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FOREIGN JURISDICTIONS CITED IN DECISIONS OF THE SUPREME COURT OF NORTH DAKOTA

JOHN H. CRABB*

We sometimes hear that one jurisdiction "follows" another regarding its law, and that court decisions of some particular foreign jurisdiction are particularly influential. In North Dakota, for example, lawyers can be heard to remark that decisions from Minnesota and California are particularly persuasive. That some foreign jurisdictions are considered to be more significant than others is indicated by the fact that in the front of all North Dakota Reports since volume 25 appears a listing (which, however, proves to be inaccurate and incomplete) of the South Dakota cases cited in the volume, and no other foreign jurisdiction is similarly honored. This study is presented to check on the degree of accuracy of such statements, and in the process to make a survey of all foreign decisions cited by the supreme court of North Dakota. The total results of the survey are presented in Table 1 opposite.

To give some indication of this historical development and trends, the sample has been broken down into five different divisions or periods, as Table 1 indicates. The periods are not uniform in terms of the amount of time or number of cases covered in each, because the volumes of the reports themselves vary considerably in these respects, so that the uniformity the volumes present on the bookshelves is deceiving. But, it is felt there is sufficient similarity to give reasonably significant and accurate impressions.

For the purposes of this survey, a large sample was selected. Beginning with volume five of North Dakota

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TABLE I
FOREIGN JURISDICTIONS CITED IN OPINIONS OF
THE SUPREME COURT OF NORTH DAKOTA

Note: The samples used for this table were every fifth volume of North Dakota Reports, from volumes five through 75; volume 79; and the North Dakota cases in the Northwestern Reporter since 1954. The sample has been divided into the following periods: I—volumes 5-20 (1888-1911); II—volumes 25-40 (1913-1918); III—volumes 45-60 (1920-1931); IV—volumes 65-79 (1934-1953); V—the Northwestern Reporter (1954-1962). Alaska and Hawaii are not included. The 100 per cent totals are necessarily approximate.

Rank Jurisdiction	TOTALS FOR ENTIRE SAMPLE		PER CENT OF TOTAL FOREIGN CITES AND RANK FOR PARTICULAR PERIODS									
	No. of Cites	No. of Quotes	I. Rank	I. %	II. Rank	II. %	III. Rank	III. %	IV. Rank	IV. %	V. Rank	V. %
			% of all For. Cites									
1. Federal	1,562	346	2	10.83	1	11.22	1	17.79	1	20.15	1	11.21
2. New York	900	107	1	12.49	2	7.08	3	7.15	3	5.48	6	5.28
3. California	716	111	6	5.98	6-7	4.94	2	8.99	2	6.95	4	6.57
4. Minnesota	676	117	3	6.86	3	5.85	4	6.92	4	4.88	2	7.69
5. Iowa	544	72	4	6.21	5	5.37	7	3.53	5	4.01	3	6.73
6. Wisconsin	522	81	5	6.18	6-7	4.94	6	4.19	7	3.77	9	3.52
7. South Dakota	404	46	14	2.91	8	3.94	5	4.37	6	3.85	7	4.96
8. Michigan	392	57	7	3.63	7	4.78	12-13	3.42	9	3.15	8	3.10
9. Illinois	369	36	10	3.09	4	5.42	10-11	2.63	10	2.86	10	3.36
10. Massachusetts	347	39	8	3.62	8	3.42	12-13	3.42	8	2.90	20-22	1.44
11. Nebraska	312	49	13	2.94	14	2.99	16	2.07	11	2.58	5	6.25
12. Missouri	301	30	12	3.00	9	3.90	14	2.25	18	1.70	8	4.00
13. Indiana	284	45	9	3.41	10	3.80	15	2.11	21	1.39	26-27	1.12
14. Texas	264	35	16	1.83	11	3.61	10-11	2.63	14-17	2.02	11	2.88
15. Kansas	260	36	11	3.06	16	2.14	12-13	2.49	14-17	2.02	28-33	.96
16. Pennsylvania	211	30	15	2.16	15	2.33	18	1.45	14-17	2.02	28-33	.96
17. Washington	185	27	26	.93	17-18	1.76	12-13	2.49	12-13	2.06	15-18	1.76

Reports, the number of citations of foreign decisions was counted in every fifth volume through volume 75. Then volume 79 was counted, it being the last volume of North Dakota Reports to be published. This was in 1954, and since that time the publication of North Dakota Reports has been discontinued, and the North Dakota cases appear only in the unofficial Northwestern Reporter. All of the North Dakota cases appearing in the Northwestern Reporter from 1954 through 1962 were taken and their foreign citations counted. The gross yield from this was 10,791 citations of foreign jurisdictions, and in the same sample there were 5,295 citations of North Dakota cases. Thus, about two-thirds of all citations were of foreign rather than domestic cases.

Table 2 presents a comparison between citations of North Dakota cases and all foreign jurisdictions, using the same periods as in Table 1.

TABLE 2
COMPARISON OF NORTH DAKOTA CITATIONS WITH
ALL FOREIGN CITATIONS

	Totals for entire sample.		Percentage of cites for the various periods.				
	No. of cites	% of cites	I.	II.	III.	IV.	V.
All Foreign Jurisdictions	10,791	67.1	83.8	75.3	60.9	58.9	43.3
North Dakota	5,295	32.9	16.2	24.7	29.1	41.1	56.7
Totals	16,086	100.0	100.0	100.0	100.0	100.0	100.0

As time passes, North Dakota of course builds up more and more of its own case law, and the less becomes the need to resort to foreign jurisdictions. Thus, the proportion of domestic cites to total cites necessarily tends to increase as the jurisdiction ages.

The survey presents, of course, a purely gross or quantitative count. The significance of it is based on the assumption that in numbers there is strength, and that the more frequently a foreign jurisdiction is cited, the greater will be its impact on the domestic law. But no attempt was made to evaluate the actual influence of any

one case cited, or of the aggregate of citations from any one jurisdiction. Nor was it possible to break down the citations according to subject matter or field of law, although it may be surmised that certain foreign jurisdictions would prove of greater significance in certain fields of law than in others. Refinements of this sort in the survey would have required vastly greater investigative resources.

But one effort to inject a more qualitative factor into the survey was counting the number of times foreign jurisdictions were quoted as well as cited. The significance of this was predicated on the assumption that greater weight was being given to a case where its language was being quoted verbatim. This, of course, would not necessarily or always be true, since opinions can be quoted from motivations of other than admiration, but generally the quoting is done by way of approbation. However, it was found that for the most part there was little proportional difference between quoting and merely citing. That is, in all jurisdictions where there was a statistically significant number of cites, the proportion of quotes to cites did not vary significantly. The proportion of quotes to cites for the entire sample was 18 per cent. The range of variation of the proportion of quotes to cites between jurisdictions having a total of one hundred or more cites was from about ten per cent to about twenty per cent. There is perhaps a weak tendency for the proportion of quotes to cites to increase with the increase in the total number of cites. It is perhaps worthy of note, however, that in the case of federal courts, which have far and away the highest number of cites, the total proportion of quotes to cites is 22 per cent, and in period IV the proportion reached 30 per cent. The statistics do suggest a tendency to quote somewhat more when citing federal cases than when citing other foreign cases.

The following three factors suggest themselves as primarily influencing the frequency of citation of a foreign jurisdiction: (1) age and population of the foreign jurisdiction; (2) accessibility of the foreign cases; (3) relevancy of the foreign to the local jurisdiction. These factors are

not necessarily of equal weight, but are offered as a suggested analysis and explanation for the statistics reflected in Table 1. And these factors are suggested as tendencies rather than as necessary or immutable rules, so that various discrepancies and inconsistencies arise in checking these factors against the statistics presented in Table 1.

The most elementary factor in citing cases from a foreign jurisdiction is that that jurisdiction should have cases to cite. Hence, all other factors being neutral (which, of course, they are not), the jurisdiction with the most reported cases would be cited the most. And presumably the amount of cases in a jurisdiction generally will increase accordingly as the number of people with whom it has to deal increases. This would bring in the factors of the size of the population and the length of time the population has been there. Thus, although sliced somewhat differently than the states, the federal jurisdiction would have a lot of cases. First among the states is New York, and in Period I it outranked even the federal cites. New York, of course, scores extremely high in the combined age and population factors, and that is sufficient to rank it first among the states in the table. Massachusetts is probably comparable to New York in the factors of age, accessibility and relevancy, but much less in population, and ends up further down the scale. California, though now about abreast of New York in population, has not had its large population for so long a time, and hence still ranks below New York in totals, even though outranking New York in the most recent period of the table. The states clustered near the bottom of the table all have in common their small populations. Somewhat further up the scale are Vermont and New Hampshire, two states whose small population is partially offset by their relative antiquity.

The accessibility factor refers to the accessibility to practicing attorneys of the reports of the various foreign jurisdictions. For, the court's opinions and the cases cited in them will be fashioned largely by the briefs of attorneys before the court, and thus the foreign cases will have found their way into the court's opinion because the attorney was

able to find them in his research and to include them in his brief. Then, the foreign jurisdictions most likely to show up in the court's opinions will be those whose cases are most frequently available in the law libraries of the practicing attorneys. Federal cases, at one level or another, are commonly available in law libraries. But perhaps the most influential single element is the grouping of states chosen by the West Publishing Company for its Northwestern Reporter. Because North Dakota cases are carried in that reporter, it naturally follows that it will be standard equipment in practically every law office, especially since the discontinuance in 1954 of the official North Dakota Reports. Thus, the other six states of the Northwestern Reporter should be favorite foreign jurisdictions, and in fact they are. They are Michigan, Wisconsin, Minnesota, Iowa, Nebraska and South Dakota. These states have held relatively high rank, especially in the most recent Period, with the exception that Michigan has for some reason declined to a tie for fifteenth place, which is surprising in that it is the largest jurisdiction in this group. Perhaps the most striking evidence of the apparent influence of the grouping of states by the Northwestern Reporter is the contrast between Montana and South Dakota. Both states rate about equally as to the factors of age and size, and both are next door neighbors. Yet South Dakota's general rank is seventh and Montana's is twenty-third, and surely the fact that the publisher has seen fit to place Montana in the Pacific rather than Northwestern Reporter has a great deal to do with this.

Among the various reasons why English and Canadian cases appear rarely, inaccessibility is undoubtedly a significant one. Reports of cases outside United States jurisdictions are a relatively exotic library item, and not normally found in an ordinary "working" (as distinguished from "research") law library. Moreover finding English or Canadian cases through any kind of a systematic search involves the use of techniques with which most American lawyers would not have occasion to be familiar. However, England ranks high in view of its supposedly low accessibility rating.

The factor of relevance which has been suggested has reference to the degree to which the legal experience and precedents of a foreign jurisdiction are deemed significant. This factor undoubtedly overlaps a good deal with accessibility, since presumably an effort will be made to have available those foreign jurisdictions deemed most important. The prestige of the jurisdiction, both professionally and generally, as a leader in legal and social developments is an element here, as well as the reputation of the different courts for juristic competence. Such considerations undoubtedly play a large part in the high rankings of such large but distant jurisdictions as New York, Massachusetts, and California. Geographical proximity must be another element of relevancy, if for no other reason than that practicing attorneys will generally have their widest experience, contacts, and familiarity with those foreign jurisdictions that are the nearest. But beyond that, geographical proximity will probably mean a sharing of history and traditions, and perhaps a similarity of social and economic conditions and problems. It seems apparent that considerations of this sort must have inspired the listings of the South Dakota cases cited in North Dakota Reports. Relevancy, in terms of historical prestige, undoubtedly accounts for England's ranking as high as it does.

Perhaps one conclusion the statistics indicate is that there is no drastic or extreme preference among the various states. It is true that the difference from one end of the scale to the other is great, and that the New York citations are sixty times the number of Delaware citations. However, the graduation from top to bottom among the states is gentle, and even the most favored states do not have an overwhelming or predominating position compared with all the other states.

The survey also counted the number of citations of legal writings — treatises (including legal encyclopedias such as *Corpus Juris* and *American Jurisprudence*), law reviews, and the Restatements. Treatises were cited a total of 1,110 times, without much indication of any trend toward either increasing or decreasing, until there came a sharp decline in the frequency of such citing in the most recent

period. Law reviews and Restatements appear only in Periods IV and V, with total cites of 11 for law reviews and 23 for Restatements. Of course, Restatements had not effectively been in existence or circulation before those periods. As to law reviews, their material normally is of a commentary rather than authoritative nature, and they do not characteristically fit the format for citation in briefs and opinions. However, since World War II there has been a large increase in the number of law reviews, thereby enhancing the likelihood of their being cited in opinions.

The statistics furnished by Table 1 lend themselves to an indefinite amount of speculation and analysis. Perhaps enough has already been suggested along the line, and it may be best at this point to let the statistics speak for themselves, for whatever purpose they may serve by way of interest or utility.