Shepardizing English Law

Stephen E. Young

The Catholic University of America, Columbus School of Law

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Shepardizing® English Law*

Young explores the use of noter-up resources for English legal materials, with an emphasis on case law and statutory citators. He also describes the online tools that can be used as citator services.

One of the most confusing aspects of English legal research for American researchers is determining what is, and what is not, "good" law. Researchers in the United States may have a basic grasp of where to turn to locate the text of an act of Parliament or the report of a case from the High Court, but finding whether the act has been amended or repealed or the case overturned is not so easy. This is troubling because researchers know that finding the authority is only the first step—once located, it is essential to determine whether it is still good authority.

In the United States, legal researchers and librarians are weaned on the citator services offered by Shepard's Citations. Begun in 1873, Shepard's has grown over the past century into a legal institution. It is the tool used by virtually everyone to determine the history and treatment of a case, a legislative enactment, a court rule, or even a law review article. However, once one makes the bibliographic journey across the Atlantic Ocean to the United Kingdom and becomes immersed in the world of English legal research, Shepard's is left behind, and American researchers are faced not only with introducing themselves to new tools, but also to a new research technique—noting up.

Noting Up

In the United Kingdom, the term “noting up” traditionally refers to the process of determining the authority of a case or statute based upon its subsequent

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** Collection Management Librarian and Jamail Fellow, Jamail Center for Legal Research, Tarlton Law Library, University of Texas at Austin, Austin, Texas.
1. There are many excellent guides to legal research in the United Kingdom which can assist librarians or researchers in their efforts to locate primary legal materials. In particular I recommend JEAN DANE & PHILIP A. THOMAS, HOW TO USE A LAW LIBRARY (3d ed. 1996); GUY HOLBORN, BUTTERWORTHS LEGAL RESEARCH GUIDE (1993); and PETER CLINCH, USING A LAW LIBRARY: A STUDENT’S GUIDE TO LEGAL RESEARCH SKILLS (1992).
treatment by other cases or statutes—what American researchers refer to as “shepardizing.” Unlike American legal research, however, there is no single repository of judicially noted information such as Shepard's Citations for English legal authorities. In large part this is due to the potentially vast time period that would need to be covered by a single service. Until 1947, in fact, there was no serious attempt in English legal publishing to produce a current citator service.

The need for information about the history and treatment of English legal authority does not differ greatly from the similar need in the United States, except in relation to statutory law. The legal concepts of “precedent” and “persuasive authority” play a central role in English case law, and, with the notable exception of the House of Lords, the courts are bound by the application of these concepts in their treatment of other cases just as in the United States.

Noter ups do play a different role in the judicial treatment of statutory law. Unlike their treatment of case law, the courts in England and Wales have no authority to declare an act of Parliament ultra vires, meaning an act cannot be judged to be outside the powers granted to Parliament. The courts may only provide an interpretation of the statute. Legislative supremacy, or the sovereignty of Parliament, is “under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”

However, legislation that pertains to England and Wales can no longer be considered in isolation. The entry of the United Kingdom into the European Community in 1973 required that Parliament “surrender” a part of its sovereignty, and in so doing it recognized the supremacy of community law over national law. Therefore, the potential exists for a case from an English court or an act of Parliament to be “noted up” by legislation or case law from the European Union.

To simplify the description of the noter-up services available for English
legal research, it is best to concentrate first on case law research and then move to statutory law.

Case Law

Once a case is located, we need to determine the validity of this case by using a citator service. In English legal research this will probably mean turning to one or more of the Current Law publications of Sweet & Maxwell. Current Law is comprised of a number of different services: Current Law Monthly Digest, Current Law Yearbook, Current Law Statutes, and two citators, the Current Law Case Citator and the Current Law Legislation Citator.

The Monthly Digest is the basic component of the series, and, as its name suggests, it is published on a monthly basis. This essential tool of English legal research contains a subject digest to case law, legislation, and delegated legislation (the English term for administrative law). It also includes numerous finding aids such as a cumulative case name index, a progress of bills section, and a table of commencements.

The Current Law Yearbook is the annual cumulation of the digests published in the Current Law Monthly Digest. Unlike the monthly publication, the Yearbook does not contain the various tables and indexes. Current Law Statutes provides the full text of public general acts arranged in chapter number order together with useful annotations and commentary. The two citator services, Current Law Case Citator and Current Law Legislation Citator, provide treatment and history of case law and statutory law.

The Case Citator and the Monthly Digest are the most relevant components of the Current Law services for the purposes of “noting up” case law. In order to effectively use these services, it is necessary to complete one or more of the following steps.

- For coverage of citations made in the current year, check the cumulative table of cases in the most recent issue of Current Law Monthly Digest. Unlike Shepard's, which is arranged by case citation, these tables are arranged alphabetically by case name. For cases that were cited sometime during the year, a date and numbered entry indicating in which month's issue the case was cited will be provided. Researchers should note that references to a digest of the original case are identified by capital letters, whereas references to digests of citing cases are identified by lowercase letters.

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12. There are a number of excellent guides to English legal research that cover in great detail the methodology and tools used in locating cases. See, e.g., Dane & Thomas, supra note 1, at 27.

13. The need to follow all the steps is dependent on the age of the case under scrutiny. For instance, more recent cases will not be included in bound volumes for 1947-95, so checking those volumes obviously can be omitted.
the entry has been located, a digest of the citing case will be provided, which will include the treatment of the case being noted up.

- Check the cumulative table of cases in the December issue of Current Law Monthly Digest for years not yet incorporated into the bound citator volumes.
- If the case being noted up is not a very recent one, check those among the three Current Law Case Citator volumes that might be appropriate (the volumes cover the periods 1947–76, 1977–88, and 1989–95).

One of the most common mistakes is to assume that the only cases covered by the citators are those that have been decided since 1947, as that is the date Current Law began publication. However, Current Law citators include cases regardless of when they were decided as long as they were cited after 1947.

When checking the citators, the first point of confusion for most researchers is one of language. In describing the treatment or history of a case, the various citator services described in this article employ terms such as “considered,” “distinguished,” “followed,” “approved,” “explained,” and “applied.” The following list provides the researcher with definitions of the more common terms.¹⁴

- **Followed:** Bound by a previous decision of a court of coordinate or superior jurisdiction in a case where the material facts were the same or substantially the same.
- **Applied:** Applying the principle of a previous decision to the case before it, the facts of which are materially different from those of the earlier case.
- **Approved:** Approves a previous decision of a court of inferior jurisdiction in unrelated proceedings.
- **Adopted:** The reasoning of a decision that is not binding is used in arriving at a decision in a later case.
- **Explained:** The court interprets a previous decision and states what it means.
- **Distinguished:** The court decides not to follow a previous case by which it would otherwise be bound because there is some salient difference.
- **Considered:** Considers a previous decision but does not actually follow, apply, distinguish it, etc.
- **Not Followed:** Declines to follow a decision of a court of coordinate jurisdiction in a case where the facts were the same or substantially the same.
- **Overruled:** Court decides that a previous decision of a court of inferior jurisdiction in unrelated proceedings is wrong.

While Current Law is considered the primary citator service in English

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legal research, it is by no means the only source available to the researcher who needs to check the history of a case. The *Law Reports Index*\(^\text{15}\) (popularly referred to as the “Red” or “Pink” index, depending on the volume) provides a “Table of Cases Judicially Considered.” The *Law Reports Index* is available as four bound “decennial” volumes covering the period 1950–1990 (the “Red” indexes). These have been supplemented since 1990 with an annual, cumulative paperback index, which in turn is updated by a quarterly, cumulative paperback supplement (the “Pink” index). This set provides subject and case name access to the various reports as well as the Table of Cases Judicially Considered and the Table of Statutes Judicially Considered. Despite their title, the Red and Pink indexes do much more than just index the cases published in the *Law Reports*. They also act as indexes to a veritable smorgasbord of other case reporters and thus can be quite useful as a tool to note up English court decisions.\(^\text{16}\)

A researcher wishing to use the *Law Reports Index* as a citator service should determine the date of the case being noted up and consult the Table of Cases Judicially Considered in the appropriate decennial volume(s) and supplement(s). Once the case being noted up has been located in the appropriate volume(s), the treatment of the case is indicated, accompanied by citations to the citing cases.

The information in the *Law Reports Index* is kept current by the advance sheets of the *Weekly Law Reports*. As its name suggests, the *Weekly Law Reports* is a weekly service that includes cases that are, for the most part,\(^\text{17}\) eventually published in the *Law Reports*. On the inside back cover of each issue of the *Weekly Law Reports* is a table indicating cases affected by the material reported in that issue (Table of Cases Judicially Considered). The drawback to using this method of noting up is that the tables only cumulate every quarter when the Pink indexes are published, thereby requiring the user to consult multiple issues between cumulation.

The advance sheets for the *All England Law Reports*, published weekly by Butterworths, also contain information on cases (and statutes) noted up. These advance sheets, reporting cases from the High Court, the Court of Appeals, and the House of Lords, usually provide the noter-up service on the inside back cover of each issue. The tables and indexes published in the advance sheets cumulate on a quarterly basis in a separately published “Current Tables and

\(^{15}\) The *Law Reports Index* began publication as the *Law Reports Digest*, covering cases reported in the *Law Reports* for the period 1865–1950.

\(^{16}\) Also included are references to cases reported in *Industrial Cases*, *Lloyds Law Reports*, *Road Traffic Reports*, *Tax Cases*, *Criminal Appeal Reports*, *Local Government Reports*, and the *All England Law Reports*.

\(^{17}\) Cases reported in volume 1 of the *Weekly Law Reports* are not published in the *Law Reports*. 
Index" issue, which, in turn, supplements the three-volume Consolidated Tables and Index 1936–1995 for the All England Law Reports.

The Digest, comparable in use to American digests, is a familiar-sounding resource to researchers in the United States, and it is often used as a cure-all for case law problems in English legal research. The Digest can be used for pre- and post-1865 case law research. Formerly known as the English and Empire Digest, this set includes cases from many Commonwealth countries as well as English, Scottish, and Irish decisions. The set contains a base of fifty-one volumes, a “Consolidated Table of Cases” volume, and an “Annual Supplement” volume. A new Quarterly Survey brings the annual supplement up to date. The Digest is alphabetically arranged by subjects (titles), a list of which is provided inside the front of each volume. When provided with a reference to a volume and a subject in the consolidated Table of Cases, the researcher turns to the front of the referred volume and looks up the case again to locate the page number. Each title has a separate table of contents, and there is also a “Digest Consolidated Index” (subject index) for the entire set that provides references by volume, title, and case number. Volumes are reissued when substantial changes to the body of law covered by a particular volume have occurred.

From the perspective of providing the researcher with citator information, The Digest certainly is a useful product. References to how the case has been treated by later cases are provided at the end of the digest summary of each case. While there is much overlap with the noter-up coverage offered by Current Law and the Law Reports Index, The Digest is also often the only source for certain cases, particularly those decided prior to 1865.

Confronted by a variety of resources to turn to, researchers must determine which is the best case-citator service for their purpose. While there is a great deal of overlap among the case citators, it is equally important to realize that there are differences in both coverage and frequency of publication among the services. A case picked up by one service may be ignored or not yet included by another. For instance, a case that is only reported in Road Traffic Reports might be noted up in the Law Reports Index or The Digest but excluded from Current Law or the Weekly Law Reports. One must also bear in mind the period covered by each service. While The Digest might be a logical starting point for the researcher unsure of dates, Current Law might be more suitable for recent cases. In terms of frequency of publication, the advance sheets for the Weekly

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18. The importance of the year 1865 in English case reports should be noted. This date is often regarded as the beginning of the modern era of court reports due to the advent of the publication of the Law Reports by the Incorporated Council of Law Reporting for England and Wales. See Moys, supra note 5, at 128 for a more complete description of the Law Reports.

19. Although a comparative analysis of English case-citator services lies outside the scope of this article, I believe this is an area that should be examined in a future article.
Law Reports and the All England Law Reports provide the most up-to-date coverage of cases, with Current Law Monthly Digest, The Digest, and the Law Reports Index all less timely.

One must also bear in mind the practical issue of the availability of resources in the United States for performing English legal research. Many American libraries are financially unable to maintain subscriptions to large numbers of publications from the same foreign jurisdiction, and it is therefore inevitable that most law libraries will only be able to offer the researcher access to one or maybe two of the sources that provide noter-up coverage for English case law.

Legislation

Let us now turn to the slightly more complex matter of determining whether a piece of legislation is “good” law. When an American researcher first tackles the task of determining the status of an act of Parliament, the most difficult aspect is often understanding that the act, even though it has received the Royal Assent and has not been repealed, may not be law—yet. An essential component of legislative research is, therefore, to determine whether the act, either in whole or in part, is in force.

Most acts contain within them a commencement provision. This provision is usually located toward the end of the act alongside the short title and extent information. However, it is possible for this information to be spread throughout the act, thereby making research difficult. Section 4 of the Interpretation Act 1978 states that the commencement provision may provide a date (either a fixed date or a date after an elapsed period of time, most commonly two months), on which either the whole act, or designated sections of the act, come into force, or it may allow for a minister of the Crown to determine when the act or sections of it should be brought into force. The latter is achieved through a piece of delegated or secondary legislation referred to as a commencement order. If an act does not provide a commencement provision, it is assumed that the entire act comes into force on the date of Royal Assent. However, this usually only happens with fairly short or uncomplicated acts.

The Chronological Table of the Statutes, published annually by Her Majesty’s Stationery office (H.M.S.O.), provides a convenient starting point for determining the authority of an act of Parliament. This two-volume publica-

21. Interpretation Act, 1978, ch. 30 (Eng.).
22. The Royal Assent is provided by the Sovereign through commissioners. Although a Royal Veto is constitutional, it has not been exercised since the reign of Queen Anne.
tion, spanning the years 1235–present, indicates treatment of that act, either in whole or in part, by subsequent enactments. Repeals, amendments, extensions, and other action are clearly displayed, together with a citation to the affecting legislation.

Determining whether an act or part of an act has been brought into force can be as simple (or as complex) as examining the commencement provision of the original act. There are other sources, however, that not only tell whether the act has been brought into force, but also whether it is still in force. Among these the most obvious is Is It In Force? A Guide to the Commencement of Statutes Passed. This single volume, published annually, outlines the status, section by section, of all acts passed within the previous twenty-five years. The quarter-century-year cutoff date can present some difficulties to the researcher needing to know whether an older act has been repealed, but it is more common that questions regarding the commencement of recent legislation cannot be answered. Obviously, an annual publication like Is It In Force? has limitations; recent action—commencement, amendment, or repeal—is not included. To span this gap, the researcher must consult the noter-up service included with Halsbury's Statutes of England and Wales.

Halsbury's Statutes of England and Wales provides the researcher with information on whether an act has been brought into force, amended, or repealed. Knowing how the various components of Halsbury's work together to provide current information is an essential element of English statutory research.

This annotated set, now in its fourth edition, contains fifty main volumes arranged by subject, an annual cumulative supplement, an index volume, six "Current Statute Service" binders, and a noter-up binder. Researchers begin most English statutory research by consulting Halsbury's Statutes.

When using Halsbury's Statutes, the researcher will traditionally locate the subject matter or title of the act by means of the index volume, keeping in mind that the index is divided into two parts: one for the main volumes and one for the Current Statute Service binders. Turning to the appropriate main volume where the act and extensive annotations referencing cases, other statutes, and statutory instruments are located, the researcher may also discover a fairly good legislative history section near the beginning of the act. Each volume also contains a table of cases, statutes, and statutory instruments located in that volume. The annual cumulative supplement should be consulted for more recent information, which may include references

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23. Due to publication delays, the actual time span covered by the Chronological Table of the Statutes is usually about two to three years behind the current date.

24. The text of an act of Parliament is available in numerous formats. The Queen's Printers Copy is the slip version of an act available from H.M.S.O. Published compilations of acts include the Public General Acts and Measures and the Law Reports Statutes.
to the Current Statute Service binders containing relevant new legislation. The final step in the process is to consult the noter-up volume for the most recent changes to the main volumes, the cumulative supplement, and the Current Statute Service binders. As a mechanism for determining the status of a piece of legislation, there are few sources that can match the thoroughness of *Halsbury's Statutes*.

The stable of publications for *Current Law* does, however, offer the researcher an alternative to *Halsbury's Statutes*. The *Monthly Digest and Current Law Statutes* provide a statute citator and a table of commencements. For changes that have been made to legislation prior to the present year, researchers need to check the “Legislation Citator” volumes (covering 1947–71, 1972–88, and 1988–95). The advantage to using *Current Law* is that it is easy to look up a cite and check its status.

Finally, it is worth noting that locating case treatment of legislation can also be performed using many of the same tools discussed above. *Halsbury's Statutes of England and Wales* provides many references to citing cases, as does *Current Law* to a lesser extent. However, there are a couple of less obvious sources that should also be mentioned. As described in the earlier section on case citator tools, the *Law Reports Index* and the consolidated tables and index to the *All England Law Reports*, along with the advance sheets to the *Weekly Law Reports* and the *All England Law Reports*, also provide tables of legislation judicially considered.

**Online Resources**

LEXIS-NEXIS supplies the researcher with a variety of files containing English legal material in its *UK* library. The *ENGCAS* file, including reported cases from 1936, and the *STATIS* file, including in-force legislation and statutory instruments, are the primary files for any form of English legal research. While there is no *Shepard's* service available for United Kingdom material on LEXIS-NEXIS, it is possible to use a case citation as a search query and thereby retrieve cases that have cited it.

Statutes may also be checked for authority on LEXIS-NEXIS. The in-force date of each section of an act is prominently displayed, thereby enabling the researcher to verify the statute's authority. In addition, the interpretation of an act by the courts may be determined by using the short title of an act as a search query in the *ENGCAS* file. Obviously this use of LEXIS-NEXIS as a noter up

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25. Commencing January 1997, the *Statute Citator* was no longer incorporated into the *Monthly Digest*. Subscribers to *Current Law Statutes* thereafter received it as a part of their subscription.

26. Westlaw does not currently provide coverage of case law or statutory law from the United Kingdom.
is less than ideal, but it is certainly a practical option for the many libraries in the United States that do not have access to some of the printed sources outlined in this article.

A recent development in the online noter-up arena has been the introduction by Sweet & Maxwell of its *Current Legal Information* Internet site. This fee-based service includes access to *The Case Citator*, providing a comprehensive guide to case law from 1989 to 1995 that was subsequently cited. The researcher can use this service to track the course and influence of each case and locate where it has been reported.

**Conclusion**

The need to know how a case or a statute has been treated by subsequent authority is as important for researching English law as it is for law in the United States. Although there is no *Shepard's Citations* for English legal materials, a number of resources are available that can aid the researcher in determining the authority of a case or a statute. Many of them are tools already familiar to the casual user of English legal materials, although their ability to serve as a citator service is often overlooked. American legal researchers confronted by the need to "Shepardize" an English case or statute should not, therefore, throw up their arms in surrender, but rather turn to the basic tools of English legal research in order to "note up" the case or statute in question.

28. Access to *The Legislation Citator* is in the developmental stage as of February 1998.