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## Literature in Law Books

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# WASHINGTON UNIVERSITY LAW QUARTERLY

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## LITERATURE IN LAW BOOKS\*

WILLIAM S. HOLDSWORTH†

The phrase "literature in law books" may seem to have in it a considerable element of paradox. And there is some justification for this view; for it is true that though law books often contain straightforward, well-reasoned, and clear expositions of principles and rules, they are not as a rule literature. It is not often that a lawyer, gifted with literary power, is moved by the importance or interest of his theme to make a statement of a principle or rule which rises to the level of literature. But the phrase is not wholly a paradox because there is a certain amount of literature, sometimes great literature, in legal text books and in the reports. This fact was brought to my attention some years ago in the following way. The Oxford University Press were publishing an anthology of English prose, and it occurred to some one that there might be hidden away in the reports specimens of great prose fit to be included in such an anthology. I was asked whether this was so but was told that I must confine my attention to modern times, since the specimens of the prose of earlier periods had been already printed. I selected some extracts from the judgments of Lords Bowen, Macnaghten, and Sumner; and those extracts were put before the editor, Sir Arthur Quiller-Couch. He was quite enthusiastic about their merits and seemed really surprised to find a new vein of great literature, of the existence of which he, a professor

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\* A lecture delivered to the Faculty of Law in the University of Birmingham on November 18, 1938, and to University College, Hull, England, on December 5, 1938.

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of English literature, had been quite ignorant. Since then I have thought over this question of literature in law books; and it has occurred to me that it might be useful to vindicate the literary capacity of lawyers by putting together a few passages from the books and judgments of the great lawyers of the past. My selection is necessarily only a selection; and others may be able to make a different and a better one. But I think that it is an interesting selection, and that it will prove that the title of this paper is not wholly paradoxical.

The earliest law books were not written in English but in Latin or French. But we must take some account of these books because in two of them—in Glanvil and Bracton—there are passages which can be said to be literature.

The passage in Glanvil, and I think the only passage, which can be said to be literature describes Henry II's institution of the trial by the grand assize on a writ of right as an alternative to trial by battle. Thayer says of it, "In the midst of the dry details of his treatise we come suddenly upon a passage full of sentiment, which testifies to the powerful contemporaneous impression made by the first introduction of the organized jury into England."<sup>1</sup> It is contained in chapter seven of Glanvil's second book and, translated into English, runs as follows:

That assize is a certain royal favour, given to the people by the mercy of the king, with the advice of his nobles, by means of which such healthy provision is made for the life and condition of men, that each may keep the freehold which rightfully is his, and all can avoid the doubtful issue of battle. And by this means it comes to pass that each can escape the last punishment of unexpected and untimely death, or at least the shame of perpetual infamy arising from the cry of that hateful and shocking word [Craven] which the conquered utters as the result of his disgrace by defeat. This institution is the product of the highest equity. For the establishment of the right which after many and long delays is hardly ever attained by battle, is attained by its means more easily and quickly. The assize does not allow so many essoins as the battle, and so labour and expense are saved to the poor. Moreover by as much as the testimony of several credible witnesses outweighs in actions that of one only, by so much is this institution more equi-

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1. *A Preliminary Treatise on Evidence at the Common Law* (1898) 41-42.

table than the battle. For while the battle depends upon the testimony of one sworn person this institution requires the oaths of at least twelve lawful men.

The literary qualities of Bracton's work are well known and well recognized; for both Lord Campbell and Maitland have stressed them. Many passages might be cited in support of their opinions—notably Bracton's introductory pages on *Jus-titia* and *Jus*. They are inspired no doubt by Ulpian; but, as Maitland says, they are no mere cant or common form, "for he feels that he is a priest of the law."<sup>2</sup> I shall cite two passages, both of which illustrate Bracton's persuasion that the law is a sacred thing. The first of these passages stands at the beginning of his treatise:

But since these laws and customs are often abused by fools and unlearned men, who ascend the judgment seat before they have learned the law, by men who are ever in doubt and unable to decide; and since they are often perverted by the majority, who decide cases according to their arbitrary whims and not according to the authority of the laws; for the instruction of the minority at least, I, Henry of Bratton, have braced my mind to study the old judgments of the just. I have perused diligently, not without night watching and labour, their acts, their counsels, and their opinions; and whatever I have found worthy of note I have digested into one book divided into titles and paragraphs. I have compiled it without prejudice to its correction by better opinion, committing it to writing for the verdict of posterity, asking the reader that if he find anything superfluous or weak he will correct and amend it or pass it over, since to remember everything and to be infallible is divine rather than human.

The second of these passages deals with the most acutely controverted question in Henry III's reign—the position of the King in the state and his relation to the law. Many passages in Bracton's book show that he was intensely interested in this question; and to his treatment of it the Parliamentary party frequently appealed in the constitutional controversies of the first half of the seventeenth century. Here is one of the most eloquent of the passages in which he sets out his view of these questions:<sup>3</sup>

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2. 1 Pollock and Maitland, *History of English Law* (1st ed. 1895) 187, n. 2.

3. Ff. 107a and b.

The king ought to be superior to all his subjects in power. He ought not to have an equal and much less a superior, and especially in the administration of justice, \* \* \*. Though in his capacity to receive justice he is no greater than the least in his kingdom, and though he is superior to all in power, yet, since the heart of the king ought to be in the hand of God, lest his power should be unbridled, let him apply the bridle of temperance and the reins of moderation, so that unbridled power may not lead him to do injustice. For a king can do nothing on earth save that which he may lawfully do, seeing that he is the servant and vicar of God. Nor is it any answer to say that "what the king wills has the force of law," because at the end of that law, the reason follows "since by the *Lex Regia* which was passed concerning his power"; that is, not whatever may be suddenly presumed to be the king's will, but what by the council of the magnates, with the authority of the king, and after due deliberation, has been rightly determined, is the law. His power is a power to do right not wrong, and since he is the author of right, he from whom rights arise ought not to give occasion to wrongdoing, and he whose office it is to restrain others from wrong should not himself do wrong. The king therefore ought to use his power to do right as the vicar and servant of God on earth, because that is the power of God alone, but the power to do wrong is the power of the devil and not of God, and of him whose works he does he does the king will be the servant. Therefore while he administers justice he is the vicar of the eternal king, but a servant of the devil if he turns aside to do injustice. \* \* \* Let him therefore temper his power by the law which is the bridle of his power, so that he may live according to law, for human laws are sanctified when they bind their maker, and moreover it is worthy of the majesty of a reigning king that he should proclaim that he is bound by the law. Nothing is so fitting to a ruler as a life obedient to law, and to submit his authority to law is greater than empire; and in truth he ought to give to the law the authority which the law has given to him; for it is the law which makes him king.

After the age of Bracton we get no great law books till the close of the Middle Ages. At the close of the Middle Ages there are Littleton's great book on *Tenures* and Fortescue's *De Laudibus* and his *Governance of England*. Littleton's book is a classic in that it sums up with great terseness and accuracy the medieval land law. From that point of view it resembles Stephen's classic work on pleading which sums up the common

law rules on that subject. But neither of these books is literature. On the other hand, there are passages in Fortescue's books which have a distinct literary quality. I shall cite one short passage from the *Governance of England*, which is the earliest piece of English literature to be found in any law book. Fortescue is advocating the better endowment of the Crown, so that the king may be able to master the lawlessness from which the country was suffering. Here is the passage with the English modernized:<sup>4</sup>

But this manner of endowment of his crown shall be to the king a great prerogative, in that he has then enriched his crown with such riches and possessions, as never king shall be able to take from it without the assent of his whole realm. Nor may this be to the hurt of the prerogative or power of his successors; for as it is shewed before, it is no prerogative or power to be able to lose any good, or to be able to waste or put it away. For all such things come of impotency, as doth power to be sick or wax old. And truly, if the king do thus, he shall do thereby daily more alms than shall be done by all the foundations that ever were made in England. For every man of the land shall by this foundation every day be the merrier, be surer, be far better in body and all his goods, as every wise man may well conceive. The foundation of abbeys, of hospitals, and such other houses, is nothing in comparison hereof. For this shall be a college, in which shall sing and pray for evermore all the men of England spiritual and temporal. And their song shall be such among other anthems: Blessed be our Lord God, for that he hath sent king Edward IV to reign upon us. He hath done more for us than ever did king of England, or might have done before him. The harms that have fallen in getting of his realm, be now by him turned into our altogether good and profit. We shall now be able to enjoy our own goods, and live under justice, which we have not done of long time, God knoweth. Wherefore of his charity it is that we have all that is in our homes.

It is not till the latter end of the Tudor period—till the Elizabethan Age—that we find any more literature in law books. Then we find it in the writings of the two great lawyers of that age, Coke and Bacon.

The great bulk of Coke's writings is not literature. But Coke was well read in literature, classical and modern. It is not

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4. *The Governance of England* (1885) c. 19.

surprising therefore that he can pen a fine phrase—*e. g.*, “the gladsome light of jurisprudence,” “[the laws of England are] the golden met-wand whereby all men’s causes are justly and evenly measured”; and it is not surprising that his enthusiasm for his theme has sometimes produced passages which are literature. I give two illustrations. The first of them deals with a theme on which Coke was always eloquent, *viz.*, the excellence of the common law; the second, with the happy effect of the wise settlement by the Tudors of the position of the copyholder. The first passage runs as follows:<sup>5</sup>

There is no jewel in the world comparable to learning; no learning so excellent both for prince and subject as knowledge of laws; and no knowledge of any laws (I speak of human) so necessary for all estates and for all causes, concerning goods, land, or life as the common laws of England. If the beauty of other countries be faded and wasted with bloody wars, thank God for the admirable peace wherein this realm hath long flourished under the due administration of these laws: if thou readeest of the tyranny of other nations, wherein powerful will and pleasure stands for law and reason, and when, upon conceit of mislike, men are suddenly poisoned, or otherwise murdered, and never called to answer; praise God for the justice of thy gracious sovereign who (to the world’s admiration) governeth her people by God’s goodness, in peace and prosperity by those laws, and punisheth not the greatest offender, though his offence be *crimen laesae majestatis*, treason against her sacred person, but by the just and equal proceedings of law. \* \* \* Cast thine eye upon the sages of the law that have been before thee, and never shall thou find any that hath excelled in the knowledge of these laws, but hath sucked from the breasts of that divine knowledge, honesty, gravity, and integrity. \* \* \* For hitherto I never saw any man of a loose or lawless life attain to any sound and perfect knowledge of the said laws: and on the other side, I never saw any man of excellent judgment in these laws, but was with-all (being taught by such a master) honest, faithful, and virtuous.

Here is the second passage:<sup>6</sup>

But now copy holders stand upon a sure ground, now they weigh not Lord’s displeasure, they shake not at every sudden blast of wind, they eat, drink, and sleep securely;

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5. 2 Co. Rep. (1658) viii-xi.

6. Coke, *Complete Copy-Holder* (1641) sec. 9.

only having an especial care of the main chance [*viz.*] to perform carefully what duties and services so-ever their Tenure doth exact, and Custome doth require: then let Lord frown, the copy holder cares not, knowing himself safe, and not within any danger. For if the Lord's anger grow to expulsion, the Law hath provided several weapons of remedy; for it is at his election either to sue a *Subpoena* or an action of trespass against the Lord. Time hath dealt very favourably with Copy-holders in divers respects.

Bacon, with the possible exceptions of Maitland and Pollock, is the most literary of all our lawyers. As we might expect, his literary genius is apparent even in his arguments on dry points of law; and his other legal works are often illumined by striking phrases and apposite illustrations. What better description was ever given of the effect of the Statute of Uses than that in the opening words of Bacon's Reading?<sup>7</sup>—"a law, whereupon the inheritances of this realm are tossed at this day, as upon a sea, in such sort that it is hard to say which bark will sink, and which will get to haven." I have selected two passages from his legal writings. The first is from his argument in *Calvin's Case*. It deals with the most pressing of all the constitutional questions of the day—the relation of the prerogative to the law. It is remarkable not only for its literary power but also for the fact that it shows that the views of a moderate prerogative lawyer like Bacon were then not so very far removed from the views of the Parliamentary lawyers. Perhaps if James had allowed Bacon to guide his policy, a *modus vivendi* might have been reached. Here is the passage:<sup>8</sup>

Law no doubt is the great organ by which the sovereign power doth move, and may be truly compared to the sinews in a natural body, as the sovereignty may be compared to the spirit: for if the sinews be without the spirits, they are dead and without motion; if the spirits move in weak sinews, it causeth trembling: so the laws, without the king's power, are dead: the king's power, except the laws be corroborated, will never move constantly, but be full of staggering and trepidation. But towards the king himself the laws doth a double office or operation: the first is to intitle the king, or design him: and in that sense Bracton saith well—*Lex facit quod ipse sit Rex*; that is, it defines his title; as in our law, that the kingdom shall go to the issue female;

7. 7 Bacon, *Works* (Spedding's ed. 1879) 395.

8. 7 Bacon, *Works* (Spedding's ed. 1879) 646.

that it shall not be departable among daughters; that the half blood shall be respected, and other points differing from the rules of common inheritance. The second is—that whereof we need not fear to speak in good and happy times, such as these are—to make the ordinary power of the king more definite and regular. For it was well said by a father, *plenitudo potestatis est plenitudo tempestatis*. And although the king in his person, be *solutus legibus*, yet his acts and grants are limited by law, and we argue them every day.

The second passage is taken from his argument in *Chudleigh's Case*. It is the best statement of the reasons why, on grounds of public policy, the common lawyers at the end of the sixteenth and the beginning of the seventeenth centuries, were waging so fierce a war against perpetuities. The passage runs as follows:<sup>9</sup>

But we should consider the perils immanent in the present estate; who see in this time the desperate humours of divers men in devising treason and conspiracies; who being such men that, in the course of their ambition or other furious apprehensions, they make very small or no account of their proper lives; if to the common desire and sweetness of life the natural regard for their posterity be not adjoined, the bridle, I doubt, will be too weak: for when they see that whatever comes of themselves, yet their posterity shall not be overthrown, they will be made more audacious to attempt such matters. Also another reason of State may be added \* \* \* and that is the peril which necessarily grows to any State, if the greatness of men's possessions be in discontented races; the which must necessarily follow, if notwithstanding the attainder of the father, the son shall succeed in his time and estate.

But omitting these considerations of state and civil policy, let us come to consideration of humanity.

A man is taken prisoner in war. Life and liberty are more precious than lands or goods. For his ransom it is necessary for him to sell. If then he be shackled in such conveyances, he is as much captive to his conveyances as to his enemy, and so must die in misery to make his son and heir after him live in jollity. \* \* \*

So passing over the consideration of humanity, let us now consider the discipline of families. And touching this I will speak in modesty and under correction. Though I reverence the laws of my country, yet I observe one defect in them; and that is, there is no footstep there of the reverend

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9. 7 Bacon, *Works* (Spedding's ed. 1879) 633-635.

*patria potestas* which was so commended in ancient times. \* \* \* This only yet remains: if the father has any patrimony and the son be disobedient, he may disinherit him; if he will not deserve his blessing he shall not have his living. But this advice of perpetuities has taken this power from the father likewise; and has tied and made subject (as the proverb is) the parents to their cradle, and so notwithstanding he has the curse of his father, yet he shall have the land of his grandfather.

The great constitutional controversies of the seventeenth century gave rise to floods of oratory and some memorable statements of the law in the courts and elsewhere; but not, I think, to any absolutely first rate literature. Eliot's great speech on Buckingham's impeachment and Strafford's in his own defence are political rather than legal documents. Nor do the law books of the second half of the century add much. There are a few striking phrases of Lord Nottingham—"Chancery mends no man's bargain but it sometimes mends his assurance";<sup>10</sup> "With such a conscience as is only *naturalis et interna* this Court hath nothing to do; the conscience with which I am to proceed is merely *civilis et politica*; and it is infinitely better for the public that a trust security or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor."<sup>11</sup> Some of the direful consequences which would ensue if wives could pledge their husbands' credit without their authority, were set out in picturesque language by Wyndham, J., in the case of *Manby v. Scott*: "the husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband"; "Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey"; "It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper."<sup>12</sup> Wyndham, J., must either have been a bachelor judge or have had an extravagant wife.

In the eighteenth century there is a considerable amount of literature in law books. I must therefore make a selection. I must pass over famous passages in Lord Camden's judgment

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10. *Maynard v. Mosely* (Ch. 1676) 3 Swanst. 653, 655, 36 Eng. Rep. 1010.  
 11. *Cook v. Fountain* (Ch. 1672) 3 Swanst. 585, 600, 36 Eng. Rep. 984.  
 12. (K. B. 1662-3) 1 Sid. 109, 122, 82 Eng. Rep. 1000.

in the case of *Entick v. Carrington*<sup>13</sup> and Erskine's orations in defence of the freedom of the press in many cases, notably in his speech in defence of Thomas Paine.<sup>14</sup> I shall give you three passages—one from a judgment of Lord Mansfield, a second from a judgment of Lord Stowell, and a third from Blackstone's *Commentaries*.

The first of these is from Lord Mansfield's famous judgment reversing the outlawry of Wilkes in 1768.<sup>15</sup> He held that the errors alleged by Wilkes's counsel were not sufficient to justify a reversal; but he went on to point out other errors which did justify it. Lest, however, it should be thought that he had yielded to popular clamour, he introduced into his judgment the following statement as to the position of the law and the duty of a judge:

But here let me pause. It is fit to take some notice of the various terrors hung out; the numerous crowds which have attended and now attend in and about the hall \* \* \* and the tumults which have shamefully insulted all order and government. Audacious addresses in print dictate to us, from those they call the people, the judgment to be given now, and afterwards upon the conviction. Reasons of policy are urged, from danger to the kingdom, by commotions and general confusion. Give me leave to take the opportunity of this great and respectable audience, to let the whole world know, all such attempts are vain. Unless we have been able to find an error, which will bear us out, to reverse the outlawry, it must be affirmed. The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences, how formidable so ever they might be: if rebellion was the certain consequence we are bound to say *fiat justitia ruat caelum*.

Lord Stowell was a master of literary style; and he took infinite pains with his judgments, from which many striking passages could be selected. One of the best known of these passages is his judgment in *The Indian Chief*,<sup>16</sup> in which he explains why an American residing in Calcutta must be deemed to have a British commercial domicil. He said:

Wherever even a mere factory is founded in the eastern

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13. (K. B. 1765) 19 How. St. Tr. 1030, 95 Eng. Rep. 807.

14. *Rex v. Paine* (1792) 22 How. St. Tr. 437.

15. (K. B.) 19 How. St. Tr. 1111-1114.

16. (Adm. 1801) 3 C. Rob. 12, 28-9, 165 Eng. Rep. 367.

parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries: In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted: and they become incorporated to almost the full extent. But in the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all of their fathers were—*Doris amara suam non intermiscuit undam.*

The literary merits of Blackstone's *Commentaries* were acknowledged even by his enemy Bentham in an often cited passage from his *Fragment on Government*; and Bentham's praise was endorsed by Gibbon, who said that Blackstone's book "may be considered as a rational system of the English Jurisprudence, digested into a natural method, and cleared of the pedantry, the obscurity, and the superfluities which rendered it the unknown horror of all men of taste." Many passages could be selected from the *Commentaries* which take rank as literature. I have selected a passage descriptive of the mixed English constitution of the eighteenth century, which has more substantial truth in it than those who read back nineteenth century ideas into eighteenth century institutions have realized. It runs as follows:<sup>17</sup>

And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his con-

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17. 1 *Comm.* \*154-155.

stitutional independence; but, which is more beneficial to the public) of his evil and pernicious counselors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the Crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

During the greater part of the nineteenth century there are many passages of clear statement and much logical reasoning in the judgments of great masters of the law, such as Cockburn, C. J., Lord Cairns, Lord Herschell, and Jessel, M. R. But, as a rule, they are just not literature. There is however a passage in the judgment of James, L. J., in the case of *Salvin v. North Brancepeth Coal Co.*<sup>18</sup> which easily qualifies. The Lord Justice is emphasizing the rules that substantial present damage must be proved before an action can be brought for nuisance. He says:

It would have been wrong, as it seems to me, for this Court in the reign of Henry VI to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common sea port and ship building town, which would drive the Dryads and their masters from their ancient solitudes.

At the end of the nineteenth and the beginning of the present century three great judges and two great professors have contributed to the literature of the law. The three great judges are Lords Bowen, Macnaghten, and Sumner. The two great professors are Maitland and Pollock.

Many passages of polished English prose could be selected

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18. (1874) 9 Ch. 705, 709-710.

from Lord Bowen's judgments. His style has been aptly compared to miniature painting. I have selected the following passage from his judgment in *Mogul Steamship Co. v. MacGregor*:<sup>19</sup>

What then are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. \* \* \* But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiff than pursue to the bitter end a war of competition waged in the interests of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill will or a personal intention to harm, it is sufficient to reply that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self advancement and self protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection.

In all the series of the law reports there are no judgments which exhibit such a combination of wit and learning as Lord Macnaghten's. Many of them are great literature. Perhaps the best known is his account in the case of *Foxwell v. Van Grutten*<sup>20</sup> of the history of the rule in *Shelley's Case*. Here is part of it:

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19. (1889) 23 Q. B. 598, 614-15.

20. [1897] A. C. 668, 669-71.

Things were not going well with the rule. Its feudal origin was a disgrace. Some judges thought that on these grounds it ought to be "discountenanced." Then it was constantly made a matter of complaint that the rule disappointed the intention, as if that were not its very end and purpose. \* \* \* It was always being disparaged, and, what was perhaps worse, it was always being explained. It led to profound discussions and to some very pretty quarrels. One object of Mr. Fearne's famous work was to refute Lord Mansfield's heresies in *Perrin v. Blake* then under appeal to this House. Unfortunately in a later edition the author suggested or proved that Lord Mansfield had not always been true to his own mistaken creed. That, of course, was an imputation not to be borne: it was resented and repelled from the bench; and so Lord Mansfield and Mr. Fearne differed and quarrelled. Lord Thurlow and Mr. Hargrave agreed in everything, and they quarrelled too. They had been friends. "The rule in *Shelley's Case*," so Mr. Hargrave tells us, "had often been discoursed upon" between them. Their friendship stood that strain. But when Mr. Hargrave laid the fruits of his labours before Lord Thurlow, and proposed to introduce a complimentary reference to the Chancellor, who had shewn in *Jones v. Morgan* that he once enjoyed a vision of the true doctrine in its primitive simplicity, Lord Thurlow felt it was time to draw back. He acknowledged the imperative character of the rule. On that point he was as sound as Mr. Hargrave. \* \* \* So far these great lawyers were at one. But Lord Thurlow thought that Mr. Hargrave was making too much fuss about his work of discovery or restoration, and he was not, I fancy, altogether certain what part was being reserved for the Lord High Chancellor, whether he was to come in as the master or the disciple. At any rate his reply was cold and distant. "For himself," he writes, "he really does not remember the time when he thought the application of the rule in *Shelley's Case* could depend upon anything else but the question whether the word 'heirs' was the designation of some particular person, or included successively all who might pretend to inheritable blood." That was putting the case in a nutshell. But it is one thing to put a case like *Shelley's* in a nutshell and another thing to keep it there.

His judgment in the case of *Gluckstein v. Barnes*<sup>21</sup> is another of his famous pronouncements. Gluckstein and others had promoted a company, and Gluckstein was one of its directors. The

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21. [1900] A. C. 240.

directors had made a secret profit of £20,000. In the liquidation of the company the facts came to light and proceedings were taken. Gluckstein was ordered to pay this money to the company; and from this decision he appealed to the House of Lords who dismissed the appeal. Lord Macnaghten sketched the genesis of the company in the following passage:<sup>22</sup>

These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes. They issue a prospectus representing that they had agreed to purchase the property for a sum largely in excess of the amount which they had, in fact, to pay. On the faith of this prospectus they collect subscriptions from a confiding and credulous public. And then comes the last act. Secretly, and therefore dishonestly, they put into their own pockets the difference between the real and the pretended price.

Gluckstein had argued that he ought not to be ordered to pay the whole of this sum, that some part should be collected from his fellow directors. As to that Lord Macnaghten said:<sup>23</sup>

My Lords, there may be occasions in which that would be a proper course to take. But I cannot think that this is a case in which any indulgence ought to be shewn to Mr. Gluckstein. He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humbler type.

Lord Sumner had so great a liking for an epigram and a biting phrase that it sometimes obscured his argument. But he was a master of English prose. His discussion of the basis and limits of religious toleration in the case of *Bowman v. The Secular Society* is one of the finest pieces of prose to be found in the law reports. He said:<sup>24</sup>

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22. *Id.* at 248.

23. *Id.* at 255.

24. [1917] A. C. 406, 466-7.

The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous. Whether it is possible that in the future irreligious attacks, designed to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times, and is a question of fact. I desire to say nothing which would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience. If these considerations are right and the attitude of the law both civil and criminal towards all religions depends fundamentally on the safety of the State and not on the doctrines or metaphysics of those who profess them, it is not necessary to consider whether or why any given body was relieved by the law at one time or frowned on at another, or to analyze creeds and tenets, Christian or other.

Let us turn now to the two professors.

An anthology of pieces of fine prose and sparkling epigrams could be compiled from Maitland's books; for everything which he wrote bears the stamp of genius. The two extracts from his works which I have selected illustrate two sides of his genius—his power to enliven a dull subject by a witty presentation of it and his power to extract new and important truths from familiar things.

Just as Lord Macnaghten could put humour into a history of the rule in *Shelley's Case*, so Maitland could put humor into that most dreary of all topics in Anglo-Saxon history—the hide. Here is his description of what historians have called “beneficial hidation”:<sup>25</sup>

Long ago the prevailing idea may have been that team-land, house-land, pound-land, and fiscal hide, were or ought normally to be all one; and then the discovery that there are wide tracts, in which the worth of an average team-land is much less or somewhat greater than a pound, may have come in as a disturbing or differentiating force, and awakened debates in the council of the nation. We may, if we like such excursions, fancy the conservatives arguing for the good old rule “One team-land, one hide,” while a party of financial reformers has raised the cry, “One pound, one hide.” Then “pressure was brought to bear in influential quarters,” and in favour of their own districts the witan in their moots jobbed and jerrymandered and rolled the friendly log, for all the world as if they had been mere modern politicians.

No collocation of names is more familiar to lawyers than that of Coke and Littleton. But who before Maitland realized that there was a paradox in that collocation? Here is his statement:<sup>26</sup>

Perhaps we should hardly believe if we were told for the first time that in the reign of James I a man who was the contemporary of Shakespeare and Bacon, a very able man too and a learned, who left his mark deep in English history, said, not by way of paradox but in sober earnest, said repeatedly and advisedly, that a certain thoroughly medieval book written in decadent colonial French was “the most perfect and absolute work that ever was written in any human science.” Yet this was what Sir Edward Coke said of a small treatise written by Sir Thomas Littleton, who, though he did not die until 1481, was assuredly no child of the Renaissance. \* \* \* A lecturer worthy of that theme would—I am sure of it—be able to convince you that there is some human interest, and especially an interest for English-speaking mankind, in a question which Coke's words suggest: How was it, and why was it, that in an age when old creeds of many kinds were crumbling, and all knowledge was being transfigured, in an age which had revolted against its predecessor, and was conscious of the revolt, one body of doctrine and a body which concerns us all

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25. *Domesday Book and Beyond* (1897) 448.

26. *English Law and the Renaissance* (1901) 3-5.

remained so intact that Coke could formulate this prodigious sentence and challenge the whole world to contradict it?

The series of obituary notices of Pollock in the *Law Quarterly Review* of January, 1937, has done justice to the range and variety of his literary gifts and to his devotion to the study of the law. My first extract shows how his wit and imagination and his profound knowledge of the law, which enabled him to write such books as *Leading Cases Done into English*, was exercised upon the confusion introduced into the land law by the coming of shifting and springing uses and executory interests:<sup>27</sup>

The arbitrary legislation of the Tudor period plunged us into a turbid ocean, vexed by battles of worse than fabulous monsters, in whose depths the gleam of a *scintilla juris* may throw a darkling light on the gambols of executory limitations, a brood of coiling slippery creatures abhorred of the pure Common Law, or on the death struggle of a legal estate sucked dry in the octopus like arms of a resulting use; while on the surface a shoal of equitable remainders may be seen skimming the waves in flight from that insatiable enemy of their kind, an outstanding term.

My second extract is perhaps the finest statement ever made of the creed of all true students of the law—the creed expounded throughout English legal history by such men as Bracton, Coke, and Mansfield. After describing Watts's great fresco in Lincoln's Inn Hall in which the great law-givers of the world are portrayed, he says:<sup>28</sup>

There you shall see in very truth how the spark, fostered in our own land by Glanvil and Bracton, waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt and Mansfield, and the Scotts, and others whom living men remember. You shall understand how great an heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this living temple of justice, that immemorial yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much

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27. *The Expansion of the Common Law* (1904) 13.

28. *Oxford Lectures and Discourses* (1890) 111.

as one stone thereof, and say, The work of my hands is there.

With this great piece of prose my anthology ends. I hope that these extracts from legal text books and reports will prove that there is some justification for the title of this paper, "Literature in Law Books." In fact I think that it would, for several reasons, be surprising if no such literature was to be found in them. In the first place, law is the basis upon which all government rests, and without it no civilized life would be possible. It is the foundation upon which all the social sciences are built. As the writer of the Year Book of 1432 said,<sup>29</sup> "The law is the highest inheritance which the king has; for by the law he and all his subjects are ruled, and if there was no law there would be no king and no inheritance." Naturally lawyers realize this fact more fully than laymen; and its realization has, from the time of Bracton to our own times, inspired some of the most striking of the passages which I have here quoted. In the second place, law touches all the most important aspects of national life. Great constitutional questions, vital economic questions, and many social questions raise issues which arouse much party feeling and party strife. Lawyers set to decide such questions feel their importance; and, for that reason, their exposition of the legal principles which should be applied to solve the particular legal disputes which they occasion are coloured by their sense of the great issues involved, and animated by their desire to command assent to their views. For that reason they sometimes assume a supremely literary form. In the third place, the continuity of English legal history will often make it necessary to trace the manner in which a principle or a rule or an institution has been molded under the pressure of political, social, or economic needs and theories. In the hands of an historically minded lawyer gifted with literary power such an exposition may easily lead him to write passages which rank as literature. In the fourth place, the curious results which a too technical development of the law sometimes produces may induce a great lawyer with a sense of humour to expound the history of a doctrine and its present position in a passage which is, to the initiated, a gem of literary exposition. Lastly we must

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29. (1441) Y. B. Pas. 19 Hen. VI, pl. 36.

not forget that our great lawyers have always been amongst the ablest men of their age, and that some of them have studied many other things besides law. It would be surprising if on a great occasion their exposition of the law did not attain the dignity of literature. For all these reasons I think that it may be maintained that there is literature in law books which, though, relatively to the great mass of law books, small in quantity, yet is of such a quality that it adds appreciably to the distinction of the large body of great English prose.