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# Materials of Jurisprudence

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## MATERIALS OF JURISPRUDENCE.

THIS period is marked by rather more strenuous efforts than have been made before in this country, to solve the problem of condensing and simplifying the law. Our own day is peculiar in the endeavors we have seen to evolve what is claimed to be a science of jurisprudence. Some admirable writers have succeeded in dividing the domain of law into its larger or smaller fields, and have shown with more or less fulness the relative positions of these, and their mutual dependence. This is a valuable service; for all lawyers know that, without a reasonably clear perception of the place of every rule in the general scheme of law, there can be no complete understanding of any legal doctrine.

But all of these attempts to resolve law into a science have shown, and the best writers appreciate it, that this science stops short at arrangement and classification, and furnishes no definite rules of conduct. The law of the land must always continue to be the expressed or implied will of the State, varying from time to time, like the will of individuals, and subject—though in a less degree—to irrational and wilful impulses. No wise man imagines that the time will ever come when one and the same “State’s collected will” can prevail in all countries, unless on subjects belonging to international law, or at least connected with extended commerce. If such nominal uniformity should be agreed upon, or imposed on many countries, it could not last in fact, whatever it might do in name. The rules would receive such different constructions, that the elasticity of language would become marvellous.

While it is not at all likely that such relief as we may some day obtain against the indigestibility of our monstrous bulk of

law material will come in the shape of any philosophical panacea, we may expect it in some form. The healing forces of nature are not more certain than those of society. Whatever difficulties may spring from positive enactments or customs, which have no moral quality or value beyond any others that might have existed in their stead, the great bulk of law rests on moral rules which can never be changed, and which suggest means of enforcement of their own which will not bear indefinite restriction. As soon as the existing machinery of the law fails to secure substantial justice, the correcting process begins, unless the abuse is so great as to demand an entire reconstruction; and this will come in due time, although with more trouble.

Thus far the evils of the legal systems with which we have more directly to do have not come from the insufficiency of the body of the law. Some changes have been made in our land laws, whereby we have got rid of a moderate portion of anachronisms, usually credited in some vague way to the feudal system, but savoring more of crude metaphysics than of any system whatever. These changes have required legislation, and will require more. But in commercial and business affairs the statutory changes have seldom done more than sanction what had already become customary. A few great inventions, such as railroads and telegraphs, were originally brought into use under laws specially devised for their regulation. But these have only served as new illustrations of the unfailing truth that no wisdom can devise laws for untried enterprises that experience will not find it necessary to alter. The results obtained from steam and electricity have already gone infinitely beyond the largest possibilities imagined by those who first succeeded in using those powerful agents. The reserved forces of the common law have been found more adequate to correct the blunders of legislation than successive statutes have been.

There is an apparent exception in regard to crimes, but it is only apparent. The great changes made in the interests of humanity have not been so much in the list of offences as in their punishment, and in their classification for the purpose of apportioning punishment more fairly. Very few new crimes have been defined. And even when new ones have been added to the list, they are probably, without exception, acts which were legally wrong, and subject to civil remedies already. Where this is the case,

declaring them to be crimes is only another way of declaring that the old remedies were inadequate, — just as new cases are continually calling for equitable interference for similar reasons. Under our system it is wisely provided that no court can determine without legislative sanction that any act not before punishable shall be treated as criminal. It is only because there is no such rule in regard to equity that statutes are not required to bring new complications, when common-law remedies fail, within the scope of equitable jurisdiction. In both classes the change is only remedial.

All schemes of law reform which propose to introduce substantial changes in rights as well as remedies are presumptively unwise, — not because laws now existing are perfect, but because changes not imperatively demanded by public necessity can be made more perfectly and prudently when the occasion arises, and suggests — as it usually will — the extent of the mischief to be corrected. The existing difficulties which have exercised so many active minds are not found in the rules of law so much as in the means of determining what those rules are. They are but slightly connected with the systems of remedies by which the laws are enforced. These have already become reasonably simplified. The law itself is getting buried in rubbish.

It certainly seems strange, to one not learned in the law, to have a simple question concerning the legal right or wrong of a given course answered by referring to a mass of decisions made in various States, and very possibly in various ways. On other subjects there seems to be a more summary way of disposing of such questions. A theologian may refer to many books to settle some question of ecclesiastical dogma, but seldom for questions of conscience. The conduct of men must be determined by simpler methods. And inasmuch as in business affairs most problems cannot wait for a professional solution, cases ought not to be numerous in which legal principles need be ascertained through any difficult process. The order of society could not long be maintained without the assurance that men may usually be held responsible for a knowledge of the law. Whatever may be the fact, they cannot generally be allowed to take refuge in their ignorance from the consequences of its violation. And we find that most men have enough actual knowledge to save them from becoming law breakers. They do not, in one case out of a thou-

sand, learn the law from a search into authorities, which is supposed to be the lawyer's method of informing himself. If they were to look into the reports for themselves, they would be hopelessly muddled. If they constantly employed others to do it for them, the affairs of life would come to a standstill.

Lawyers themselves are discovering that there is something wrong in this waste of time and confounding of ideas. When it has been determined by a competent tribunal that black is black, and white is white, neither blackness nor whiteness is made any plainer by the multiplication of opinions to the same effect. There should at least be a point where the reiteration may stop. As a matter of fact, we all know that among lawyers who have more than one case at a time, this point is reached early. But there is a certain supposed occasion for the display of erudition, which leads men who are otherwise candid into garnishing their briefs and treatises with long lists of names taken on trust at second hand, or gathered from the Digests, which represent cases that cannot possibly have been carefully read, if read at all. There may be writers who examine all the cases they cite, and yet cite a great many. They are not like other men if they do this thoroughly. There are very good books with many citations which were never gathered by their authors in person at all, and which bear witness to this by repeating misquotations and verbal errors that sometimes have marred generations of predecessors. When we attempt to verify these citations, they are sometimes traced through books and authorities that we know are reliable in themselves, and we accept the doctrine for the borrower's sake, with no further search for the lender.

The time will probably never come when precedents will be useless. But the time has come and gone many times when it became necessary to give up the old and resort to the new; and now that the new are multiplying so rapidly, some other process of choice and rejection is unavoidable. It behooves us, therefore, to consider what is the real office and value of precedents. It is above all important to know whether they are to be looked upon as the origin, or only as the testimony of legal doctrines, and how far their witness goes. One would think there could be no doubt about their place in our system, but they are sometimes strangely used.

There are two great divisions of lawyers, — those who cite

cases chiefly because of circumstantial resemblances, and those who use them as recognitions of doctrine. The thorough-bred case lawyer is often successful within a certain range of business, where substantially exact parallels are easily found, — although even there a little variation in facts may mean a great deal. But on questions of constitutional or statutory construction, or even in the interpretation of peculiar private documents, he is apt to be at fault. He would be so much oftener if every man were not forced to use his common-sense in all kinds of work, and make his practice better than his theory. It is astounding to hear the preposterous arguments that men of no mean powers sometimes feel warranted in using on the faith of misapplied precedents. The very multitude of reported cases has had one good effect in making the old-fashioned case lawyer nearly impossible. It has led to excessive citations, and thus produced confusion; but no court will listen to the indefinitely prolonged reading of authorities. However indulgent the bench may be to such repetitions, there must be required at some time a statement of the principle claimed to result from the aggregate, and a reference without reading to the greater portion.

One prolific source of mischief we are rapidly getting rid of. On technicalities of pleading and practice, precedents had no value except as precedents, and became very troublesome. What we did not learn from reason has been taught us by necessity. There are few States or courts which have not discovered that whatever tends to delay issues and trials is mischievous to justice. The modern codes of procedure were devised to get rid of the pettifogging and confusion that came from the perversion of the system of special pleading, and the multiplied rules of practice that were its parasites. No system of practice can be of more intrinsic importance than another. That system is best which reaches a just end soonest and most easily. It was never difficult for a good lawyer to draw up a sufficient common-law declaration, which should be as simple and concise as any well-framed complaint under a code. A bill in equity was never demurrable for substance if it contained a plain and complete narrative of facts, showing an equitable cause of action, and indicating the relief desired. It was only the absurd multiplication of pleadings, repeating in several counts or pleas the same thing contained in others, with slight variations, which gave no actual

information to anybody, and the necessity created or supposed to be created of putting in a separate plea or set of pleas for each ground of defence, that made the old system deservedly odious. A controversy where all the facts on both sides could have been intelligibly stated in a page or two, was narrated, or, to speak more correctly, disguised, in a series of counts and pleas and replications, with possible rejoinders, sur-rejoinders, rebutters, and sur-rebutters, that were absolutely unintelligible to ordinary men, and often to everybody. It was only the blind love of precedent that made the wordy draftsman stop at sur-rebutters. There was surely no reason in the nature of those acrobatic dialectics which made it impossible to continue the series indefinitely. The sacred seven pleadings might as well have been twice or even seventy times seven, if the tired imagination of their first inventor could have devised any names for them. Fortunately, a plea without a name was a thing at which legal reason revolted. When a respectable body of learned and acute men stand aside from the trial of causes and handling actual facts, and devote themselves exclusively to framing pleadings, they very soon come to regard the pleadings as the chief end of controversy, and look on the determination of the merits as entirely subordinate. Their example, and the intricacies in which they involve the case, lead to a similar magnifying of rules of practice. Judges who have been trained to believe in the vast importance of subtleties and technicalities will sacrifice substantial rights to useless forms.

The great argument in favor of special pleading, which is still pathetically urged by admirers of the old system, is that it brings out every issue clearly, and also serves to train the lawyer to exactness and logical accuracy. That it did train men in habits of close discrimination is true. But even this merit is exaggerated. There are minds already over-subtle that need to be restrained from over-refining; and persons having such a tendency multiply distinctions beyond sense and reason, and make it impossible to apply the rules of law, as they define them, to the actual business of life. Some of the best legal intellects, and some of the safest judges and counsellors, cannot pursue these niceties very far without hopeless bewilderment. And we all know that when a sensible and slow man allows himself, as he sometimes will, to indulge in metaphysical refinements, his

vagaries are surprising. Those of us who remember special pleading experiences can recall instances where acute counsel have amused themselves with trying how far they could prolong the floundering of an unhappy brother of heavier capacity, by demurrers and immaterial issues, until months and even years have passed before the case reached the jury. When that came, it not seldom happened that their ponderous antagonist would have his turn in a more public triumph, and fairly annihilate them. As for bringing out the issues more clearly, it must be remembered that those who have most need of knowing their precise effect are the jurors. If any thing could hopelessly befog a jury, intelligent or stupid, it would be listening to the reading of such pleadings. Probably few counsel have ever been foolish enough to attempt such a farce. When they have done so, their success, it may fairly be presumed, did not encourage its repetition.

The same practice which prevailed in common-law cases was found in a modified form in equity. The use of a general replication prevented any long succession of pleadings, and made the bill and answer include all the issues. The nature of an English bill — especially where it had to be verified — made it necessary to have in some part of it a tolerably direct story of the facts. But the pleader's imagination was allowed to run riot in the superfluous parts, which were retained, for not very creditable reasons, long after their uselessness was acknowledged. In the combination and charging parts, and in the interrogating part, there was room for great expansion. The most punctiliously correct and honest man, who happened to be interested, however remotely, in something which was to be affected by the suit, was sure to find himself charged with maliciously, wrongfully, and with all the other known adverbs of wickedness, combining and confederating with his co-defendants and unknown conspirators to defraud and injure the unfortunate complainant. He was then charged with falsely and fraudulently getting up all manner of false pretexts and sham defences, and an imaginative draftsman would set out a fearful list of such iniquities. If the defendant happened to be a matter-of-fact man, with a reasonable regard for his good name and fame, it was not always easy to satisfy him that, although charged with a good share of the worst crimes in the decalogue, he ought not to take offence at it.

Although the answer had to be sworn to, yet there was always



room in that pleading to insert a great deal of matter not held to be covered by the oath; and if the defendant's counsel desired to cover the case with as much fog as possible, there were ample opportunities for such abuses. The real use of all these prolixities, both at law and in equity, was that they furnished a living to men who made profit by multiplying words. The reports were lumbered up with pleading and practice cases, which were all the more eagerly sought as precedents because they involved no principle whatever, and must be blindly followed, if followed at all.

When the abuse became beyond endurance, a remedy was sought in two different ways, but with the same purpose. One project was the entire rejection of the old system, and the substitution of what is called a code in its place. The other was the reduction of the existing practice to simplicity. The code system was adopted with the design of having all the facts set out in a natural way by plaintiff and defendant, so as to develop the issue as it would appear on the trial. The common-law reformers introduced liberal statutes of amendments and jeofails, to prevent parties from being injured by mispleading, and allowed all defences to be brought in under a notice appended to the plea of the general issue. Both of these projects met with hostility among the bigoted votaries of the old system. The code was condemned as not favorable to logical and formal neatness. The notice was complained of as allowing issues to be tried which were not plainly formulated.

There were some courts as bitterly hostile to simplification as any of the bar; and where such hostility existed, the old abuses were magnified rather than diminished, because most practice questions had been settled before, and the changes in legislation furnished an excuse — only too eagerly seized — to unsettle every thing. The special pleaders, where they found a favorable hearing from the bench, succeeded in nullifying the benefits of notices, by having them required to be drawn with all the precision of special pleas, instead of with merely reasonable certainty. This perpetuated most of the mischiefs of the old practice. In States where this narrow policy prevailed, a more radical remedy was the only one which could do any good. The introduction of a code, if fairly treated, could have afforded this remedy, as it has done in part. But it met desperate

opposition from many very able lawyers and judges, who insisted on applying to it many of the same technical rules which had made the old practice odious. Under such treatment nothing was gained in expedition, and very little in simplicity. So many practice questions had to be settled or re-settled, that the reported practice cases form an enormous mass, too closely comparing with the decisions on merits. In those regions where a code was adopted at the beginning of their judicial career, this difficulty has been much less, and has not always been serious. There is no good reason why it should not in such places be made simple and useful. Whether it works better there than an improved law and equity system cannot probably be determined. Either system in good hands will work smoothly and expeditiously. There can be nothing gained in giving up one for another, when it works well and has become familiar. It can only add to the multitude of useless, if not frivolous, litigation, and swell the ranks of valueless law-books.

The distinction between cases calling for a single hearing, and a judgment for damages or possession, and those which require successive inquiries and flexible specific remedies, is one which must always exist, and which no system of procedure can change. Whatever names may be given to these two classes of controversies, they will always represent what are known, under the old definitions, as Actions at Law and Suits in Equity. There are very few, if any, places where equitable rights are not held valid and respected in all courts; and where there is any common-law remedy suitable for their enforcement, they can generally be made available in such an action. In those States which retain the distinctions of law and equity, the difference is generally one of remedies, and legal and equitable suits differ only as actions of *assumpsit* differ from *ejectment* or *replevin*. It is true that in the courts of the United States government it is held that the Constitution perpetuates the old disability against enforcing equitable rights in common-law actions, or seeking common-law rights through equity. Yet even there assignees obtain redress at common law, directly or indirectly, and under the patent and copyright laws penalties may be enforced in equity. These are innovations on the ancient law, and the latter is a very serious innovation on the most liberal modern practice, inasmuch as it cuts off trial by jury on charges which

are penal. It is one of the difficulties of a code system that the constitutional right of trial by jury, which is universally preserved in all the States, can only be secured by keeping in mind the old distinctions. It was never reckoned to be a right except in common-law cases; but in those it is a right on which men are justly tenacious, and it becomes necessary on this account to know what cases under the code belong to that class.

The objection chiefly urged against the substitution of a notice under the general issue for special pleas is that the parties are not informed by the record of the precise case they have to meet. This objection, however, applies nearly as well to the older system where pleas and counts were multiplied, and where the common counts did general service. A special plea was always demurrable if it covered defences which could be made under the general issue, and the scope of that was very wide. It is unquestionable, too, that, after the practice allowed any number of special pleas to be put in, the pleader very generally put them in without much reference to the exact facts, and so multiplied and varied them as to obscure the issues, rather than present them clearly. This, however, does not entirely answer the objection, because, if sound, the reform should have met it. But the real answer is that the method does not work badly in practice, and it is never desirable to change methods of procedure without a prospect of doing some good by it. Under these rather slipshod proceedings it is found that parties are seldom surprised at the trial, and are never more likely to be so than under the other methods. It must not be forgotten that, when special pleading was in its prime, there was less liberality in regard to amendments; and filing a wrong plea, or committing any sin against pleader's logic, was often fatal. The capital merit of bringing the cause to an issue in a very few weeks at latest outweighs almost any theoretical advantage which prolongs the litigation without any adequate recompense for the delay.

Mr. Butler, in his "Reminiscences," refers to an early attempt to substitute notices for pleadings, and to the divided opinions of the English bar on the subject. After mentioning that the civilians of antiquity branched into two sects, — the Proculeians adhering strictly to letter and form, and the Sabinians, or Casians, recommending liberality of practice and construction, — he proceeds: —

“Something like this difference has long subsisted at the English bar; but the good sense of English lawyers has prevented them from forming themselves into sects. About the year 1770, a bill was brought into the House of Commons for allowing defendants, in almost all cases, to plead the general issue, and give the special matter in evidence. The measure failed; its effect would have been to confine special pleading within very narrow limits. It is not a little remarkable that it was favored by Mr. Wallace, who was a mere special pleader, and opposed by Mr. Dunning, who, like the Reminiscent's friend, Mr. Tidd, was both a special pleader and much more.”<sup>1</sup>

It is true that in America, as in England, good lawyers and sensible men have been opposed on all these matters, and that all changes which are supposed to mar the symmetry of the old close system of pleading have been regarded by some useful judges and counsel as dangerous. But it is questionable whether there may not have been unconsciously lurking in their minds a feeling that such innovations would make their “cunning of fence” unavailable, as villainous saltpetre renders the expert swordsman no match for a fair marksman with his gun.

The changes in the law of evidence which have removed the disabilities of parties and interested or convicted parties as witnesses, and the statutory provisions for preserving testimony by depositions, to be used when witnesses could not be examined at the hearing, have not only relieved the books of much bulky discussion, but have put an end to most of the auxiliary jurisdiction of equity to furnish testimony for use at law. The practical effect of all this has been to simplify and reduce the equitable jurisdiction to the enforcement of peculiar or specific remedies, instead of being in any sense an opposing system to the common law.

Under the old practice, the equity draftsman rivalled the special pleader in prolixity, and more than rivalled him in verbose repetitions. The English bill, which began as a simple and informal petition in plain English, expanded under this treatment into a very absurd composition; and the answer was drawn with equal verbosity to cover up the ingenious, but not ingenuous, efforts of counsel to enable their clients to evade replies to all awkward interrogatories.

When courts desiring reform were baffled in their efforts to

<sup>1</sup> Reminiscences, ch. ix.

simplify and shorten proceedings, by the perverse obstinacy or selfish cunning of those who were set against innovation as their congeners, the Ephesian smiths, who monopolized the making of silver shrines for a very homely idol, the end was reached in one State, at least, by a simple remedy. The old fee-bill was abolished. Costs were taxed without reference to the pleadings. When folios ceased to figure on taxation, and the pleader got no more for a ream of pleadings and a score of interlocutory applications than for a single page and a single hearing, economy of time and words became profitable. Now and then a chivalrous champion of the old school multiplies his counts and expands his averments. But men, in general, however prodigal of breath, do not care to work for nothing.

No one who has not had some experience of these changes, or examined into the intricacies and peculiarities which we have discarded, can estimate what an immense body of rules and precedents became obsolete. A faint idea can be formed by comparing the practice cases with the rest of the reports, and considering that in many States practice cases are almost unknown in courts of last resort. The lawyer who now is frightened by the accumulation of authorities has the consolation of knowing that most of his researches are made among things of intrinsic importance. In this the advantage is twofold. It is neither pleasant nor profitable to spend time and labor on trifles. And it is more difficult to master arbitrary rules and customs, than those principles which have not only governed human conduct in the past, but must direct it in all time to come.

But notwithstanding this great relief, by the removal of so much of the lawyer's work, from the necessity of seeking out what was hardly worth seeking, we find the amount of books of various kinds, to which he is invited to give his attention, so great as to be almost disheartening. The question is continually presented, What can be done to secure sound law with the least waste of time and toil?

In law, as well as in other things, it will usually be found that evils, sooner or later, work their own cure. The superfluity of law-books is only a similar mischief to other redundancies which affect the whole people. There is no place and no occupation that is not annoyed by them. There was a time when few men of culture could be found who did not know something about

every book that obtained much currency. There were many crude and trashy works, and many dull and respectable, with probably about the same proportion as now of positively good ones. A certain deference was paid to almost any decent author, and a corresponding deference was paid by the author to the right of the reading public to his best efforts. Now authorship is not in itself more respected or respectable than other honest callings, and books when published, unless under influential sponsors, must jostle or wait for place like other commodities. Readers of all classes fail to see some things they would have enjoyed, and perhaps have found very useful; while two out of three confine themselves to a few books, and read a great deal of lighter material, which, whether instructive or not, has the advantage of being compact. The habits which are forced on us by daily papers and the telegraph lead us into rapid and cursory views of a great many things. Condensation has become a cardinal virtue, and mere brevity is often mistaken for it. This is found in law as well as elsewhere. But it is not so safe to mix up all manner of adulterations with genuine law, as to mingle other things that are less important.

Whatever may be the suggestive value of alien law, it is not our law; and courts, when they allow their judgments to be warped by it, — even when they thoroughly understand it, which must be a very uncommon experience, — are not only legislating instead of expounding the law, but are judging people by a standard of which they are ignorant, and which they are not bound to regard. Not a little mischief has been done by this unwise and dangerous indulgence. While there is a great difference in degree between adopting foreign law and following the lead of kindred jurisdictions, there is a similar danger in resorting to indiscriminate citations of outside authorities. Doubtless, we may safely assume that there is no part of the Union, and no common-law region, where bench and bar cannot throw light on questions of general concern. But every State and nation has some peculiar rules, customary or statutory, touching legal rights and interests, which may give a tinge to the whole body of its jurisprudence. The opinions of any respectable court have a decided value to all who study them. But it is not true, in any sense, that they are of positive authority anywhere else. If precedents were scarce, they might be more necessary. But

every lawyer must admit that, except to those courts that are subject to its review, or administer the same laws, no decision of any tribunal has real value beyond the weight of its reasoning, or the respect due to the opinion of judges who have proved their claim to deference. We all habitually look to the common law as the origin of our system, and we know that all courts dealing with common-law principles are likely to make similar rulings on similar familiar conditions. But we are constantly meeting with new conditions, some of which affect all parts of the country alike, while more of them are affected by local customs and circumstances. Lazy legislators and ignorant theoretical reformers borrow untried statutes or detached fragments of statutory schemes, when the sections or chapters borrowed cannot mean the same thing under different surroundings; and then the court which first construes phrases or sections is held by rash text-writers to have settled the law, unless some other court very speedily differs from it. This can only be when a similar controversy has arisen elsewhere, and we all know that such controversies may lie dormant a great while. A few more decisions, though based solely on the first one, make up that mysterious bugbear which is solemnly called the weight of authority; and the unlucky citizen is gravely told he must be held responsible for a knowledge of law which has never been promulgated in his own State, and of which he never heard as announced anywhere. And so he is cast in damages or stripped of his possessions in obedience to authority to which he was never subject, and under rules which may have neither wisdom nor justice to sustain them.

Whatever may be professed on this subject, it is certain, as a matter of fact, that, in a majority of cases, these outside decisions are not followed for their cogent and convincing reasoning, but because they are recorded in books of reports. Men follow them as sheep follow their leader, over fences and ditches as well as on the highway. And it is chiefly because the numerous decisions, that are rightly no more than local precedents, are cited indiscriminately as the law of the land, that the complaints of the growing bulk of law literature have become so loud and importunate. The well-meant attempts to condense them by selection is a temporary relief, but a very imperfect one. Such collections can rarely show the mutual bearings of decisions which sometimes

must be taken together in order to be comprehended at all. Digests of such a multitude of cases are imperfect, because, however well arranged, they cannot throw light on the implications behind local decisions. The only practical refuge is among the text-writers; and it is hardly to be doubted that, while nominally based on original references, a great deal of our law is borrowed from their books, and borrowed with reasonable safety. Those which are reliable at all come near enough to the fountains of the law for many purposes, and they always furnish a good starting-point for further investigations. There are text-books written by some of the old lawyers which have the fullest authority, and there are modern text-books which deserve it.

Lord Mansfield, who certainly managed to extract the kernel of jurisprudence, whatever he may have done with the husk, is said to have remarked, when speaking of the great increase in the number of law-books, "that it did not increase the amount of necessary reading, as the new publications frequently rendered unnecessary the reading of the old. Thus," he said, "after Mr. Justice Blackstone had published his Commentaries, no one thought of reading Wood's Institutes or Finch's Law, which, till then, were the first books usually put into the hands of students." He said that, when he was young, few persons would confess that they had not read a considerable part, at least, of the Year-books; but that, at the time in which he was speaking, few would pretend to more than an occasional recourse to them in very particular cases.<sup>1</sup>

No lawyer now is ashamed to say he never read the Year-books; for, with our changed methods of education, very few could read them if they tried. Excursions into such fields are more like the amusement of antiquaries than the solid work of study. Even the older text-books are used more for occasional reference than for reading. Yet no work on criminal law has ever surpassed Lord Hale in clearness or philosophy; and the Reminiscent before mentioned, who was not only an elegant scholar, but learned in continental law, and one of the profoundest of common lawyers, gave strong testimony in favor of the study of Coke's Commentary on Littleton, and showed his confidence by joining his own labors to those of Mr. Hargrave in annotating it. Now and then any court may be called on to decide matters which

<sup>1</sup> Butler's Rem. ch. xi.



have not been discussed by modern jurists; and when such occasions arise, the merits of the old lawyers become apparent. The few treatises that have escaped oblivion are, in many respects, as full of life now as ever. Their garments may be quaint, but they cover sound bodies.

The greatest English lawyers agree in admiring Littleton, who has had the singular honor of being accepted as authority for some purposes in Normandy, as well as in England, upon the ancient customs. Basnage makes frequent reference to him, as he does also to that little read but elegant and nervous writer, Sir Thomas Smith, whose small treatise on the English commonwealth is one of the best works of its kind in existence. A little reflection on the reason of this remarkable survival of popularity may give us a hint concerning what law-books ought to be. It has been acutely remarked by a shrewd critic that the books which outlast their own generation, and maintain perennial popularity, are small books. As he quaintly expresses it: "The light skiff will shoot the cataracts of time, when a heavier vessel will infallibly go down."<sup>1</sup> Littleton is to most modern writers as the Institutes are to the Digest, or as the sea laws and French customs and ordinances are to the commentaries on them. His propositions contain the law pure and simple. He does not usually reason them out, or explain them, but he states the rules very clearly; and they must, when written, have sufficed to explain themselves. If the common law of his day had not been almost absorbed in tenures and estates, he might have written works which would have been in use to this day as standard text-books. His method is precisely what we need now, and precisely what, in most times and countries, has been the surest relief from that confusion which is caused by the multiplication of crude materials. His treatise is not one which quite meets the wants of our time, when land laws have been reformed and commerce is the great mother of lawsuits. But its accurate brevity is worthy of emulation.

It is not an easy matter to reduce the law to a series of detached propositions, which will need no expansion or qualification. It is not impossible in matters of positive law, and in most cases of distinct usages it may be feasible. The old English land law was very well suited to this treatment. But the more im-

<sup>1</sup> *Glory and Shame of Literature.* Edinburgh Rev. 1839.

portant and flexible doctrines are much more difficult to formulate, because general statements are seldom made definite enough, and concise statements are apt to be partial. If attempted by an average legislature, the best and neatest propositions would be amended into confusion. Moreover, what we need is a formulation of such doctrines as are generally accepted through the United States, which will be authority everywhere, and universally useful. Such a work can be done in one part of the country as well as another. It needs the best skill of the best jurists to make it what it should be. Local variations and qualifications could be separately explained without spoiling the symmetry of the rest. More trouble arises from the inherent difficulty of making complete formulas than from any other cause.

There is a great temptation in the way of lawyers to be sententious. A terse, strong assertion of any kind not only has weight with the multitude, but even with the man who makes it. For many purposes such utterances are valuable. They keep in mind the main point in controversy, and prevent its being lost in the confusion of minor questions. But they are liable to do harm by this plausible quality; for every one has known bad cases and sophistical arguments backed up by the sonorous utterance of sound maxims and legal truisms, which are very good where they belong, but do not belong to the case where they are used. There is no more instructive reading for those who are sanguine about the ease of making terse formulas than the treatises on legal maxims, and the laborious explanations which show that for the most part they are no guides at all in doubtful cases. Legal casuistry does not often reach the absurd advancement of that described in Pascal's Provincial Letters, but it cannot be denied that an occasional ambition emulates it. In the main, legal discussion is fair, and absurd extremes are individual and not general follies.

Maxims, which belong to the same family with proverbs, and often become proverbs, are safer for laymen than for lawyers; because laymen habitually talk less precisely than they think, and find it safe to take a good deal for granted. But there will always be some very respectable lawyers who sorely lack imagination, and who accept very literally all that drops from the lips of legal authority. It is, perhaps, neither our shame nor our misfortune, but rather a source of stability, that the race of common

lawyers contains its full proportion of rather slow intellects that feel their way, and work out reasonably well with time and reflection, but do not take in much at a glance. But it must be confessed that we cannot get much help in legal reform from such men. We cannot overlook them, for they contain the largest reserve of that terrible force, the *vis inertiae*; and unless they can be moved with the rest, there can be little motion.

Although it is said that in many other countries pithy legal proverbs abound, it may be that those who use them find similar difficulty in applying them without qualification. But it is remarkable how few such proverbs or pithy rules are found in the English language, or in common-law authorities in any language. Most of our current maxims have come down to us in a Latin dress, and more of them probably came from the civilians than from English judges. They seem never to have had English originals, and could have had little, if any, currency among the English people, whose common law was, in the main at least, well known to the mass of the people. The English forms, where they have been translated, are not found among the common fund of popular proverbs. They are often clumsy and incorrect, and have led to bad mistakes. To be sure, these mistakes are not confined to the Latin maxims, for one of the few rhyming English saws, although a modern one, led to a very serious contention on the right of juries in libel cases, Lord Mansfield maintaining his view by representing Mr. Pulteney's ballad on the acquittal of the publishers of the "Craftsman" as saying:—

"For twelve honest men have decided the cause,  
Who are judges of fact, but not judges of laws;"

when the balladist was twitting the Attorney-General for losing a case where the jury disregarded the charge of the court, and acted, as he claimed rightly, as those

"Who were judges alike of the facts and the laws."<sup>1</sup>

But rhymes on legal topics have never gained popular currency, although Coke's Reports were versified, and Burrow recorded a settlement case in doggerel. The lawyers and courts are oftener misled than the people by the stock maxims. None has been oftener misapplied than one which certainly should have been more carefully weighed than any other,—*Ignorantia juris, quod*

<sup>1</sup> Lives of the Chancellors, vol. vi. p. 176.

*quisque tenetur scire, neminem excusat.* This, which is not elegantly expressed, is generally paraphrased into a maxim that every man is *presumed*, not *bound*, to know the law, and has often been applied with that meaning. Yet in larceny, and perhaps in some other cases in criminal law, ignorance of the law, and reliance on a mistaken notion of legal right, may negative felonious intent. In *Martindale v. Faulkner*,<sup>1</sup> Maule, J., very neatly and plainly exposes the erroneous version. "There is no presumption in this country that every person knows the law; it would be contrary to reason and common sense if it were so." And Lord Mansfield, in *Jones v. Randall*,<sup>2</sup> in reply to a rhetorical flourish of Mr. Dunning on the presumed knowledge of the courts and judges, made this pertinent remark: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard on the profession if the law was so certain that everybody knew it; the misfortune is, that it is so uncertain that it costs much money to know what it is, even in the last resort." These suggestions have been accepted and acted on repeatedly, and yet the maxim is generally misquoted and very often misapplied.

The equity writers who have made many clandestine and unauthorized excursions into the fields of the civil law, which common-law judges would not hold an Englishman either presumed or bound to know, have gathered more of these maxims from foreign learning than from home sources. Some of them come near being sound rules of universal law. But if the leading maxims of equity were placed side by side, as independent and universal propositions, they would present a curious medley of contradictions, although safe enough when qualified and properly applied. But when we are told in one breath that priority of equity prevails, and then that equality is equity; that equity follows the law, yet only gives relief where legal remedies are inadequate; that equity treats that as done which ought to be done; and other propositions of similar obscurity, — we begin to appreciate Lord Mansfield's remarks.

We need not study maxims long to discover that the way out of our confusion requires more reliable guides. We find why it is that precedents are needed. Among the old sages, and among religious and philosophical teachers of all ages, the proverb is supplemented by the parable, or by some illustration from life.

<sup>1</sup> 2 C. B. 719.

<sup>2</sup> Cowp. 38.

Our old English authors sometimes preferred to let the precedent stand alone, so that any one might draw his own inference. But while many of the early reports and abridgments merely gave facts and judgments, the contemporaneous authors made little reference to them, although giving such explanations as served as good a purpose. And inasmuch as the principle is all that is valuable in the precedent, it seems better to put principle and judgment together, like fable and moral, so that there may be no blunder in drawing the inference. Our courts, from the prevailing American custom of preparing written opinions, have acquired the habit of expanding the principles involved in the controversy into legal treatises, sometimes at great length. There is value in these discussions, where they deal with legal rules which have not before been fully vindicated. Upon questions of statutory construction, or constitutional law, they are almost indispensable. But it may be doubted whether the courts might not act more profitably for the bar and for the public by more abbreviation. Of course the labor would be greater, for words would have to be carefully weighed, and most of our courts are already overburdened. The attention of lawyers is always first turned to a particular decision as bearing on a case by the headnotes or summaries prepared by the reporters, or other writers for the press; and while the average skill of these gentlemen is very creditable, they too are hurried, and will occasionally mistake the exact meaning and bearing of an opinion which they summarize, or omit a vital point. Long opinions are more liable to this misrepresentation than short ones, and are more likely to repel counsel who are driven into an emergency from spending the time necessary to read them critically. It is a commoner experience than it ought to be for courts to have cases brought up for review on points settled long before, which reporters have failed to note, or digest compilers have overlooked or placed under an inappropriate head. But, long or short as these opinions may be, a careful observer will note that by the elaboration of their reasoning they have to a great extent lost their quality of precedents, and become not much else than statements of doctrine. Facts are only recited so far as is necessary to illustrate the doctrine, and frequently they are not stated at all, beyond some general reference which shows that the law questions treated were really involved.

Indeed, it is nearly impossible to create such precedents as made up the old collections. Both civil and criminal treatises show that in early times there must have been either special verdicts, or some equivalent determination of the facts assumed and relied on, in nearly all of the decided and reported cases. The English judges had a good deal of jealousy of the prerogatives of juries, and often managed to cheat them out of their right to apply law to facts through a general verdict. Until bills of exceptions were invented, there was no other method of invoking the judgment of an appellate court on the law questions prescribed on the trial, except by special findings. But with us there are few special verdicts, and courts can seldom venture to declare precisely what facts the jury may have found. It is only on the hypothetical propositions on which charges are given and refused, that the law is now laid down in most instances.

It is evident that we have changed our ways, and that our jurisprudence is but sparingly furnished with wise saws or modern instances. We deal more with the abstract, and less with the concrete. We must accept this as a fact in all our attempts at simplifying and condensing our legal material. This is perhaps the experience of most countries having an intelligent bar. The measures which were adopted in France from the time when the customs were first ordered to be compiled, in the various provinces and municipalities governed by their own unwritten law, until the completion of the modern codes, all looked towards dispensing with case-law. The commentators on the local customs refer to more or less precedents, but the written collections which constitute the official evidence of their provisions are wonderful specimens of comprehensive brevity, and do not contain a word of illustration or argument. The Code Napoleon discountenanced entirely the making of precedents for future cases, and the French tribunals, as it said by those who have studied their practice, have carried out this precept with some rigor. French law-books seem to be written on the same principle.

In the United States, while we have in a general way professed to be governed almost slavishly by adherence to precedent, it is the sort of precedent before referred to, as containing doctrine in the shape of legal rules, and not doctrine inferred from given facts. The old American bar got into the habit of arguing cases on principle more from necessity than design; but it was a fortu-

nate necessity which enlarged their views and trained their intellects into independence and breadth. It has often been remarked, and is true, that the early lawyers did more to give vigor and manliness to the law than their successors, who have fallen into a good inheritance. No one can justly say the former days were better than these, in possessing greater minds or more legal learning. We have lawyers who would have been illustrious in any age or country. But it is just as true now as it was then, that wisdom is not found in a multitude of books, but in good books thoroughly mastered. And it is equally true, that reading without meditation is not much better than eating without digestion. Over-reading with too little reflection is one of the dangerous besetting sins of our time.

It is not presumptuous to say that the American colonists were not inferior to their British kinsmen in any particular except scholastic learning, and in this they had some eminent and a sufficient number of respectable representatives. But there were not many considerable law libraries. The ordinary supply of an office, outside of the opulent towns, could not have gone much further than the few standard text-books and digests of that period, and possibly some modern English reports. For many years after the Revolution, and down to the present century, we were without American reports, beyond, at most, some half a dozen volumes of none but local use. Coke, and Hale, and Bacon, and Comyn, and Viner made up the heavy books of the library. Blackstone was the daily manual, and represented the common law of both England and the United States, as then existing, with substantial accuracy. Hardwicke and Thurlow and Eldon were counted the greatest recent and existing lights, and the embodiment of equity in its improved shape. The political struggles of the colonies, and the institutions which were passing through experiment to permanency, had made every one familiar with the foundation principles of law and government. They had been compelled to look deeper than surface appearances, into the vital organs of human society. The American lawyer was as familiar with the old charters and liberties as with property law and contracts, and found more pleasure and profit in studying the text-writers who dealt with original principles than he might have done if his dearest interests were not directly involved in them. Both Coke and Hale were men of robust political virtue;

and had with different tempers but equal honesty passed honorably through experiences which had daunted the virtue of eminent contemporaries of each. To those who read their works with the same loyalty to justice, it is easy to see that every part of the law was in their sight a branch from the same tree, rooted in a deeper soil than the accumulated rubbish of cases. Great lawyers have said that Coke's Commentary on Littleton contains the whole common law. Some of them have said that he was the author of no small part of the law he propounded, because he laid it down dogmatically, and gave no authorities for it. But no one could successfully foist a new set of laws upon such jealous defenders of their old customs as the English were, and there is no reason to suppose that Coke declared any thing to be law that was not, in his opinion, the actual law of England; and, while not infallible, he was the best authority of his time, and did much to preserve the liberties of England, public and private. We have many admirable law treatises of recent production, but, with all their care and fulness, it sometimes happens that those great writers may still help us out of difficulties that our own contemporaries have failed to consider. Our predecessors who used those noble works had spacious armories and good weapons. Blackstone, too, in all but his unquestioning and highly respectable devotion to the political institutions of his day, was a true lawyer, and a man of liberal notions much in advance of his time, and of most of his associates. He suggested, if he did not originate, humane reforms. He made the law attractive, by showing its harmony and its bearing on all classes and conditions. The paucity of books, and the necessity of adapting the principles of the common law to a new state of things, compelled the American bar to think and reason out all important doctrines, and apply them according to their real significance. Courts and lawyers were often obliged to dispose of heavy controversies where there were no libraries at all. Yet we know that their work was wisely and thoroughly done, and that the early legal systems of our States and Territories were often more sensible and orderly than more modern ones. It took a considerable time to get rid of some harsh criminal rules, and of imprisonment for debt. But our land laws were simplified, our penal code became humane, and our remedial systems were relieved of many burdens and complications. While we have in late years made further progress, the



improvement made in sagacious law reform during our first half-century was not only in advance of English legislation and improvement, but was much greater than has been made since. It was largely due to the compulsion put on the bar of working out the law from its elements, and proving it as they proceeded, by experience and not by the furtherance of learned writers. While it would be unwise to discard any means of instruction, it is certainly true that facilities which relieve us from the necessity of thinking for ourselves are of doubtful advantage.

There is one source of knowledge concerning our early improvements in the law which has been strangely overlooked, — probably because not now readily accessible. Much of our acknowledging and recording system of conveyancing, and many of our business and civic regulations, came from the local customs of cities and corporate towns, which had much better methods of conveyancing than prevailed in other parts of the realm, and made much better regulations of trade and commerce than the general laws provided. The influence of these local usages must have been very great. Many of our most solid colonists came from towns, and not from the country, and, without any statutory order to that effect or even any written or formal recognition, their old usages became patterns of the new. It was this that led to many local differences in the common law of different colonies and States, and to more or less statutory differences. Upon this subject our text-books are either silent or misleading. They usually, and it may be said in most things universally, overlook the influence of these customs on our jurisprudence, and construe every thing by the general customs and laws of England, as if they regarded the variations as accidental deviations or unreasoned innovations, instead of usages often more ancient than the common law, and sanctioned by time and settled by long enjoyment. Every reader of history knows that the municipalities of England were its most enlightened and spirited places, and that they were always foremost in resisting encroachments, by prerogative or otherwise, on their rights. It needs no reasoning to inform us that this advancement in political standing could never have been made without something in local laws and usages favorable to its growth and maintenance. It would be difficult to reckon how much we owe the old English municipalities, and we ought to make it appear in our legal literature.

In considering how we may best secure a more intelligible and orderly body of law, a first necessity is a reliable knowledge of the history of our law. We are tolerably supplied with good general histories of our political and military experiences. But the lack of legal history is painfully felt whenever questions are raised concerning rights and proceedings having no place in American precedents. There are some good histories of English law, although they are sometimes deficient in that accuracy of statement which is required for judicial purposes. Modern research has brought to light many valuable documents which explain or illustrate legal questions. They have been used freely, and rated quite highly enough. But a patient lawyer who should diligently collate and compare what is said on various subjects by the leading law-writers of early times could not fail to discover a body of legal philosophy not understood by all legal historians, yet probably very significant to us. Between Hale's and Blackstone's days a great deal of manly philosophy, and some cardinal principles of freedom, became obscured. During that period arose the doctrine of parliamentary omnipotence, which was first asserted as an offset to royal prerogative, but became, so far as we were concerned, a much worse usurpation, and provoked and produced the American Revolution. While civil liberty was gaining ground in England, one would never infer it from a comparison of the law writings of the fifteenth and sixteenth centuries with those of the latter part of the seventeenth and the eighteenth. During this latter period, while there were several able and independent judges, the writers of law-books did very little to increase our respect for jurisprudence. Their works are tame and formal compared with the outspoken and nervous treatises of the old statesmen, who looked upon law as their sovereign mistress, and not as their kitchen-maid.

But even the best of these sages leave out of view almost entirely the local usages before referred to, which have so largely influenced American institutions. No way has yet been opened whereby we can conveniently become acquainted with the laws and customs of London, York, Durham, the Counties Palatine, the Cinque Ports, and the old seaports and boroughs in which we know the strength of the realm and the security of franchises had refuge. Enough appears to make us wish for more; but all is fragmentary, and much is imperfect otherwise. Those volumes

which antiquarians sometimes reproduce are not within general reach or comprehension, and are not always chosen with a desire to give useful information. We can generally pick a little out of them; but we want something better than *bric-à-brac*. If some good lawyer who has access to these things would perform for these old corporate usages and regulations as good service as the elder D'Israeli rendered in more purely historical and literary collecting, he would deserve well of the profession. Much would be explained in our systems which is now misunderstood, or not considered at all. And we should probably find the true reasons for many variations in the laws and usages of our older States, which have followed their emigrating children into the West and South.

If such a collection could be made complete enough to cover the whole ground, it would be both interesting and useful to compile from it a body of usages generally prevailing in the municipalities, and differing from the usual law of the realm. It is very well known that towns often copied each other's systems. But we can find very little on this subject, either in reports or text-books. The cases disposed of in the city and palatine courts, or other special jurisdictions, do not appear in the collections; and our own lawyers travelling abroad probably think as little of visiting these courts as of frequenting the sanctuary of a back-alley justice. The newspapers occasionally mention such public customary doings as strike their attention. Much amusement is sometimes produced by the boundary perambulations in the old city parishes of London, where urchins were formerly, and it may be are now, whipped at the landmarks, *in perpetuam rei memoriam*. Every year there is a solemn counting of nails and splitting of fagots, in performance of the conditions of some antiquated tenure. To most of us who read the accounts of these performances, the reasons of them are unfamiliar. Few know much, if any thing, about the Treasury usages, and the modern use of tallies, or how it came to an end in the burning of the Houses of Parliament. It has been shrewdly suspected that a more thorough knowledge of the processes of the Exchequer would have prevented some anomalies not unknown in our own practice, in rendering summary and *ex parte* judgments against public debtors and recognitors. And there are probably many things in the government routine which are about as little

known as local customs, that have crept into our business and been dealt with ignorantly. The researches of the Record Commission have brought out some things which indicate large reserves of material that could be obtained by proper search and diligence. When these matters are brought to light, we shall no doubt be able to find in them many peculiar ways and practices which will seem familiar from their existence in a modified form among us, as we often trace a family likeness to a remote ancestor.

So far as our recognized law is concerned, it has been a favorite scheme of legal philosophers to reduce it to a short and simple code, embracing all permanent and general rules, if no more. In our composite government this can never be done by authority. Our success in getting it done by law in the several States whose revised statutes are meant to approximate it, has not been flattering. The most celebrated revisions have led to much litigation, and the work of construing them has been increased by amendment.

But there is not, and never has been, any reason why those who have faith in the plan should not attempt it themselves. If properly framed, it would be very desirable, and might at any rate form the basis for a scheme of institutes. We have already several text-books on particular branches of the law, which have aimed at something like it, and have done much to prepare for it. But such a work cannot be well done at once or at a single heat. The condensing process must be very gradual. Before a short paragraph containing a perfect enunciation of a principle can be framed correctly, the entire statement must be found or prepared at sufficient length, and with care enough to include every exception and qualification. Not until the whole ground is covered in this way can the work of condensation begin. Then every redundancy must be so carefully pruned off as to remove nothing that is not superfluous. In this way, by degrees, the complete proposition will be developed, containing every thing essential, and nothing else. Such work cannot safely be done by the unaided work of a single person. It needs the aid of conference and suggestion, and of fresh and independent criticism.

Every formula that does not convey a clear and complete meaning to others is defective. The difficulty with single writers

is that they read their own writings in the light of their own knowledge and theories, and forget that others who read them do not have the same preparation, and do not look through the author's eyes. The Institutes of Justinian, which are perhaps as perfect of their kind as any legal writings in existence, were not only prepared by a joint commission, but are evidently old maxims newly arranged. The same formulas appear repeatedly in the Digest, and in older collections. The American codes, which have always been prepared under joint supervision, and are very ably drawn, are not exceptions to the rule that such formulation cannot be done at once. With all their care in comparing and revising, and in spite of the aid freely sought of outside criticism, they cannot be regarded as beyond the need of considerable amendment. The preparation of the French codes, the history of which is very carefully recorded, was more deliberate and cautious by far than that of the system of Justinian, and resulted in very remarkable success. They represent the successive efforts of centuries, and of many minds of several generations.

Some confusion has been caused by the use of the term "code," to represent what was formerly known as institutes, as well as with its old meaning as a body of enacted, instead of common-law, regulations. The distinction is not very important, perhaps, because the State codes have all been made to embrace common as well as former statute law. It is the common law which most needs this process. But there is a difference both in the capacity and in the necessity of compression, in different branches of the law, that it is not wise to overlook.

It will be found, on comparing the earlier collections of institutes, that those branches of the law which are most important, because pertaining to rights and estates, are most easily made intelligible in a short form, and that those which involve arbitrary rules instead of questions of moral principle or convenience are much more troublesome to condense. The customary land-laws were so familiar to the people, that they needed little more explanation than questions of natural justice. If we take the English books, we find Fortescue, St. Germain, Littleton, Finch, and some anonymous authors of institutes, putting the whole body of the common law within so small a compass that it can be read in a morning, with as fair a comprehension as if it had been considerably expanded. Justinian's Institutes, which are also very

broad in their scope, take up very little space. Loysel summed up the entire customary law common to the Pays Coutumier, which embraced the northern half of France, into nine hundred and nineteen articles, which average less than three lines to an article, and which, when accompanied by a very full body of comments and illustrations, — the result of the learned and enthusiastic devotion of several successive editors, all men of distinction, — require less than seven hundred duodecimo pages to contain them. The eighty-three articles, summing up the liberties of the Gallican Church, with preface and comments, occupy fifty-five duodecimo pages. The Great Charter and the Constitution of the United States, both “institutional” documents, are certainly any thing but prolix. The annotated edition of the Coutume de Paris, which was the common law of Canada, is in two small 16mo volumes, which can readily be carried in a side-pocket.

These summaries are chiefly occupied with civil rights, although some of them touch on crimes. But the criminal law, although pervaded by certain general principles, is nevertheless a system of positive law, and the best writers on it have found it necessary to write at some length. It has required less aid from commentaries for the same reason, because the text itself is its own comment. Early writers have been heavily overlaid with annotations, but these have been chiefly made up by multiplying citations or illustrations, and not by explanations.

These short treatises, whether broken up into distinct propositions or written consecutively in an orderly manner, are not calculated or designed to be used alone as complete bodies of the law. But they ought to be complete summaries of it, and to need no other help to give their readers a correct outline. It is said that Justinian's Institutes were meant for students. All persons who desire to know law or any other branch of knowledge find it profitable to have a preliminary view of the entire field, so that when they go more fully into details they can have constantly before them the general scheme, and know how each particular part fits into its place with the rest. When we have once learned this, the rest becomes comparatively simple. It is therefore of prime importance that these brief treatises should be very simple and clear, so as to present no hindrance to any reasonably good mind, and assume no knowledge beyond that of

ordinary men. After they have been carefully read, the larger knowledge must be obtained from more extended general commentaries and from special treatises, with such outside references and supplements as may be found convenient. But the little books will, if written as they should be, never lose their value for reference and review.

We have had some excellent contributions of this kind within a few years; not, perhaps, as complete and compendious as possible, but far more so than in the days of bulky books of badly arranged material seemed probable. The English handy-books have been followed by some excellent American first-books of various kinds, not yet, perhaps, sufficiently tested, but at least appearing well. Some valuable compends of existing law on special topics, which have acquired deserved reputation on both sides of the water for their exact brevity, have not been found suited for elementary teaching, because assuming too much knowledge. It is sometimes forgotten that under the jury system all of our law has to be applied to facts by men who have no professional training, and every one who seeks to formulate the law should bear this in mind. It is also one of the temptations of acute lawyers to deal with evidence as if cases could be established according to the strict methods of the logicians. But we all know that when issues once opened must be disposed of at once, with such testimony as is attainable and with no means of exhausting the possibilities, very few cases can be determined with logical certainty. We must go largely on presumptions from what seems to be a reasonable preponderance of evidence, with a full understanding that the finding may be wrong, but with a fair probability that it is right. The rigid logicians do not make allowance enough for the variable, but inevitably present, element of human nature, and they do not furnish the best rules for use in legal controversies, however valuable they may be as suggestions for improvement. It is unsafe to have any part of the law too subtle for popular comprehension. And laws which do not satisfy the popular sense cannot be carried out.

The French codes already referred to are said by the learned jurists of France to represent the popular usages very thoroughly. The reduction of the customs into shape was by calling assemblies of delegates from all parts of each province, and acting on their agreed testimony upon each provision. Many rules appear

in very antique language, and had evidently been handed down in the same words by tradition. From a comparison of these customs, learned jurists, acting on their own behalf and not for the government, deduced a system of rules which they found in all the customs, and which may be said to have been the common law of France. The Marine Ordinance of Louis XIV. is, no doubt, little more than the collation of the existing marine usages and regulations. It resembles very closely the other sea-laws. Before the Code Napoleon was passed, successive lawyers of the first merit had spent much labor in perfecting the statement of legal doctrines, and the French are noted for their skill in such work. The commission had few crude materials to deal with. And yet every sentence was discussed with the same thoroughness that made the translation of the English Bible so perfect in the accuracy and beauty of its language. When any American lawyer desires to set forth perfect legal formulas, he will find it necessary to use similar means, and no one need be troubled if perfection does not come in his day. We can find profit in less than perfection, if it is modest in its claims.

Our ordinary text-books are so well prepared that we need very little more than a good collection of institutes to present a complete system, and serve as a general introduction and analysis. Our books are often written by profound jurists, and most of them from the beginning have made principles prominent, and not merely dwelt on authorities. The English text-books since Lord Hale's day have very generally been no more than convenient digests. Jones on Bailments and Abbott on Shipping were out of the common order. The present generation of English lawyers take much more philosophic views than some of their predecessors, and deal with important questions liberally and sensibly. But while there never was a time when there were not great English lawyers, the last century did not bring to the surface any considerable ability in public law, and such men as Mansfield and Thurlow and the Yorkes will be remembered as exceptional. Eminence in legal acuteness alone is not likely to interest posterity.

During all of our early history we were constantly engaged in a struggle to maintain the most important principles of constitutional and international law, and our books are a natural result of that training. The names of Kent and Story always come to



the front in all mention of legal bibliography. Judge Story injured his later editions by diffuseness, but his books are, nevertheless, written on a true theory, and philosophically. Chancellor Kent's simple and orderly commentaries are as conspicuous for wisdom and sagacity as for sound learning, and made the law so plain to the common understanding that it is at once recognized as justice. We have a fair share of good treatises written by men of eminence and long experience. We find them rapidly taking the place of older books, and relieving lawyers from a good deal of case-reading. They are rapidly tending, however, to special treatment of narrow subjects, which is very convenient to the practitioner, but which is apt to lead the writers into treating them as hobbies, and exaggerating their importance. It is also likely to lead to dwelling on fine distinctions, which in business matters makes bad law. Where a distinction is too attenuated for ordinary notice, it is wise to conclude, in the language of the old adage, *de non apparentibus et de non existentibus eadem est ratio*.

When our law has been so modified by the new industries and interests so rapidly springing up on every side, as to need another Kent to bring it into system, he will find his material already very well classified; and so much of the law as is common to all of the States can undoubtedly be brought into so good a shape that the citer of many cases will be looked upon as one of the curiosities of the bar.

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