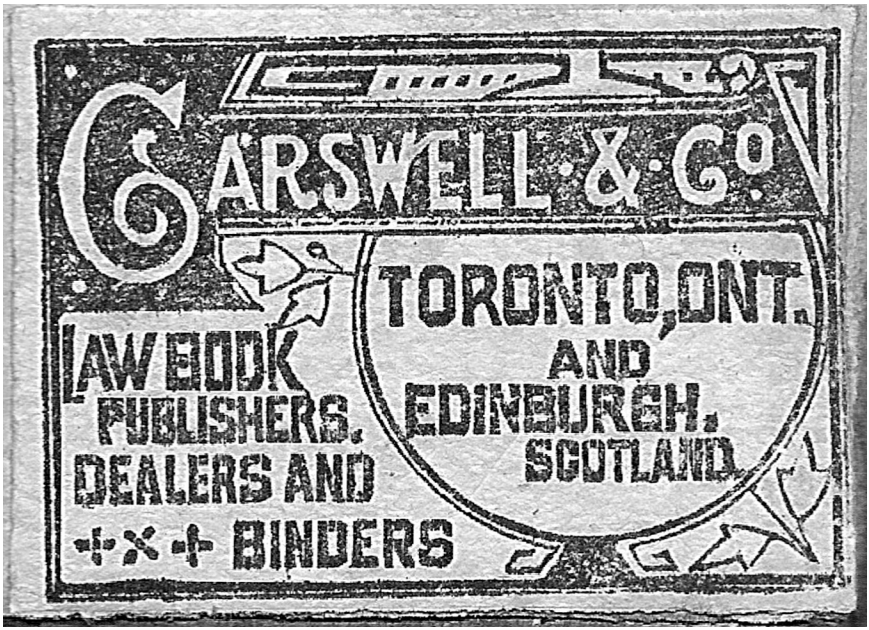

Figure 6.1 Small sticker from inside the front cover (bottom right-hand corner) of volume 2, from James Kent, *Commentaries on American Law*, edited by William M. Lacy, vol. 2 (Philadelphia: Blackstone Publishing Company, 1889) of the copy "presented to the Library of the University of Toronto by the Executors of the Estate of the Late George Tate Blackstock, Esq., K.C." George Tate Blackstock was a prominent Toronto lawyer, who practised with the law firm that became Faskens. See Wilson, "Blackstock, George Tate." (Image provided by Sufei Xu, Infoexpress Librarian and Access Services Coordinator at the Bora Laskin Law Library.)

The "Text Book Series" was a book-reprinting and selling initiative spearheaded by an American company named "the Blackstone Publishing Company," a business located at 19 South Ninth Street in Philadelphia, Pennsylvania.[23] The series provided pirated editions of classic English works to Americans and those in other countries at a fraction of the regular price, one book per month for a set subscription fee of $15 per year.[24] Single volumes could be purchased for $1.25 each.[25] Their agents in Canada were "Carswell and Co."[26]

Book notices touted the Blackstone Text Book series as an excellent way for students to obtain valuable treatises at extremely reasonable prices. For example, the *Kansas City Law Reporter* contained an advertisement

from the company which described the system as a way to get a "working library" at a moderate price. This advertisement appeared among others for things that were useful to lawyers such as legal blanks, typewriters, and fireproof safes.[27] The first volume in the series (Smith on Master and Servant) was issued on 1 December 1886.

The *Canada Law Journal* listed the books in the series to date, describing the "prices [as] so absurdly low, as to enable even every student who enters an office to secure a good law library by the time he is ready to begin practicing."[28] A month later, in May 1887, it stated, "We presume most of our readers are subscribers to this series by this time. If not they had better begin at once."[29] A South African law journal reprinting of the *Canada Law Journal* note demonstrates that the series was marketed beyond North America.[30]

British commentators (predictably) frowned upon this system of "absorbing the brains of English law authors without paying [them] a penny."[31] Editors of the *Canada Law Journal* objected to the use of the term "pirated" in connection with the Blackstone Text Book series, pointing out that it was legally permissible to reprint in places where the copyright did not extend.[32] Some called for an international law of copyright.[33] Meanwhile the *Railway and Corporation Law Journal* reported that the series (5,738 printed pages to date in early 1888) "met the approval of a large class of American lawyers" grateful for these "English treatises of exceptional excellence and value."[34] The reviewer did, however, note that the encouragement and commendation of the series left aside "the question of piracy."[35] Such reprints were very common in the United States because they were so much cheaper than the originals.[36] There was no American copyright protection for foreign authors.[37] One estimate put the price at about 1/10 the cost of imported versions of these books.[38] Editions ranged from straight reprints to those that involved an editor, who would be paid for adding American notes and cases.[39]

The editor, who would have been hired and paid for this express purpose by the Blackstone Publishing Company, was a lawyer named William M. Lacy of the Philadelphia Bar.[40] Kent's work was "a perennial bestseller" and so it made sense for the Blackstone Publishing Company to want to reissue it.[41] However, Kent's *Commentaries* were a domestic, not a foreign work.

Perhaps this is why, when the Text Book series edition appeared in 1889, it earned the Blackstone Publishing Company the accolade that it was "revolutionizing the law book business."[42] The practice of hiring an in-house editor who would be paid a fixed fee for their work and then reproducing "unauthorized," but just-as-good *and* much cheaper editions, was a winning strategy for foreign books. Could it also be used for domestic ones? Were a new editor's additions and changes to the notes enough to protect the Text Book edition from infringing the copyright Kent's heirs or publishers of the *Commentaries* held inside the United States? What did Kent himself have to say about the matter?

In his *Commentaries*, Kent wrote quite extensively about the "original acquisition, by intellectual labour" (in the same part coincidentally where he discussed "original acquisition, by occupancy") and specifically copyright.[43] He did not discuss the point about editors' notes in particular, at least not initially. He did write that "[a] copyright may exist in part of a work, without having an exclusive right to the whole," words that could be interpreted to give an editor protection.[44] In the second edition (1832), Kent discussed amendments made to the *Copyright Act* in 1831, which extended protection from fourteen to twenty-eight years with a possible renewal for another fourteen years.[45] Unlike the fourteen-year renewal provided under the 1790 act, an author no longer needed to be alive to renew. Noah Webster, the chief architect of the 1831 act, secured the renewal right for the widow and children of the author.[46] Kent emphasized the "personal benefit" this change in the law bestowed on the author's wife and children, and their "entitlement."[47] Ironically, however, it was the fifth edition of his text, published in 1844, shortly before he died, that introduced a note, relying on the famous copyright dispute between reporters for the United States Supreme Court *Wheaton v. Peters* (1832), that stated "[a]n editor may have a copyright in his own marginal notes."[48]

Kent died in 1847. He had re-registered the copyright twice, in 1832 (six years after the initial registration on 25 November 1826 and one year after the law changed in 1831) and 1840 (fourteen years after the initial registration). William Kent re-registered the 6th, 7th, 8th, and 9th editions in 1848, 1851, 1854, and 1858, the year the publisher changed to Little, Brown.[49] William was still the name on the copyright on the 10th edition in 1860.[50] However, the 11th edition in 1866, which featured a new editor,

one George Comstock, changed to "Mrs. William Kent" (presumably William's widow). The 12th and 13th editions in 1873 and 1884 reverted back to "James Kent" (edited by Oliver Wendell Holmes Jr. and Charles Barnes, respectively) with the last, 14th edition (edited by John Gould) naming the copyright registrant as "Estate of James Kent."[51]

How would the law have treated these registrations if they had been contested, and exactly whose interests in what text would they have protected? Well, twenty-eight years after Kent's original registration in 1826 would bring the protection to 1854, which, when renewed by his heirs for another fourteen years, would have extended the protection until 1868, only ten years after the publisher changed from Kent's son to Little, Brown. Yet Little, Brown carried on for almost thirty more years, until 1896, with no direct competitors, at least until the Blackstone Publishing Company came along.[52]

Little, Brown might have argued against any such interlopers that each new edition restarted the forty-two year clock, especially if significant enough changes were made by the editor. In the 12th edition, in his summary of the 1870 congressional consolidation of the copyright statutes, Holmes noted that "[t]he subject of a book need not be new, nor the materials original, in order to entitle an author to copyright, provided he has made a new arrangement and combination of materials."[53] But were new notes, even those as elegant as Holmes's, really "a new arrangement and combination of materials"? Holmes himself seemed to understand that, however great he might become and however important his work on the edition was to him, "the owners of the copyright" were Kent's heirs and the estate.[54]

Acknowledging in his treatise on intellectual property that new editions "present questions of extreme nicety and great difficulty in determining whether this is a basis for a new copyright," Eaton Drone did think there was a "general rule," namely,

> that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work. It is immaterial whether the new edition is

> produced by condensing, expanding, correcting, rewriting, or otherwise altering the original, *or by adding notes, citations, &c.*[55]

The question, as Drone put it, was whether the work was "substantially different."[56] It seems pretty clear that none of the texts of Kent's *Commentaries* would have been considered different enough to be the basis for an entirely new copyright. The notes, even Kent's, did not change the text that much. It was still Kent's work. If the copyright on the original text and notes had expired, then it was fair game. Drone wrote that "anyone may revise or annotate and republish a book not protected by copyright, and obtain a valid copyright for the new edition,"[57] although "the new copyright, as a general rule, will cover only what is new."[58] The Text Book Series edition had a different publisher with a different editor and its own notes. For example, Lacy did not include the note, which appeared in the 5th through 14th editions, about the possibility that an editor could hold a copyright in his own marginal notes (the note with the *Wheaton v. Peters* citation). The copyright on Kent's main text and notes had likely expired. The law is not very clear, but we probably can safely say that new notes by other editors did not extend the copyright on the original material and its notes because they did not make the text different enough. Given Drone's views, it is possible that a court might have found that the Blackstone Publishing Company's copyright only extended to protect Lacy's new notes. At the end of the day, even if the notes were valuable and distinctive enough to be protected, what would they be without the text they commented upon? That out-of-copyright text would have to accompany the new material in order for it to make any sense, whether published by Little Brown, Blackstone Publishing, or someone else.

When Lacy's edition appeared, the *Virginia Law Journal* announced that the volumes would be in "the usual style" of the Blackstone Publishing Company Text Book series, namely, "well printed and cheap."[59] After volume one, volumes two, three, and four would follow, one a month.[60] Not everyone was happy about this, specifically Little, Brown. The *American Law Review*, published by Little, Brown, charged that the Text Book Series edition was not as good in terms of print and paper as the Little, Brown edition.[61] This review also reported that Kent's heirs were willing to offer

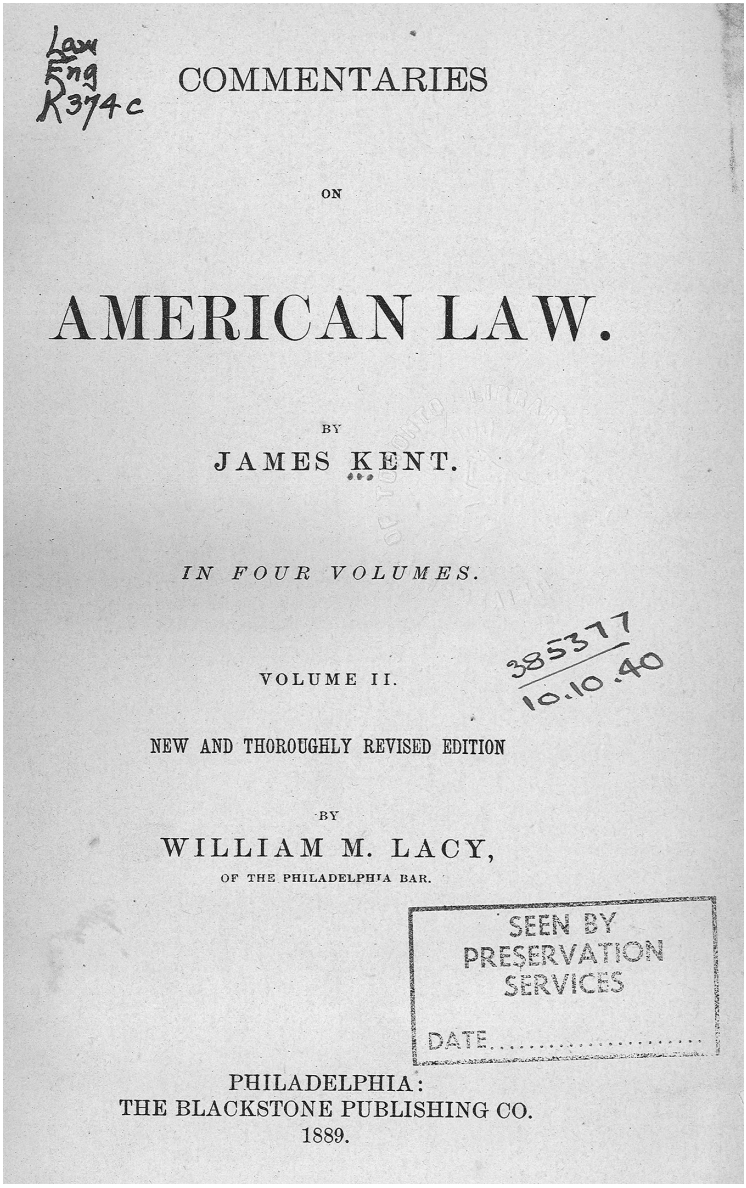

FIGURE 6.2 Title page of James Kent, *Commentaries on American Law*, edited by William M. Lacy, vol. 2 (Philadelphia: Blackstone Publishing Company, 1889) from the same copy identified in Figure 6.1. (Image provided by Sufei Xu, Infoexpress Librarian and Access Services Coordinator at the Bora Laskin Law Library.)

the 13th edition, "retain[ing] the valuable notes of Judge Holmes," in "Law Sheep," for $12[62]—nice, but subscribers to the Blackstone series obtained eight more books throughout the year for their $15. The claim about problems with the print and paper did not appear in other reviews. The *Green Bag* said "type and paper are satisfactory in every respect."[63] And the *Legal News* said it was "on good paper."[64] However, the *Railway and Corporation Law Journal* did note that it fell "below the high standard of Mr. Justice Holmes' elegant edition."[65] And the *Central Law Journal* described the leatherette binding as "very unsatisfactory."[66] The *Canada Law Journal* showed no hesitation endorsing the volumes, which it said were "of considerable interest and value to Canadians."[67] The review in the *Railway and Corporation Law Journal*, when volumes 2 through 4 appeared, pretty much sums up the situation. First, Lacy's edition "of course suffers in comparison with the elegant edition of Judge Holmes."[68] And, second, although it was "well printed, on good paper," it did need to be better bound, which when done would still keep the price lower than the set from Little, Brown.

Important to note here is the wider context of books being offered using the "subscription method." Michael Hoeflich explains that this was a common and important publishing scheme in nineteenth-century America.[69] It was the way the first American edition of Blackstone's *Commentaries* was sold in the late eighteenth century.[70] "Forced" or guaranteed sales were a way, as Hoeflich puts it, to offer "substantial risk reduction to printers and booksellers and often substantial price savings to buyers."[71] Philadelphia was an old player in the book publishing and book printing trade.[72] Hoeflich identifies the most important and longest-lived law subscription publishing scheme in antebellum America as "The Law Library" initiated by John S. Littel of Philadelphia in 1833.[73] Subscribers were asked to pay $10 a year for one book a month.[74] It ran for twenty-six years and reprinted more than one hundred English legal texts.[75] It would have been a model for the Blackstone Publishing Company's Text Book Series.

In terms of understanding legal publishing and law-book habits, Hoeflich has emphasized "the importance of the mundane necessities of life without which high theory can come to nothing. . . . [G]reat doctrinal developments in the law may be advanced or impeded by nothing more glamorous than a decent postal route."[76] Decent postal routes and cheap

editions are not the things of grand theory, but they did determine what editions of what books lawyers in the nineteenth century had access to, and were using, at any particular time and place; they also influenced which ideas lawyers would formulate. The fact that the Text Book edition of this volume of Kent's *Commentaries* cost $1.25 is highly significant and provides pretty much all the explanation one needs in order to understand why Ritchie was using it, especially when there was scarcely any difference in quality between it and the authorized edition, with the exception of notes. However fancy a lawyer Ritchie was, $1.25 is pretty difficult to argue with. And it might be that differences over something rather esoteric like the authorship of the notes was less meaningful the further away one was from Boston, the stomping grounds for Holmes and his elite Brahmin community.[77]

We do not know where or how Ritchie acquired his copy of the Text Book series edition of Kent's *Commentaries*. However, Ritchie's use of the book did not necessarily mean that he subscribed to the whole series, as it was common practice for local book agents to obtain multiple copies as subscribers, which they would offer for resale.[78] Ritchie might have obtained it as a solitary set or even a stand-alone volume from a book shop or law book agent in Halifax, Boston, Philadelphia, or New York at any point between 1889 (when it was published) and 1896 (when he used it in Halifax for his factum in the *Gerring*).

The fact that Ritchie was located in British North America, specifically Halifax, meant that he would have been part of a legal culture that long benefited from pirated texts from the United States, whether the authors were English or American. The *Canada Law Journal*, at least, consistently showed no hesitation in touting the strengths of the Text Book Series, including its reproduction of English works. Belonging to this culture would have meant Ritchie had little concern about using an allegedly "pirated" edition, which, once shipping costs were taken into consideration and any mark-up from resale was added, likely cost him more than the bargain basement price of $1.25. He probably would not have been thinking in terms of "piracy" at all, being very used to editions that were straight reprints, as well as those with variations that ranged from slight to significant, especially for legal texts where updates were required given changes in the law.

Little, Brown issued the last edition of the *Commentaries* in 1896, highlighting its key strength and competitive advantage, namely, that it had been edited by Holmes.[79] The 13th edition in 1884 had not included Holmes' name, suggesting that experience with the Blackstone Publishing Company edition in 1889 spurred Kent's heirs and Little, Brown on to competitive action.[80] The 14th edition only listed the copyrights going back to the Holmes 12th edition, perhaps to dissuade anyone who could count to forty-two from wondering how, when the initial registration by Kent was in 1826, the heirs could still claim to be in possession of the copyright in 1896. Yet all of this skirmishing appears to have been end-of-life activity, as the 14th edition was the last edition of Kent's *Commentaries* that anyone published. The Blackstone Publishing Company's edition in 1889 also appears to have been its last imprint.[81]

The 1891 *International Copyright Act* (or Chace Act) gave some copyright protection to non-US authors so long as the work was manufactured on US soil.[82] The express permission to reproduce the works of foreign authors that had existed in US law until this time was finally removed.[83] This meant that the Blackstone Publishing Company could no longer boldly republish British works. Yet domestic works were also legally risky, since, as we have seen, uncertainties existed over what was or was not a substantially different or substantially similar work that might either entitle a publisher to a new copyright or render them in violation of another's copyright. Authors' heirs and estates (and their lawyers) could be keen to argue over copyright ownership issues, especially for famous law books (as was evident from the dueling court reporters in *Wheaton v. Peters*). American judges and juries were likely to be more sympathetic to American authors than to British ones, should legal contests arise. All of these factors would have created a hostile environment for the Blackstone Publishing Company to continue doing in the 1890s what it had been doing in the 1880s.

As for Kent's *Commentaries*, perhaps the substantially cheaper (and probably still available) Text Book Series absorbed the extant market of readers for such a text at home and abroad, and Little, Brown simply gave up on making money out of it. Moreover, the size of the market for that particular text would have been shrinking, as Kent's style of cosmopolitan learning (drawing on natural law, Roman law, and civil law) was on the

wane in the United States and was coming to an end, at least in Upper Canada, by the 1890s.[84] This feature—namely, the Roman and civilian orientation to the old question of how one acquires possession in a wild animal—more than any other explains why the *Gerring* did not experience the uptake one might have expected in the twentieth century, at least in Ontario, despite the fact that it did become a leading case on the definition of "fishing" in Canada under the *Fisheries Act*.[85] However, that is a story for another day.[86]

NOTES

* This chapter is from research for a book-length study under contract with the UBC Press in the Landmark Cases in Canadian Law series, tentatively titled *The Frederick Gerring, Canada's Twenty-First Century* Pierson v Post (to be co-authored with Christopher Shorey and Bradley Miller).

1 Quoted in Philip Girard, "'Of Institutes and Treatises': Blackstone's *Commentaries*, Kent's *Commentaries* and Murdoch's *Epitome of the Laws of Nova-Scotia*," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus D. Dubber (Oxford: Hart Publishing, 2012), 60, citing Stewart to Kent, 28 April 1847, James Kent Papers, reel 5, Library of Congress. Kent died on 12 December 1847.

2 W.B.A. Ritchie, "Filed in the Registry of the Supreme Court. Respondents Factum. In the Supreme Court of Canada, 1896," in Great Britain, *Arbitration of Outstanding Pecuniary Claims Between Great Britain and the United States of America: The Frederick Gerring, Jr.*, Appendix, Annex 5, 25–34 (Ottawa: Government Printing Bureau, 1913), 31 ["Respondent's Factum"].

3 See Donald R. Kelley, "Gaius Noster: Substructures of Western Social Thought," *American Historical Review* 84, no. 3 (1979), 621.

4 Kelley, "Gaius Noster: Substructures of Western Social Thought," 620.

5 See John W. Cairns, "Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State," *Oxford Journal of Legal Studies* 4, no. 3 (1984): 322.

6 John Cairns argues that Blackstone's departure from the *Institute* form of Justinian (e.g., treating the English system of government in the first book) should not exclude his work from the institutionalist tradition. See "Blackstone, an English Institutist," 350.

7 Philip Girard argues that it is incorrect to view the institute form as giving way to stand-alone legal treatises on specialized topics, as for instance John Langbein has argued was true of Kent's *Commentaries* and as Brian Simpson generally supposed when he wrote about treatises. See Girard, "Of Institutes and Treatises," 44–46.

8 See Girard, "Of Institutes and Treatises," 45.

9 See William Blackstone, *Commentaries on the Laws of England*, vol. 2 (Oxford: Clarendon Press, 1766), 400, 403. Institutes, treatises, and other old law books are widely available in databases such as Hathi Trust, Google Books, Hein Online, and the Making of Modern Law. An excellent electronic version of Blackstone's *Commentaries* is available at http://avalon.law.yale.edu/subject_menus/blackstone.asp.

10 Blackstone, *Commentaries on the Laws of England*, 2: 403.

11 James Kent, *Commentaries on American Law*, vol. 2 (New York: O. Halsted, 1827), 281.

12 See James Kent, *Commentaries on American Law*, 6th ed., 4 vols. (New York: W. Kent, 1848). William Kent published the seventh edition in 1851 and the eighth in 1854.

13 James Kent, *Commentaries on American Law*, 9th ed., 4 vols. (Boston, MA: Little, Brown, 1858).

14 James Kent, *Commentaries on American Law*, 12th ed., ed. Oliver Wendell Holmes Jr., 4 vols. (Boston, MA: Little, Brown, 1873). Holmes spent three years working on the project, updating the English and American case law. See Michael I. Swygert and Jon W. Bruce, "The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews," *Hastings Law Journal* 36, no. 5 (1985): 745.

15 James Kent, *Commentaries on American Law*, ed. William M. Lacy, 4 vols. (Philadelphia: Blackstone Publishing Company, 1889).

16 Philip Girard, "Ritchie, William Bruce Almon," in *Dictionary of Canadian Biography*, vol. 14, University of Toronto/Université Laval, 2003–, http://www.biographi.ca/en/bio/ritchie_william_bruce_almon_14E.html.

17 Gordon Bale and E. Bruce Mellett, "Ritchie, Sir William Johnston," in *Dictionary of Canadian Biography*, vol. 12, University of Toronto/Université Laval, 2003-, http://www.biographi.ca/en/bio/ritchie_william_johnston_12E.html.

18 Girard, "Ritchie, William Bruce Almon."

19 Girard, "Ritchie, William Bruce Almon."

20 Girard, "Ritchie, William Bruce Almon."

21 Girard, "Ritchie, William Bruce Almon."

22 Ritchie was the solicitor of record for the respondent, the Dominion government (see *Frederick Gerring, Jr. (The) v Canada* (1897), 27 SCR 271 at 308). He also wrote the factum: Ritchie, Respondent's factum, 34. However, the barrister who argued the case was a Queen's Counsel named Newcombe (see *Gerring*, 273). This was certainly Edmund Leslie Newcombe, also from Nova Scotia, who succeeded Robert Sedgewick as Deputy Minister of Justice and Deputy Attorney General in 1893, and served in this role until his 1924 appointment to the Supreme Court of Canada: Philip Girard, "Newcombe, Edmund Leslie," in *Dictionary of Canadian Biography*, vol. 16, University of Toronto/Université Laval, 2003–, http://www.biographi.ca/en/bio/newcombe_edmund_leslie_16E.html

23 "Law. 12 vols. for $15," *Kansas City Law Reporter* 1, no. 7 (10 August 1888): vii.

24 The $15 price was for volumes bound in "limp leatherette." Binding in "Law Sheep" cost $20 for the year: "Law. 12 vols. for $15." "Sheep" was "the common binding for

law books"; "calf" was leather and usually more expensive; and deluxe editions would features things like "calf with gilt decoration": M.H. Hoeflich, *Legal Publishing in Antebellum America* (New York: Cambridge University Press, 2010), 71, 65, 76, 86. Offering binding in "limp leatherette" and "sheep" (as the fancy option) indicates that the volumes in the Text Book series were meant to be working rather than "display" items. Books bound more expensively in "calf" or even "calf with gilt decoration" tended to be aimed at more affluent members of the profession who might want to display their learning, not merely read. On the "prestige" versus "working" value of law books, see Hoeflich, *Legal Publishing in Antebellum America*, 87, 123, 112 n. 23.

25 "Book Notices," *Green Bag* 1, no. 9 (September 1889): 412.

26 See "New Law Books," *Canada Law Journal* 23, no. 6 (15 March 1887): 116.

27 See the advertising pages in *Kansas City Law Reporter* 1, no. 7 (10 August 1888).

28 "Law Books," *Canada Law Journal* 23, no. 8 (15 April 1887): 141.

29 Untitled, *Canada Law Journal* 23, no. 10 (15 May 1887): 181.

30 "Law Books," *Cape Law Journal* 4, no. 3 (1887): 183–84.

31 Untitled, *Law Journal*, 22 (12 November 1887): 597.

32 "Copyright and Piracy," *Canada Law Journal* 24, no. 2 (1 February 1888): 35–36. The first use of the term "pirated" appears in an untitled note in the *Law Quarterly Review* 4, no. 1 (January 1888): 121. A follow-up, explaining that the term was used with "full deliberation," appears in "Notes," *Law Quarterly Review* 4, no. 2 (April 1888): 225.

33 "The Blackstone Text-Book Series," *Scottish Law Review and Sheriff Court Reports* 5, no. 58 (October 1889): 251–52.

34 "New Books," *Railway and Corporation Law Journal* 3 (7 January 1888): 24.

35 "New Books," 24.

36 See Hoeflich, *Legal Publishing in Antebellum America*, 59, 81.

37 Hoeflich, *Legal Publishing in Antebellum America*, 82, 58.

38 See "New Books and New Editions: Blackstone Publishing Company's Text-Book Series," *Albany Law Journal* 37, no. 20 (9 May 1888): 404.

39 Hoeflich, *Legal Publishing in Antebellum America*, 46–47 (on publishers paying American authors and editors), 60 (on the legal and competitive advantage of adding notes). See "New Publications," *American Law Record* 15, no. 10 (April 1887): 633–34, advertising a series in which the first two installments were straight reprints.

40 "Book Notices," *Green Bag* 1, no. 9 (September 1889): 412.

41 Hoeflich, *Legal Publishing in Antebellum America*, 87. See also Philip Girard's discussion of the longevity of the "institute" and its co-existence with treatises in "Of Institutes and Treatises," 43–45.

42 "Kent's Commentaries," *Copp's Land-Owner* 1, no. 11 (1 September 1889): 121.

43 See Kent, *Commentaries*, 2: 298–99, 306–15 (1st edition, 1827).

44 Kent, *Commentaries*, 2: 313.

45 4 Stat. 436. See e.g. James Kent, *Commentaries on American Law*, 2nd ed., vol. 2 (New York: O. Halsted, 1832), 383.

46 Bracha, "Commentary on the Copyright Act 1831."

47 Kent, *Commentaries*, 2nd ed., 2: 384.

48 James Kent, *Commentaries on American Law*, 5th ed., vol. 2 (New York: printed for the author, 1844), 382 n (c). See *Wheaton v Peters*, 33 US (8 Pet) 591 (1834).

49 The copyright history is recorded on the opening pages of the first volume of James Kent, *Commentaries on American Law*, 9th ed., 4 vols. (Boston, MA: Little, Brown, 1858).

50 James Kent, *Commentaries on American Law*, 10th ed., 4 vols. (Boston, MA: Little, Brown, 1860).

51 James Kent, *Commentaries on American Law*, 11th ed., ed. George F. Comstock, 4 vols. (Boston, MA: Little, Brown, 1866); James Kent, *Commentaries on American Law*, 12th ed., ed. Oliver Wendell Holmes, Jr., 4 vols. (Boston: Little, Brown, 1873); James Kent, *Commentaries on American Law*, 13th ed., ed. Charles M. Barnes, 4 vols. (Boston: Little, Brown, 1884); James Kent, *Commentaries on American Law*, 14th ed., ed. John M. Gould, 4 vols. (Boston: Little, Brown, 1896).

52 Question-and-answer editions were introduced over the years, the first, by Asa Kinne, initially appearing in 1838 with Kent's approval. John C. Devereaux similarly secured the permission of William Kent when publishing his question-and-answer edition started in the 1860s. See Asa Kinne, *The Most Important Parts of Kent's Commentaries Reduced to Questions and Answers*, 2nd ed. (NY: W.E. Dean, 1840); John C. Devereux, *The Most Material Parts of Kent's Commentaries Reduced to Questions and Answers* (NY: Lewis & Blood, 1860). These were very different works than the original, and while they may have competed they were certainly separate new works for copyright purposes. I have not examined the original's resemblance to the following two works, an 1886 abridgement or an 1875 "analysis." See Eben Francis Thompson, *The Student's Kent: An Abridgement of Kent's Commentaries on American Law* (Boston: Houghton, Mifflin, 1886); Frederick S. Dickson, *An Analysis of Kent's Commentaries* (Philadelphia: Rees Welsh, 1875).

53 Kent, *Commentaries on American Law*, 12th ed., 2: 373 n. 1(b).

54 Kent, "Preface." Holmes was thirty-two in 1873. He expressed the belief that greatness had to be achieved before forty, if it were to be achieved at all. Holmes wrote, "'I remember that I hurried to get it [*The Common Law*] out before March 8 [1881], because then I should be 40 and it was said that if a man was to do anything he must do it before 40'": see Mark DeWolfe Howe, *Justice Oliver Wendell Holmes*, *vol. 2: The Proving Years, 1870-1882* (Cambridge MA: Belknap Press of Harvard University Press, 1963), 135. For a sense of the importance of the *Commentaries* project to him, see the anecdote related in Angela Fernandez, *Pierson v Post, the Hunt for the Fox: Law and Professionalization in American Legal Culture* (New York: Cambridge University Press, 2018), 257–58.

55 Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Britain and the United States: Embracing Copyright in Works of Literature and Art, and*

Playright in Dramatic and Musical Compositions (Boston, MA: Little, Brown, 1879), 146 (emphasis added).

56 Drone, *A Treatise on the Law of Property in Intellectual Productions in Britain and the United States*, 147.

57 Drone, *A Treatise on the Law of Property in Intellectual Productions in Britain and the United States*, 148.

58 Drone, *A Treatise on the Law of Property in Intellectual Productions in Britain and the United States*, 149.

59 "Book Notices," *Virginia Law Journal* 13, no. 7 (July 1889): 619.

60 "Book Notices," 619.

61 "Book Reviews," *American Law Review* 23, no. 5 (September–October 1889): 850–51. See Michael I. Swygert and Jon W. Bruce, "The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews," *Hastings Law Journal* 36, no. 5 (1985): 757 (identifying Little, Brown as the publisher of the *American Law Review*).

62 "Book Reviews," *American Law Review* 23, no. 5 (September–October 1889): 851.

63 "Book Notices," *Green Bag* 1, no. 9 (September 1889): 412.

64 "New Publications," *Legal News* 12, no. 41 (12 October 1889): 321.

65 "Kent's Commentaries," *Railway and Corporation Law Journal* 6 (24 August 1889): 160.

66 "Recent Publications," *Central Law Journal* 29, no.15 (18 October 1889): 295–96.

67 "Commentaries on American Law," *Canada Law Journal* 25, no. 14 (2 September 1889): 437.

68 "New Books," *Railway and Corporation Law Journal* 6 (21 December 1889): 500.

69 Hoeflich, *Legal Publishing in Antebellum America*, 126–43.

70 Hoeflich, *Legal Publishing in Antebellum America*, 128, 131–34.

71 Hoeflich, *Legal Publishing in Antebellum America*, 143 and 127, n. 8, citing Rosalind Remer, *Printers and Men of Capital: Philadelphia Book Publishers in the New Republic* (Philadelphia: University of Pennsylvania Press, 1996), 125–30, says that the term "forced sales" was used for subscription sales and other mechanisms that guaranteed a market for the text.

72 See Edwin Wolf II, *The Book Culture of a Colonial American City* (Oxford: Clarendon Press, 1988).

73 Hoeflich, *Legal Publishing in Antebellum America*, 142.

74 Hoeflich, $10 was apparently also supposed to be the price of the Blackstone Publishing Company series. See "New Publications," *American Law Record* 15, no. 10 (April 1887): 633–34. This might have been wishful thinking or a confusion based on the earlier Law Library series.

75 Hoeflich, *Legal Publishing in Antebellum America*, 142–43.

76 Hoeflich, *Legal Publishing in Antebellum America*, 171.

77 See Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus and Giroux, 2002). Holmes belonged to the Metaphysical Club, an informal discussion group that met in Cambridge, Massachusetts for nine months in 1872 and included the important moral philosopher William James and founder of semiotics Charles Sanders Peirce. The term the "Brahmin Caste of New England" was used in the title of an 1860 story published in *The Atlantic*: "The Professor's Story: Chapter 1: The Brahmin Caste of New England," *Atlantic Monthly*, January 1, 1860, 91-93. Webster's dictionary says, as an alternate meaning of Brahmin, "a person of high social standing and cultivated intellect and taste <Boston ~s>." See *Webster's Ninth New Collegiate Dictionary* (Springfield, MA: Merriam-Webster, 1986).

78 Hoeflich, *Legal Publishing in Antebellum America*, 134, 138.

79 James Kent, *Commentaries on American Law*, 12th ed., ed. Oliver Wendell Holmes, Jr., 4 vols. (Boston: Little, Brown, 1873); James Kent, *Commentaries on American Law*, 14th ed., ed. John M. Gould, 4 vols. (Boston: Little, Brown, 1896).

80 James Kent, *Commentaries on American Law*, 13th ed., ed. Charles M. Barnes, 4 vols. (Boston: Little, Brown, 1884).

81 A publishing company with the same name operated in the 1940s from an office at 455 Spadina Road, Toronto, Ontario. See Drummond, "Supplement to List of American and British Law Book Dealers and Publishers," 342.

82 See Robert E. Spoo, "Courtesy Paratexts, Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America," *Stanford Law Review* 69, no. 3 (2017): 645–46.

83 See Thorvald Solberg, "Copyright Law Reform," *Yale Law Journal* 35, no. 1 (1925): 50.

84 See G. Blaine Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire," *Law and History Review* 3, no. 2 (1985): 267–69.

85 This point is elaborated on in Angela Fernandez, "Fish, Colony, and Nation" in a forthcoming collection of essays in honour of G. Blaine Baker to be published by the Osgoode Society for Canadian Legal History and McGill-Queen's University Press.

86 For its beginnings, see in this volume Christopher Shorey, "The Last Voyage of the *Frederick Gerring, Jr.*"