1879

Law Abridgment: Closing Address Delivered Before the Graduating Law Class of the University of Michigan, March 20, 1879.

James V. Campbell

Law abridgement : closing address delivered before the graduating law class of the University of Michigan, March 20, 1879 / by James V. Campbell.

Campbell, James V. (James Valentine), 1823-1890.
Ann Arbor, Mich. : S.C. Andrews, 1879.

https://hdl.handle.net/2027/mdp.39015071590320

LAW ABRIDGMENT.

CLOSING ADDRESS

DELIVERED BEFORE

The Graduating Law Class

Of the University of Michigan, March 20, 1879.

—BY—

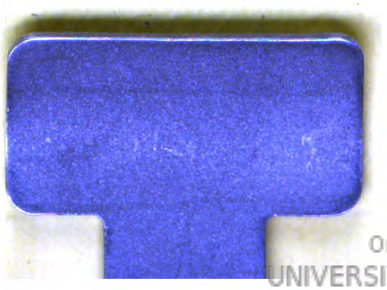
JAMES V. CAMPBELL, L. L. D.,

Marshall Professor of Law,

ANN ARBOR, MICH.

S. C. ANDREWS, PUBLISHER.

1879.



LAW ABRIDGMENT.

It would be a very pleasant thing if, in giving the last words of counsel that you will hear in any formal way in this place, some plan could be worked out which would enable each one of you to go straight forward to the goal of his ambition. Beginning with the inexorable rule of society that every one is bound to know the law, the student and the lawyer find out year after year that such knowledge seems more and more imperfect. Yet in all common emergencies it comes reasonably up to the occasion, and enables most honest and sensible men to deal safely.

We hear on all sides complaints of the increasing mass of printed Reports and text-books, which it is said the lawyer must find some means of mastering, but which no life is long enough to read. The young lawyer, as he scans the dreary catalogues, and wonders what Crœsus can buy or what brain can learn all this lore, is sorely puzzled what books to choose from the thousands that have found printers. And when a few years of practice have shown him how small a share of these books have done any good in the world, he is forced to consider, whether the evil can not in some way be removed. The remedy has not yet been found, and perhaps may not be, unless some great convulsion should come, which shall destroy laws altogether. This is not the relief we desire.

It may be that one reason why we find no remedy is because we have no clear idea of the mischief. And while it may need some greater pressure, and some intolerable grievance, to make any of us see the true condition of affairs, I have thought it could do no harm to spend this hour in making some suggestions on the subject.

The evil is mostly felt in the supposed necessity of attempting to find out what has been said since the beginning of time by any court in England or America, upon such questions as arise in practice. To discover this, counsel, by a legal fiction, are supposed to exhaust all the Digests, and from the brief notes there found hunt up the many decisions in point. Some able lawyers actually attempt this at times. Most of them are wise enough to make such long excursions rarely. The voice of the Bar declares—if not truly with a measure of truth—that decisions can be found on every side of every question, however many sided it may be. In this state of things courts and counsel feel called

upon to determine on which side the weight of opinion lies. Here again there are two ways of decision. The wiser lawyer, who is willing to reflect on the principles involved, cares less for the numbers than for the wisdom of the witnesses. Yet some men, whose ability cannot be denied, act upon the belief that the majority of voices should prevail. The diligent student, who traces up this majority of decisions to their sources, will often find they all come from one source. And it sometimes happens that the original decision, on which they all depend, was misreported, or based on manifest error, and has been repudiated by the courts of the jurisdiction where it was rendered.

For much, and sometimes for all of the work of research, reliance is placed on Digests alone, or on the head-notes of the Reporters. But the best of these useful men may omit important points, or overlook guards and qualifications, and thus mislead his readers. And the printer or copyist may baffle his skill, by leaving out or putting in some small word, or by changing one where the writing is not legible, and in that way lay down a legal rule for which no court is responsible. The maker of Digests perpetuates these blunders, and by similar mishaps adds to their numbers. These in due time help to make up the weight of decision; so that the slip of the printer's journeyman may pass for the wisdom of learned courts.

Even this does not end the risks. There is a long list of text-books, some very good and some very bad. In all ages great lawyers have been found, who have won fame and gratitude by reducing the principles of law to form and system, and bringing together in one treatise all that can throw light on the subjects they have chosen. Where this work has been thoroughly done, their books are sometimes received as more than substitutes for all the books before them. The curious reader, who ventures with his moderate learning to seek out the wisdom of those ancient Englishmen who wrote in that strangest of all jargons—Law-French, or in Latin that Priscian might have criticised, is taught a wholesome lesson of humility, as he finds in their almost forgotten pages the greatest principles set forth so clearly and completely, that none of their successors have improved upon them. To this day the defenders of civil liberty, when they speak most forcibly, find themselves repeating phrases that were familiar when the Great Charter was signed, and are much older than their history. The student who reads what Fortescue, and Finch, and Sir Thomas Smith have to say about laws and institutions, needs no commentator to teach him that he has been near the fountains of justice. Yet these in turn have been displaced by writers who wrote in English, and brought experience and manly independence into the use of a larger body of hearers. The studies of twenty years that Lord Coke says he gave to his Institutes, and the life-long devotion of that pure and just patriot, Sir Matthew Hale, left no room for much addition to the knowledge they bestowed on their large subjects. The lawyer who seeks to glean in the fields they reaped will find little grain ungathered. But the century between Hale and Blackstone produced very few legal treatises of permanent value. And until Lord Tenterden wrote his book on Shipping,

such works as appeared were mostly slavish and clumsy compends, where the compilers—for they do not deserve the name of authors—made no attempt to reach legal principles, and seem to have supposed that the law, instead of being a science, was a mere bundle of decisions resting on resemblances. The only value of their books is in the references to Reports and older writers. These men, who have gained more fame than they deserve, are largely responsible for the increase of mere case-lawyers,—a bigoted and narrow generation who have done all in their power to retard the natural and wholesome growth and improvement of jurisprudence. They beguile lazy or hurried counsel into neglecting even Digests and Reports, and trusting implicitly to their show of authorities. Edition after edition is issued, each claiming superiority by an array of some thousands of new citations, until the young lawyer, who is plied with the publisher's handbills, is persuaded that men who have such industry must be prodigies of learning. Some of them are; for authors of merit have submitted to the craving for cases of their hungry brethren, and waste their own valuable time in really examining what some legal authorities appear to have trusted to their office-boys. It is difficult to magnify the mischief done by the mob of so-called law books, which, as they are hastily read, seem plausible, but which are never of any use when a real controversy arises. No book can ever help courts or lawyers, unless written by some one who has had much business experience. The most perfect books are those where principles are stated so plainly and concisely, that while cases are cited in their support, their simple statement is their best defence. Of such works America has produced its full share of the best, and we are continually gaining others. But crowding in with them, and jostling them in public esteem, are much larger numbers of books, well bound, well printed, and bulky, yet of very little use, where they are not worse than useless. They are largely written by men of some ability and a good deal of cramming, whose chief lack is of that practical experience without which no one can make a useful text-book. Unfortunately, in glancing over such productions, which abound in platitudes and axioms, their defects may not be seen until some case arises calling for precise doctrine, and the want of precision only appears when it leads to mischief. They are often made up of acknowledged and unacknowledged quotations and paraphrases loosely strung together, and sometimes parade stray passages—not always accurately given—from foreign law. But their special strength is in the multitude of citations, which are added in dozens and scores to fortify the plainest as well as the most doubtful propositions. These beguile unwary counsel to insert a cheap and showy filling in their briefs. And it now and then happens that some unlucky quotation, which cannot be verified in the Reports, leads to the discovery that the compounder of this miscellany has pilfered most of his materials ready made, and has borrowed some blunders with them. Citations which are mistaken in name, or page, or volume, can sometimes be traced back from book to book for a century, and are found to have been first set down

wrongly by a slip of the pen, or an uncorrected proof, in the works of some one who was usually very careful. It is amusing to see how many such blunders have been repeated in these pretences of research.

Another common abuse is annotating new books to secure a copyright. It is difficult to get a reprint which contains no more than the work of its author as he chose to give it to the public. Original editions are costly and are not much imported, because reprints would undersell them. But when some learned and disciplined writer has done his best to present such a clear and condensed view of the law as rejoices every judicious reader, his modest duodecimo appears in an American edition in one or more heavy octavos, where the rivulet of text is choked in a swamp of notes, dreary and pathless, but swarming with the inevitable citations. Perhaps a *quaere* is found here and there, to make people think that in spite of his own intellectual labors the note maker has found time to look at the book itself.

Very few sensible lawyers care to hunt up a score of authorities upon a plain proposition, and it is well they do not. The only use of any precedent is to show the practical recognition of some legal rule, and to define its application. A single well considered precedent, from a court whose decisions are of binding authority, is sufficient and conclusive, no matter how other courts may deal with the subject. In cases where there are no precedents at home directly in point, the use of foreign authorities concludes nothing. They are of no use except for the merits of their reasoning. In very many cases the disagreement among courts is due to local usage or tradition of which the opinions make no mention, and not to any dispute upon the same principle. There is always risk in forming a judgment upon any unfamiliar system. The same language is understood differently in different States and Countries; and the implications which control in the interpretation of phrases are seldom identical, even in the most closely connected communities.

In considering how we can avoid giving some degree of credit to so much rubbish, we may draw some comfort from the fact that the evil has begun to cure itself. The natural healing forces always do the best work. As all our valuable political and legal reforms have worked themselves out with very little help from philosophical plans, so it may be fairly expected that such evils as have arisen from our redundant law writings, and the useless attempts to master them all, will cease, as they have already been checked, when we fully appreciate the folly of trying to master them.

This is not the first or the second time when it has become necessary to rid the law of its burdens. In every instance where the attempt has been wisely made, it has been aimed at getting legal principles defined apart from their accidental surroundings. In every country, and in all periods, the unwritten law, which is the basis of every system, has been found in natural justice, or deduced from human transactions. To know what is understood as customary law, we must know what dealings of man with man have been approved or condemned by authority and popular acquiescence. Until the con-

duct of men furnishes a practical test, we can never tell precisely how a theoretical principle will work. The same difficulty which has always attended paper schemes of government, which were not the expression of existing institutions organized but not vitally changed, must always attend legal theories never tried by experience. A system of law built up on precedents is the safest and best that can be devised.

But the only value of a precedent is in the rule on which it rests. If that rule is capable of clear verbal definition, its expression will serve all the purposes of the detailed decision. If it were not for slowness on the one hand, and subtlety on the other, there would be no need for preserving any more. A time comes when the rule is so completely defined that it ceases to be argued, and is treated as an axiom. The mischief of our day, and of a long period behind us, is, that there are some really acute and strong lawyers who never knew and never will learn that a legal principle can stand alone, and needs no further aid from the expressed approval of this or that court. If a writer on Geometry, after showing that the square of the hypothenuse of a right-angled triangle is equal to the squares of the other sides, should fortify his assertion by the names of all the geometers who have held that opinion, he would be laughed at. Yet that is not a self-evident proposition, and is not as elementary as some legal rules which often appear in our books with an equally useless train of corroborating references.

The recognised leaders of the Bar and of the Bench are very generally becoming convinced of the folly of needless citations; and their arguments and opinions, except where a different course is plainly called for, seldom undertake to prop up doctrines that need no support. When they do cite cases, they do not pick them up at hazard from foot-notes and Digests without examination, but prove their correctness.

The remedy will be found—when it is found— in some method of obtaining a condensed and clear statement of those principles which now have to be drawn from scattered sources. In several countries this process has been tried with varied success. We are all interested in turning our attention to it.

The first thing that meets us is the increasing multitude of Reports; and there are difficulties in dealing with this rapidly growing mass of repetitions. Reporting is now no more than the publication of the full decisions of courts, with an editor's synopsis of the heads of the discussion, and sometimes a narrative. There is here much room for economising.

Lawyers and courts do not always remember that no tribunal in this country has any authority to lay down the Common Law for the whole country. Under the Constitution of the United States the only law deriving authority from the general government is written law, including the Constitution, treaties, and valid acts of Congress. The power to lay down Common Law with authority belongs to each State for itself. The only Reports absolutely essential in any State are the English originals of the Common Law and of

Equity, the Reports of the United States Supreme Court upon the laws of the United States, the Reports of the older States—if any—from which local jurisprudence was borrowed, and the home Reports. Valuable as any others may be, they are not of binding authority. The courts of most of our States are constantly making desirable contributions to jurisprudence, and the enlightened lawyer will not overlook them. But a more sparing and discriminating use of them, with a due recollection that they are to be sought for light and not authority, would be wise.

A crying evil is the legal or practical compulsion put on courts of writing elaborate opinions, which sometimes seem to be treatises rather than decisions. Oral opinions in the days when they were generally given, were more concise, and much less prone to laying down unnecessary positions. Their value as precedents was greater, because the immediate connection between facts and results was more obvious. The duty of the Reporter in preserving such opinions compelled him to a judicious combination of clearness and brevity. In cases of novelty and peculiar difficulty written opinions would still be prepared, and be valued because of the necessity. No doubt all such Reports should be revised by the Judges, to avoid the variances which are sometimes found among the old Reporters. But this would not be difficult.

Under our usages there are many decisions which might safely be dispensed with as precedents. There are, as we all know, rules of right and rules of remedy. Rules of right must necessarily be uniform. To a certain extent the ordinary rules of practice should be uniform. But many practice questions are so far subject to discretion that precedents upon them are misleading, and a slavish reliance on them causes waste of time and expense. In this State practice questions are not common. If the Bar could be induced everywhere to be liberal, and to rely more upon the rules of court and their own good sense, the multitude of Practice Reports, which in some States almost outnumber the decisions on merits, might be consigned to the paper-mill, where they could do no harm.

Another source of mischief is found in citing decisions on the admission and exclusion of evidence. Here, again, general principles cannot be too carefully defined; and such rules as are arbitrary must also be familiar. But the admission or rejection of a particular question in a particular case can seldom be a guide in any other case, unless it rests on some peculiar ground. Lord Mansfield, who was a most sensible judge, was very liberal in admitting testimony; and in nine cases out of ten, unless a question strikes a clear-headed trial judge as improper, he is right in receiving it. There is no branch of the law which ought to be kept more free from over-nicety than evidence.

Another class of decisions, which most of us like to read, are nevertheless unsafe precedents. In Equity and Admiralty cases, where the facts and the law are combined in one decision, it is no uncommon thing for men who should know better, to confound conclusions of fact with conclusions of law. The same difficulty formerly arose in criminal cases by encouraging special verdicts.

The tendency of all professions is to generalize and classify, without allowance enough for varying circumstances. All equity lawyers know the difficulty of getting Courts and the Bar to understand that fraud is usually a question of fact and not of law. Some Admiralty lawyers regard the finding in a given case that a vessel should have ported her helm, or gone through some other nautical manoeuvre, is a crucial test for all other vessels in nearly similar positions, without reference to tides, currents, or other uncertain conditions. Writers on Criminal Law multiply what they call legal presumptions, and hold innocent men guilty until they prove their innocence, because in some similar case a jury has convicted a man who was really guilty. The notion, which is certainly not a rule of law, that a jury not only may but should convict when certain ambiguous facts exist, has led to many wrong convictions, and not a few judicial murders. No finding of fact by court or jury should ever be made a precedent.

If we could get rid of all reported decisions that do not really settle law questions, their bulk would be much reduced. The reduction of bulk would in turn diminish the confusion of facts and law, by bringing the real questions in every case into plainer view.

Unless a change is made in the material of our Reports, or in the manner of using them, a resort to some other sources of law in their place can hardly be avoided. If this is not carried too far it will be a great relief. The complex character of our government will necessarily prevent any official codification of American Law.

We have had more or less State Codes of Practice, but these involve no permanent principle, because one remedy, if convenient, is as good as another. Any plain method by which substantial justice is reached without delay is good enough. I make therefore no reference to practice. Statutes are for other reasons beyond control. Our legislation is unstable, and bad laws are very common. It is fortunate that our legislators have left untouched the substance of our unwritten law; for, confused as it is, there is some method and order in it, and it can be reduced to system much better in some other way than by hasty annual or biennial experiments.

We are apt to be deceived by names. Something like the work of Justinian—whose name always comes up in this connection, has been done, and well done, in Common Law countries. But not being done under the direction of governments, or under formal titles, these labors have not been classed in the same way.

From such sources of knowledge as are open to those who make no claim to acquaintance with foreign jurisprudence, enough can be learned to throw some light on the methods of relief introduced in other countries.

There is a vague idea that the Roman Law was never well defined until formulated by Justinian. In fact—so far as Europe is concerned—what he did may almost be regarded as the last dying utterance of the Empire. The original hold which Roman Law had in that region was taken before he accomplished his great work. There were codes and institutes before his day, and

the Theodosian Code was never superseded by his in some parts of Europe. In the obscurity of the dark ages it cannot be known how widely his Body of the Law had been circulated; but the great rejoicing over a manuscript found at Amalfi in the 12th century seems to indicate that prior knowledge of it was largely traditionary. Nevertheless the Corpus Juris of Justinian has represented the Roman Law in modern times as its most complete and authentic evidence. It was meant to supersede all the old authorities, and, so far as it operated at all, it generally did so. While there is a great difference of opinion concerning its merits, it has served as a model for shaping much more recent jurisprudence. Its plan, therefore, is suggestive. It contains a collection of written laws, a Digest of Common Law, and a synopsis of legal principles.

The first part compiled was the Code, which contains the Imperial Constitutions, and bears some analogy to a volume of Revised Statutes. The Code is said by the Civilians to have been very unequal in composition.

The next work was what is commonly known as the Digest or Pandects. This purports to be a collection of extracts from the opinions and works of celebrated jurists, on legal questions, combined in a somewhat cumbrous system, and covering all points considered likely to arise. No attempt was made to condense or paraphrase. All was in detached quotations. But liberties were taken with the language; and there is no certainty how much in any given passage was written by Ulpian, Paulus, Gaius, or other old authors, and how much by Tribonian, who is said to have done most of the altering. He was authorized by the Emperor to take these liberties, and he never explains what they were. This work, for which ten years were allowed, was done in three; and while it is a valuable mine of judicial knowledge, it is regarded by learned lawyers as in style and arrangement a very slovenly production. It has some admirers who as a witty French Commentator declares make a fetish of it. Some jurists, on the other hand, of whom the learned Hottoman is an example, not only charge Tribonian with dishonesty—which seems to have been his undoubted failing—but accuse Justinian and all his company with corrupting and mutilating the beautiful jurisprudence of Rome, and placing in its stead the trash of Greeks, Syrians and Africans, and not the genuine opinions of great Roman sages. But, as the more temperate writers suggest, the middle view is doubtless the true one. Though Tribonian had only two men of note, Theophilus and Dorotheus, among his sixteen assistants, he was himself—as admitted—very much such a man as Lord Bacon in intellect and learning; and although venal and dishonest, there was no reason why he should wish to pervert the laws. The Emperor had unbounded authority, and could make the law to suit himself. The general spirit of the system is despotic. The real wrong was in falsifying and changing the words of the old lawyers, so as to make them sponsors for what they perhaps would not have approved. How far this was done no one knows. The dispute is not within my present subject.

Although the number of volumes said to have been compressed into the

Digest is enormous, they must have been rather small treatises, for the new work is said to contain a twentieth part of the bulk of the originals. Justinian forbade the further citation of any previous authorities, and ordained that no commentaries should be written on the Digest. He expected judges to decide their causes by using their own good sense in applying the doctrines of the Code and Digest, and of his Novels, or new Constitutions, whereby he introduced some further changes. The Code itself was twice compiled.

The plan was completed by the Institutes—a compact and well arranged treatise for the use of students, setting forth the leading rules of the law with wonderful clearness and brevity. Yet this admirable compend furnishes an illustration of the insufficiency of very concise maxims for practical guidance. Even among lawyers—to say nothing of laymen—abstract propositions do not seem to make sufficiently definite impressions. Rules are not understood without illustrations, and imaginary illustrations are not as good as real controversies. This legal work, which seems a model of clearness, has been more commented on than any other secular work in existence. In 1701, as Lord Mackenzie has pointed out, a work was published by a learned German Professor, entitled "On the deplorable multitude of Commentaries on the Institutes." And, as his lordship remarks, "even in our day the tide has not yet turned, for hardly a year passes without adding some volumes to the camel's load." *Roman Law*, 26. In the United States, where no one can have much practical experience in questions of Roman Law, we have had some contributions to this literature.

The amount of old law put forever out of the way by the jurisprudence of Justinian was enormous, and the labor was undertaken to relieve a similar pressure to that we now complain of. It may be worth remembering that while the awkward but more practical Digest has not been very extensively meddled with, the simple and clear synopsis of principles has probably caused more to be written to explain it than the whole system superseded.

Such treatises as the Institutes have one capital merit which can hardly be overrated. They give a comprehensive view of all the law with which they deal, in such a way that the reader sees the mutual relations of the several departments. No one can fully comprehend, or rightly value, any system of laws, until he sees how all interests are regulated. The reasons why breaches of the law are remedied—one in civil and others in criminal form, sometimes in proceedings *ex-contractu* and sometimes *ex-delicto*, sometimes by damages and at other times by specific redress, now by public, and then by private intervention, are often supposed to be capricious and arbitrary, when in fact these matters have shaped themselves more wisely than any theoretical scheme could plan them. No one conceives how one interest affects every other until he sees them all together. Those great men who have been permanent founders of jurisprudence, such as Coke, Hale, Mansfield, Hardwicke and Marshall, never seem, when dealing with one subject, to have lost sight of the rest; and their reasoning and its force can never become obsolete.

The difficulties we have to deal with belong more especially to Customary Law Countries, where the foundation of the law rests on usage and precedents, and where the written law is construed with the aid of the unwritten. With some difference in circumstances, there has been much similar experience in England and France, and remedies have been attempted in both.

Without dwelling on uncertain antiquity, the first accessible decisions on the customs of the realm of England are generally understood to be the Year Books. The old private treatises do not deal much in proofs and illustrations. The fact that no one, who is not a little pedantic, indulges much in citations from these ancient Reports, shows that some substitute has been found for them.

The earliest compends were once called Abridgments, but are now better known as Digests. Some of them group together all the decisions on one point with a single statement, while others repeat them. But all gather the law under alphabetical heads. It was not systematised otherwise.

The earliest work which is still authority, that deserves the name of a scientific law book, is Littleton's Tenures. The greatest lawyers in England and France place it in the foremost rank of law literature. It is quite as concise as the Institutes, and more practical. It is quoted with as much respect by the French commentators on Customary Law as in Westminster Hall. And it became the end of the Law. No one went behind it for authority. Most English property law related to land, and this book contained its essence.

Another source of legal knowledge, not found in the early Reports, has not been given as much weight by the English writers as by those of the Continent. The French jurists reckon the municipal charters, and the recognition or establishment of customs under them, as the first and not least important among the codes. The student of English Law will not find much light on these in the Reports. But the English cities and boroughs were for many centuries the freest and best governed parts of the kingdom. Their customs were known and settled. Their civic usages and regulations furnished patterns for much of our best American legislation, and have moulded a great deal of English law. The Law Merchant grew up almost entirely from their commercial systems.

The Sea Laws have also been codified for many centuries. While it cannot be said that any of those codes had the force of law in England or America, the comparative uniformity and permanency of maritime regulations is largely due to them.

The publication of Coke's Commentary on Littleton is another era. His remaining Institutes have been mostly superseded. But his first Institute has been universally regarded as complete and exhaustive. It is honor enough for any lawyer to be annotated by two such learned lawyers and elegant scholars as Francis Hargrave and Charles Butler, who introduced him to this century. It is safe to take him as a starting point. In the large libraries which contain all the Reports behind his time, the dust is apt to gather on them, without much harm to the law.

In the early days of James I., Henry Finch wrote his Nomotechnia, or

Description of the Laws of England, which in its English version served as a text book for students until superseded by Blackstone. It is a complete view of the Common Law, clearly and philosophically arranged, with profound learning and scientific accuracy. The fact that such a book may cease to be needed, shows that the sages of the law have not disappeared.

The Criminal Law text-books have very generally and satisfactorily superseded the old Reports.

The invaluable Commentaries of Blackstone, written just as the American Colonies were about to make considerable departures from English law, and become independent, have in both countries been relied on almost implicitly as a complete view of the Common Law of that period. The omissions and errors are too few to lessen their value.

Pausing at this period, we see that without government influence, wise lawyers, observant of events and guided by practical experience, have from time to time enabled their contemporaries, without shock or change of system, to dispense for most purposes with most of the books that preceded them.

The experience of another Customary Law country—France—is still more instructive. Whether, as some writers claim, the French Customary Law owes much to Roman Law, or whether, as some of her great jurists insist, its mixture of Roman Law is small, it is not worth while now to discuss, if I had—as I have not—any sufficient knowledge to do so. Whatever may have been its sources, it passed through various stages from unwritten to written systems, and at last became so well arranged by the Code Napoleon, that its later modifications have required no great labor.

Until very recently France was divided into the country of the written law, and the country of the customary law. The written or Roman Law was the basis of the laws of the southern provinces, where Roman colonies had been long established, and Roman institutions thoroughly settled. But the North part of the Kingdom, which was chiefly settled by people who were very tenacious of their own customs, continued until the Revolution to be governed by what was originally unwritten customary law.

For many centuries the Provinces were the real seats of power, and contained all the important courts of justice; and there was nothing to interfere with their practical judicial independence. In these provincial courts, while our jury system did not exist, there was nevertheless in most cases a similar safeguard in lay assessors.

When the central power began to gain strength, and causes went up to Paris from the Provinces, the judges found it impossible to inform themselves concerning the local law. More than one King meditated the establishment of a National Code. While this was among the dreams of ambitious monarchs, it was not regarded as practicable. But it was thought feasible to collate the customary law of each province, and possibly this may have been regarded as a step towards our system. England, which had been very intimately connected with France, had succeeded in fusing together many Norman customs with

those of its seven kingdoms; and, except in a few places, its Common Law was uniform,—save for some local customs which did not prevent a general agreement. Its cities and boroughs retained their own usages. But England had never been so divided as France.

There had been several collations of law which had made this idea familiar. The early Capitularies were not new royal ordinances. They were chiefly based on customs, and had they not been they would not have been obeyed. The Salique Laws and other ancient written systems are regarded by the French law-writers as purely customary. Charles the Bald, in 864, recognised by edict the exemption of the larger part of his realm from Roman Law. Godfrey's Assises of Jerusalem were based on customary law.

The early customs were more uniform than the later. Changes grew up in the provinces under different feudal rulers, very much as the common law of the American colonies and States, with a general resemblance, has become changed by local interests. Rollo and the Normans made important variations. The traditions of Normandy honor him as a wise and good governor.

The great diversity among these customs made the work of compiling them very tedious. Royal ordinances were passed by Charles VII, in 1453, providing that all the customs should be reduced to writing and ascertained by competent persons in each region, and settled in the general assembly of each province, where representatives of the clergy, nobility and burgesses, from every part of the province, were to be summoned to aid in determining them. The first custom ascertained was not completed until 1495. Others were completed from time to time during the next century, The Custom of Normandy was not ratified until 1585. There had been two or more older collections of these customs of Normandy, and the Norman customs introduced into England by William the Conqueror are supposed by Basnage to have been the same established by Rollo.

The method of ascertaining these customs was very good. Every one who knew of any custom or maxim, produced it in the common assembly gathered for the purpose. The old written customs were preserved in the original language, where they had not been changed. Every rule on which opinions differed was discussed and verified. Some were found to be general, others local. Each was set down in the class to which it belonged. They were all condensed into brief and pithy rules easily remembered, and most of them had probably been handed down in such forms. Many would be recognised by any one as popular proverbs—some of which have become current without their legal origin being suspected.

Such proverbs are not unknown in English law. The Kentish saw—"the father to the bough, the son to the plough,"—expresses very tersely the immunity of gavelkind lands from forfeiture for crime. Some maxims seem to apply to economy rather than law, and are shrewd and caustic. Poor Richard's rules as to borrowing and lending, and kindred subjects, might perhaps be traced

to some such source. A maxim that gold is worth what is worth gold, is a very neat expression of financial doctrine.

The commentators have sometimes complained that the language of these collections is uncouth and obsolete. Among the more thoughtful this is reckoned a merit, as enabling the era of each rule to be discovered. Some, which are in comparatively modern form, were evidently either framed or revised when the collation was made. Others belong to the oldest known dialects of the provinces.

All of these several customs soon found commentators not inferior to Coke, who was the cotemporary of some of the most celebrated, and who was no doubt familiar with the proceedings in Normandy. Both Coke and Littleton are referred to—the latter as original authority, on customary law. It is disputed on some points whether England or Normandy borrowed from the other certain rules of property.

When the work was done, it appeared that there were about sixty general, and three hundred local, bodies of customs.

But before this work had been commenced under Charles VII, some of the enlightened lawyers of France, and none are more enlightened, had discovered what they called a certain family air among these numerous customs.

It was an acknowledged doctrine that no body of customs could be enforced which had not been approved by the representative estates of the province. And while a very large power remained in the local sovereigns and lords, there was no such thing recognized as absolute power in them or in the King. In forfeitures for felony, which was deemed an offence against allegiance, the lord as well as the vassal forfeited his right when he failed in his own duty. It is said by the jurists,—who are better authority than some flippant historians, that the little principality of Yvetot became freed from the direct sovereignty of the crown of France, by forfeiture for felony committed by King Clothaire in murdering the feudal lord, whose heirs became thereby vested with palatine rights and free from the usual royal burdens. Ferriere, who wrote in the middle of the last century, and who is one of the best authorities on French law, gives this explanation of what he mentions as undoubted; and the King of Yvetot is spoken of in Monstrelet as a personage of some note. This little realm, although Beranger has made it hard to speak soberly of it, was probably as important in its day as the Kingdom of Man, or the Channel Islands, or Monaco, all of which are still in legal effect distinct realms.

There was no trace in the customary law of the family and marital despotism which was so prominent in Roman law; and the law of tenures was equally distinct. The comparison of customs made it evident that, with many differences, there were many important common provisions, mostly dating back to the more uniform usages of the Franks, although in some respects belonging to more recent feudal regulations.

But this uniformity was not absolutely determined for a long time. Had not the general revision taken place, it would perhaps have been very much

longer before any common system was worked out. But finally, instead of resorting to the Roman Law in cases not covered by a particular custom, resort was had to the customs generally prevalent; and according to some writers the Custom of Paris was regarded as a proper guide where no other more general rule was to be found.

It may interest us to know that for more than a century the Custom of Paris was the Common Law of Michigan, and, prior to the assumption of possession under Jay's Treaty of 1794, nearly all of our contracts and transactions were framed in accordance with it. Had the population been more numerous we might have remained under the same system with Louisiana, which was once under the same control, and whose first Governor, LaMotte Cadillac, left his Seigneurie at Detroit to assume his new functions.

The reduction of the common principles of customary law to one general system occupied at the same time the attention of three very distinguished jurists of the 16th century, Charles DuMoulin, Guy Coquille, and Antoine Loysel. DuMoulin, who died in 1566, is said by Dupin and Laboulaye to have had more influence than any one else on the development of French jurisprudence. He wrote a series of notes on all the customs, with the express view of preparing the way for a general system. Coquille, who prepared a commentary on the customs of Nivernais, was led by his researches on that subject to the preparation of a work called Institutions of French Law, in which the body of customs was reviewed, and a general scheme explained. But his friend Loysel seems entitled to the credit of giving completeness and order to the plan which the others had less sharply defined. He and they were practised jurists and accomplished scholars, versed in liberal arts and masters of all the knowledge of Roman Law. Loysel was the favorite pupil and companion of the great civilian Cujas, and well fitted by breadth and precision of learning for the work he accomplished. He spent his leisure for forty years in comparing the multitude of customs prevailing through France, and deduced from them nine hundred and nineteen rules, which were classified in six books, each divided into several titles. In addressing this collection to his sons, he explained to them that he had taken each rule as he found it, preserving the original words and expressions, and making no avoidable changes; and that he had spent all this labor to procure their ultimate union in one single law and custom of the kingdom. He first published it as an appendix to an edition of Coquille's work, then under the editorial charge of his son-in-law. These rules thus classified he entitled "Customary Institutes, or a Manual of many and diverse rules, sentences and proverbs, both ancient and modern, of the Customary and most ordinary Law of France."

This work at once attracted attention, and was studied and annotated by various lawyers. The most important notes and illustrations were those of Eusebe de Lauriere, an associate in the labors of D'Aguesseau, who has left behind him several important works, of which his edition of Loysel, published in 1710, although not a large book, is considered as the most valuable. Several

editions of this were published during the last century, the best of which is said to have been that of 1783, edited by Jean Baptiste Bonhomme his son-in-law, and enriched by notes found among his papers after his death.

This impression had become very rare; and, in 1843, Mr. Dupin having announced that he had a new one in preparation, Mr. Edward Laboulaye, who was also engaged in a similar project, united with him, and by their joint labors they have produced an edition worthy of the reputation of two of the most eminent men of our day. They have enriched it not only with legal illustrations drawn from all sources, but also with references to the old chronicles and poets, where many passages are found explaining both words and customs. They have also added a Glossary of obsolete language. It is curious that for the meaning of many words they have had recourse to the English law dictionaries, where the old Norman French has been preserved more carefully than in the modernised dictionaries of France. The tendency of emigrants to retain language free from the capricious changes it undergoes in the mother country, might be further shown by the preservation in our own vernacular of old Enlish that has puzzled British antiquaries, and by the currency in Canada of many of the phrases in this Glossary.

When Napoleon conceived and completed his plan of framing a code of French law, he was not compelled, as has been sometimes imagined, to look to Justinian as his model, nor to compose a system out of legal chaos. In addition to several systematic ordinances, of which the Marine Ordinance of Louis XIV is a remarkable specimen, he had not only the annotated books of customs, but the admirable works of DuMoulin, Coquille and Loysel, and their successors, to aid him in his great undertaking. The best commentators on the Code Napoleon, and its later modifications, are very emphatic in repudiating any but a customary origin to its chief provisions. Napoleon justly regarded this as his best gift to France. That accomplished scholar and lawyer, Charles Butler, has called attention to the fact, that, in the discussions during its preparation, all the magistrates and jurists who aided in it were treated by the Emperor as equals, and that his suggestions not only showed a complete knowledge of the subject, but were inferior in value to none, and always inclined to liberal and humane views.

Mr. Butler has noticed, what has some times escaped attention, that the French courts and writers have always been sparing in the use of precedents. Napoleon provided expressly that thenceforward no court should attempt to lay down rules for future cases. This necessarily rendered citations useless, and they are now seldom found in the text books. The Code is the only source of authority for legal decisions.

The same gentleman has mentioned a very good reason for dispensing with precedents. Writing in 1822, he says that while there were but four Superior Courts in England, with fifteen Judges, France then had six hundred Courts and five thousand six hundred Judges. They might well beware of precedents if all these courts were to make them. That seems a prodigious number of

tribunals. But if any one will count up the number of State and United States Courts, of original and appellate jurisdiction, whose decisions appear in volumes or periodicals,—to say nothing of the able tribunals in Canada, and the British Courts, civil and criminal, he will find the American lawyer who desires to exhaust the precedents has a list much larger than he thinks, and will discover the necessity of confining his researches within reasonable bounds.

The condensation and simplification of the law, both in England and France, have chiefly come from private and not public undertakings. Whenever the right man has done the work, it has made reference to previous precedents generally needless, unless in rare and peculiar cases. And those very men, while they base all their doctrines on established law and inferences from it, seldom overload their own pages with citations, but choose them with great care.

We may, therefore, fairly expect that here, as elsewhere, the remedy will be found in the labors of sound writers, who will do what they can to set forth in order the principles of the law, and not leave their readers to grope among chaotic quotations or pointless platitudes. We have no reason to be ashamed of our authors, although we have had some miserable compilers. Our special treatises are often elegant and thorough. Upon a wider field of law, the commentaries of Chancellor Kent need not be named as second in merit to any law book in existence.

The greatest blemish in many of our books is their indiscriminate multiplication of cases. No doubt there is a demand for this, but it is an unhealthy craving, and those who are to guide the student to a knowledge of the law should not be afraid to refuse him this poor sustenance. Nothing else will stop the increase of those stupid productions, which have nothing valuable in them that did not come from some one else than the collector, and yet whose enormous lists of citations, useless as they are, lend them a semblance of learning. When it is once understood that a book should derive its value from the author's text, and not from any footnotes which have no ideas in them, our libraries may be smaller, but they will be better.

It is pleasant to note that the jurists who have succeeded in writing works which have made new eras in jurisprudence, have been not only skilled in the law, but wise and patient, of cool judgment and patriotic devotion. Most of them have been learned and accomplished in other ways. And when we reflect how important public spirit and integrity of thought and action are to every commonwealth, we have no reason to regret that some men of great intellect, who have left their mark in other fields of thought, have made very little impression upon the law.