

## "A RHAPSODY OF ANTIQUATED LAW."

When Mr. Nelson, to whom we are indebted for this phrase, published his Abridgement in 1725, the Year Books had gone out of fashion. Mr. Nelson accordingly deems the disapproval which Lord Verulam expressed as to abridgements to be due to the fact that they were abridgements of the Year Books, so he went to Fitzherbert and Brooke that his work might not suffer from having come from so fantastic a source. But unfortunately for his theory, the Abridgement which bears the name of Nelson, and which does not abridge cases from the Year Books, is far less favorably known than those which drew their cases from that despised collection. In spite of their having thus fallen into disfavor they continued to be used and sometimes cited by men who cared rather to know what the law really was than what it was said to be. In so well known a case as that of *Lumley v. Gye*<sup>1</sup> they were freely cited and relied upon, Coleridge, J., saying, "Whatever may be said of the uncertainty and often conflicting nature of the decisions of the Year Books, and however we may now smile at some of the reasonings of the judges, . . . they seem to me satisfactorily to establish the principle"—*i.e.*, the principle which he was expounding. In this country we cannot be said to have ever wholly neglected them. Yet even Mr. Wallace, after writing about them so entertainingly, almost tenderly, went on to say in his famous book about the Reporters, which was published more than fifty years ago, that, "taken with the fact that much of their learning has long since passed, with the persons who possessed it, to the land where all things are forgotten, it is not probable that in their present form they will again be read, though of course they will always be occasionally referred to."<sup>2</sup> He too thought them out of fashion, though, unlike Nelson, he was rather inclined to regret than rejoice in what he felt to be an undeniable fact. For some years past, however, there

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<sup>1</sup> 2 Blackburn and Ellis, 216, 1853; 22 L. J., N. S., Q. B. 463.

<sup>2</sup> Wallace: The Reporters, page 13, 2d ed., 1845.

has been a tendency to return to the Year Books as the deep spring from which flow the living waters of the common law. The study of case law as it is now followed in the greater universities has given rise to a class of men who have become so habituated to getting their law at first hand, as it were, to going to the sources and the roots of things, that when they turn from their active practice or their lecture-rooms to write an essay, or a monograph, or some such monumental work as Mr. Thayer's "Treatise on Evidence at the Common Law," we find them making such a free and liberal use of the Year Books as to bring these old reports at once back to the importance they once seemed to have lost forever. But talent even such as these men possess cannot wholly relieve the Year Books of the stigma which has been cast upon them, for when the student's research has led him to seek these first reports, and when he has found the case for which he was searching, he has also often found that it is so obscure as to language, so uncertain as to facts, or so contradictory as to the legal principle for which he has understood that it was the chief support, that he was willing to agree with any adverse opinion in regard to them which might happen to come to his notice. In such a case he seems generally to have been content to blame the obsolete language, the poor pleading, or the incompetent justices. He does not seem, except possibly in very rare instances, to have felt that he might be the victim of poor publishing, poor printing, and poorer editing. He took the law to be as it was stated, or he formed an extremely poor opinion of the petty pleaders who apparently did not know what they were talking about. There were also a large class of men, and even in these last few years of enlightenment there may still be a few, to whom it made very little difference what the Year Books said; who wanted to know only how the latest case "went;" who read digests and did not share Lord Coke's opinion that "*Compendia sunt dispendia.*" Even those who loved the old law and yet found it so unsatisfactory were content to accept the Year Books as they stood, and Mr. Wallace says, "The only edition now much known, or that anybody but an antiquary of anti-

quaries—who would go ‘beyond beyond’—would care to possess is the one already referred to,—that of Sergeant Maynard,—which begins with Edward I and appeared in 1678-80.” He himself would have gladly gone “beyond beyond,” but he never hoped to see the time when anyone else would care to journey into such dim regions. For a time there were those who thought that this country would take the lead in giving us a new and authoritative edition of the Year Books, for it had begun to be known that this edition of 1678-80 was very corrupt, not even so correct as other editions previously printed, and a desire for something better than even the older and incomplete editions was springing up here and there. But it is England and the Selden Society which have given us the first translation in which the old printed text has been compared with that of the manuscripts which have been so long reposing in the libraries of Cambridge, Oxford, Lincoln’s Inn, and the British Museum. It is some months since the volume, containing a translation of less than one-fourth of the cases in what has been known as “Maynard,” was published. It contains cases in the first and second years of Edward II, and is preceded by a most delightful preface by Mr. Maitland, in which he says: “Are they not the earliest reports, systematic reports, continuous reports, of oral debates? What has the whole world to put by their side? In 1500, in 1400, in 1300, English lawyers were systematically reporting what was said in court. Who else in Europe was trying to do the like—to get down on paper or parchment the shifting argument, the retort, the quip, the expletive?” “Often have we been told to seek in Roman Law the clues that will guide us through the English maze. It is high time that the converse and complementary doctrine were preached, and it is safe to prophesy that some day a great expositor of Roman legal history will express his profound gratitude to the English Year Books.”

Later, when Mr. Maitland is giving us a most luminous and learned dissertation on the language of these Year Books, he even has a good word for that which has been so much maligned, so much abused. As a final word in extenuation of its faults he

says: "We shall have to admit that with all its faults this Anglo-French enabled our lawyers to think out a system of rules which sinned rather on the side of subtlety than on that of rudeness, and to develop a scheme of technical concepts which were durable enough, and, it may be, but too durable. The language which did this deserves respectful treatment." This respectful treatment it has not generally received. "Law French" is spoken of as if it were the same in the days of Edward II and at the time of the Restoration or the Revolution, when it had really become the "jargon" or, as Mr. Maitland calls it, "the slang" of the courts; when men spoke it without understanding it, and when men hearing it without understanding it naturally thought it incoherent and incomprehensible. To read the language of one Year Book easily is not necessarily to be able to read the Year Book of one hundred years later with equal ease; the language grows, gets more English, but is not more comprehensible for that, shows new and more perplexing abbreviations, is more puzzling altogether. The human element also has a large share in its changes. No one knows who first began to report the cases collected in the Year Books; no one knows who continued them. It used to be boldly stated that they were official publications. This is no longer thought plausible, but we are left without a theory except that of private enterprise, and that enterprise not of one man but of many, who took down the cases in court for their own use and thereafter printed them, or gave others leave to print them. This is doubtless the reason for what may be called the mannerisms of the various books, or the difference in the reporting for one term from that of another, though both may be in the same Year Book and both of periods very near together. Each clerk had his own way of reporting, of abbreviating, of spelling above all. Some could not hear clearly and said so, some could not think clearly but did not say so. All this had its effect on the language as it has finally come down to us through the hands of many copyists and printers, careful and careless, putting in much that did not belong in a sentence and leaving out much that did. All this we used to know in a manner; it was,

at least, reasonable to believe it. Since Mr. Maitland has given us this book of his we know that we were right. The manuscripts, defective as they themselves are, with many of the same things to be said about them that we have said of the printed volumes, have supplied the words and sentences which were wanting to complete the sense of many a case; have shown us where the clerk used wrong letters, or the printer changed one word into another like it in looks but utterly unlike it in meaning, if, indeed, it had the good fortune to have any meaning at all. We find that the “existing printed text of this Year Book (Maynard) is too bad to be understood, and therefore too bad to be tolerated.” We are told that “with imperfect material and inadequate exploration and defective knowledge we have substituted sense for nonsense in about three cases out of every five.” Anyone who will take the trouble to read Mr. Maitland’s edition, comparing it word for word and line for line with the older printed text, will have no occasion to dissent from this statement. We are shown the necessary emendations it was found must be made in the first ten cases translated as examples of the way in which these corrections turn the nonsense of the old text into the perfectly clear sense of the new. It would be equally easy to take any other ten cases in the book and show the same thing. Everywhere we find words which have no meaning, phrases occult as any oracle, conclusions which cannot be drawn from any previous statement. In some cases the printer has omitted entire lines from the cases, notably an anonymous case which is quite well known, having been cited by Coke,<sup>3</sup> who says “*sed mon est lex.*” A late note in one of the manuscripts from the British Museum also declares it not to be the law, so we see that the error was noted at a very early date. The case is clear enough as emended by the manuscripts, but the omissions in the old text made it quite unintelligible in parts. In another case a stain in the manuscript having obliterated a space on the page, the words which should have been inserted in the space are left blank in the old version

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<sup>3</sup> Coke, 2 Inst. 345.

(page 17), leaving also, as a matter of course, a blank in the meaning. The new version gives us the blanks filled up from the manuscripts. In many cases the change of a word in a sentence from its original form to a word with quite a different meaning has rendered the whole case unintelligible, such as the change which gives us *vicint*, a word with no meaning, when we should have *bier*, a word which has the very definite meaning of wish or intend. Changes like that of *nous* to *vous* or *vous* to *nous* are frequent, while the frequent insertion or omission of the negative *ne* renders the decision in the case a matter of doubt. The elision of the definite article has led to a habit of attaching the remaining *l* to the first letter of the next word, giving us *La tourne* for *l' attourne*, *L' peel* for *l' appeal*,<sup>4</sup> and similar changes which, while easy enough to distinguish apart from the context, add very much to the confusion of the abbreviated and sometimes confused text. These few instances may be sufficient to indicate some of the difficulties the average lawyer has to deal with when he undertakes to turn to the Year Books for his law. He may be a good Latinist, he may have a familiar acquaintance with modern French, he may even have taken up the study of the Norman French, but notwithstanding all this he will still only be able to guess at his law when he reads his standard edition. Mr. Maitland is surely right when he says that the men are dead who were so familiar with the old pleading that they had a right to guess at what the judges should have said; the conclusions to which they would have been "chaced."

There should be no need for any further plea than Mr. Maitland makes in his preface for the proper printing of the Year Books. Yet how many of the legal fraternity of this country have read this preface? Of the six copies of the Selden Society's publication taken in Philadelphia three are taken by libraries, so there remain three individual members of the bar of this city who have sufficient interest in an enterprise of this sort to support it by a subscription. There are eleven subscribers in New York, twelve in Boston, two in Chicago. Though the libraries in each of these places would add from three to six

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<sup>4</sup> Maitland, Introduction to Year Book Series, page 88.

more to the number of subscribers, yet it is evident that in the United States the proportion of lawyers who are likely to become enthusiastic from a perusal of Mr. Maitland's preface is very small. This being so, those who have read it may be permitted to add a few words to his more eloquent plea. For is he not right? Have we not here "a precious heritage" if only we could disinter it from the dust of six hundred years, clear it from the *débris* of the dead centuries which conceal its true form much as the little shops and dwellings of the middle ages surrounded and concealed the noble proportions and the beauty of form of the Gothic cathedrals. Is it not because of these excrescences and superimposed defects that men have shunned them and despised them? If Nelson could say they were "a rhapsody of ancient law," yet in that phrase some of the antique flavor still survives; but after him came men who looked upon the black letter, the strange symbols, the long pages of unbroken, and to them undecipherable, print, and they turned away with disgust; no longer a "rhapsody," but a "jargon" it had become to them, and they passed it by with contempt. But yet there were men like Wallace of "The Reporters" who knew them well and found in them "an infinite variety." To him they were no dim mine of forgotten knowledge from which some infinitesimal nugget of legal silver might perchance be brought to light. He found in them wit and wisdom, quaint anecdote and grim satire. He saw them as they are, a picture of the times, in which the lord of the manor comes into court to complain that his last presentment to a benefice has been set aside; the tenant complains of the taking of his cows and his calves and the damage done to his growing corn; the lady abbess comes upon the levying of a fine and is strongly suspected of fraud, but clears herself; the city merchant goes out of London and falls among thieves, and the justices imply that it is good enough for him for not staying at home like a good citizen; the parson is complained of for breaking a close, cutting the shoots of trees and carrying them away, but the parson says it was his common which they were trying to enclose (a frequent complaint); executors wrongfully retain the

estate they have in charge, and women and children wander through the pages, appearing one after the other to claim their rights, to sue for redress, to ask that injustice may not be done to the widow and the fatherless. Martin Haywood and Ellen his wife complain that the prioress of Kelham has unjustly dis-seized them "of a chamber and of a corody to be taken in the priory of the said prioress, to wit, of seven loaves a week, the price of each being one halfpenny, and of four gallons and a half of beer, price four-pence, and of two dishes of flesh on every flesh day, the price of each one penny, and on fish days of one dish of fish, the price being one halfpenny." They are not able to show title and the prioress goes without day, but we have had an intimate glimpse into the domestic life of the times. It is a rural and an agricultural life which is shadowed forth in these cases of six hundred years ago. The merchant rarely appears, and when he does we have found that he is maltreated if he ventures into his "villein nest" and has a hard time to get back to his safe city streets. The suits are for lands and cattle, for damage in another's close, for dower, for all sorts of matters which have to do with interests in land. In Maynard we rarely have to do with any sort of crime. We have one writ of imprisonment (page 56) where "A beat a woman so that she died," the son raised the hue and cry, the bailiff arrested him, and the "coroner came to see what had happened, and A was found guilty, and the common fame was that he had killed her, and therefore B arrested him, as well he might." There is a case of felony (page 42) in which the murderer goes free, but the murdered man's brother goes to prison for having sued the appeal when his elder brother was living. The judge said he "must have prison and penance too, but that it ought not to be very grievous." The lawyers do not hesitate to plead that a decision adverse to their clients will be a very grievous hardship. "Llewellyn is a poor man, and has not wherewithal to live except these services," or "It would be a great hardship if he were not received" (page 28). "He is a poor man who knows no law" (our version has it "a poor woman") "and he prays you to tell him what estate



he ought to have." They say to each other "Vous dites talent," which Mr. Maitland renders "You talk at random," a translation seeming to catch the meaning of this phrase, which is one of those admitting of a variety of renderings. It is in these phrases which do admit of more than one reading that we get the value of such a translation as this. We are allowed to retain the flavor of the old language, its homeliness and directness, while we are kept with sufficient strictness to the text. The old fashion of guessing at the meaning is no longer to be tolerated, but we are not asked to frown upon the more picturesque rendering simply because it is pleasing. We are given the truth as nearly as it can be ascertained by one deeply learned, conscientious, painstaking, and we also have the good fortune to have it given to us by one who realizes that truth is no less true for being attractive.

Those who love the law and are anxious that its course should be kept pure from its very source will greet such works as this with gratitude; those who have not cared to pore over the black letter and the obscure language of the old Maynard, yet who care for the historical development of the law, will find here laid before them a fascinating study; and those who, like the writer, have guessed and blundered through the old text will welcome the new with enthusiasm, for we see now that it was not wholly our own ignorance of the old law, the old pleadings, or our failure to penetrate the mysteries of the old language which made our task at times so hopeless. Added to the burden of our own ignorance were the slips, the mistakes, the hundred and one little mischances which overtake a manuscript in the hands of the clerk and the printer. We may still sigh a little when we look upon the many pages of the Maynard still to be freed from its errors, the ten great volumes of the remaining Year Books which have as yet received no light upon their pages, but we need no longer look upon them with reproach for their errors or so overwhelming a feeling of our own defects. We know that some day their crooked pages will be made plain to us, and that the puzzles we have been unable to decipher will be explained.

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