



TO THE BAG

MISCITED INTO OBSCURITY

To the *Bag*:

With the kids asleep and a few spare minutes, I decided to do an unscientific test of the validity of the apparent view of your Editor-in-Chief that a Westlaw ALLCASES search is a fair barometer of obscurity of legal publications. (Ross E. Davies, *The Original Law Journals*, 12 GREEN BAG 2D 188, 199.) My own search in this database on “Green Bag” disclosed a few facts that may be of interest to your readers.

As reported in *Hodson v. O’Keefe*, 229 P. 722, 723 (Mont. 1924), a 1920’s civil trial lawyer referred to a document as “a fit subject for exhibition in the Green Bag,” which the Montana Supreme Court stated was “evidently referring to the facetious column in that journal where legalfreaks, oddities, and drolleries are collected for the amusement of a profession too much crowded with the solemn things of life.” Among the many possible things to note about this quotation is that your predecessor publication had ceased publishing a decade prior to the Montana Supreme Court decision. Even apart from the numerous favorable citations to it uncovered by my search, *Green Bag 1st* plainly failed the Westlaw obscurity test on the strength of this citation alone.

My search revealed two cases that miscited the case of *Pumpelly v. Green Bay Co.*, 80 US 166 (1871) as *Pumpelly v. Green Bag Co.* Those cases are *Sayre v. City of Cleveland*, 493 F.2d 64, 70 (6th Cir. 1974) and *Black River Improvement Co. v. La Crosse Booming & Transportation Co.*, 11 NW 443, 453 (Wis. 1882). Setting aside any comparison between Cheeseheads and Bobbleheads, these miscitations raise the

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larger question of the typo rate in published opinions and/or electronic versions of such opinions, which itself casts doubt on the utility of using a Westlaw search to determine obscurity.

Still more problematic is that an ALLCASES search on the word “bobblehead” and the phrase “bobble head” only turned up 13 cases, none of which are related to your publication, despite the obvious non-obscurity (and high prices on the secondary market) of such dolls, as evidenced by even a cursory Google search. Moreover, of the thirteen cases, only two are published, leaving a distinct lack of citable authority on bobbleheads. Unless, of course, other terms were used (e.g., noddors) or there were typos (e.g., Bag instead of Bay).

Harold Kahn
Judge of the San Francisco Superior Court

MISINTERESTED

To the *Bag*:

The new issue has a number of examples of one of my favorite English misusages: “disinterested” to mean “uninterested,” which it does not mean. Neal Devins does it five or six times. E.g., on page 141, “Journalistic disinterest in this topic” What he is trying to say is “Journalistic lack of interest” Disinterested means impartial. You want disinterested referees and judges.

I can’t resist telling you.

Anthony Lewis
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WORDS NOT SPENT IN VAIN

To the *Bag*:

I was delighted to see John Lord Campbell’s long collection of Shakespearean legal references in the 2009 *Green Bag Almanac and Reader*, but was disappointed to see that he passed up one of my favorite legal references in Shakespeare: that is, the Bard’s explanation of the “dying declaration” exception found in Act V sc.4 of *King John*:

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SALISBURY

May this be possible? may this be true?

MELUN

Have I not hideous death within my view,
Retaining but a quantity of life,
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false, since it is true
That I must die here and live hence by truth?

Despite the Kentucky Court of Appeals' mistaken attribution of this passage to "the dramatist, Melun," *Daniel v. Commonwealth*, 157 S.W. 1127, 1131 (Ky. App. 1913), other courts have recognized that Shakespeare, "[t]he sublimest poet and dramatist of the English tongue," is here expressing "the common feeling that the utterances of a dying person are free from all ordinary motives to mis-state." *State v. Mitchner*, 256 N.C. 620, 630 (1962). See also *State v. Lewis*, 235 S.W.3d 136, 148 n.8 (Tenn. 2007); *Ellis v. State*, 558 So.2d 826, 829 n.3 (Miss. 1990); *United Services Auto Ass'n v. Wharton*, 237 F.Supp. 255, 258 n.3 (D. N.C. 1965); *Speer v. Coate*, 14 S.C.L. (3 McCord) 227, 227 n.(a) (Ct. App. S.C. 1825). Nor is this Shakespeare's only reference to the dying declaration exception. As the California Court of Appeal observed in *People v. Smith*, 214 Cal.App.3d 904, 907-08 (1989), the playwright also explained the exception in Act 2, scene 1 of *Richard II*: "O! but they say the tongues of dying men / Enforce attention like deep harmony: / Where words are scarce, they are seldom spent in vain / For they breathe truth that breathe their words in pain."

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