STONORE SAID

What he said was spoken in the year nineteen of the third Edward. England was still feudal England; the language of the land was still French; it was taught in her schools and spoken in her courts, where it was to persist as a living language for a long time to come, and to fix itself indelibly into the structure of the legal language of England. So in that year and among that group of lawyers and justices sitting in Hillary Term to decide a somewhat troublesome point, there was no question as to the use of any other tongue. Had they been asked to plead in any other language they would doubtless have been sorely tried. All their words of art were in that tongue, and they would have inevitably fallen back upon their well-known phrases had they tried to speak in any other. In that year of 1345, when they were tirelessly trying to unravel the tangled threads of interwoven rights, they would have shrunk from pleading in English much as the opera star of today shudders away from the suggestion of singing in such an inartistic medium.

Before Stonore can be brought forward we must introduce Hillary, who was sitting on the bench with Sharshull, and with Stonore as chief justice. Hillary, justice, says to Birtone, who is of counsel: "You say what is true; and therefore demandant, will you say anything else to oust him from being admitted?" R. THORPE: "If it so seems to you, we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is." HILLARY: "It is the will of the justices." STONORE: "No, law is that which is right."

Now, that is the translation of the case given in the Rolls Series of the Year Books.[1] The words actually used by Stonore were : "*Nanyl, ley est resoun,*" and while Mr. Pike, the learned editor and translator of that volume of the Year Books, has a perfect right to translate "*resoun*" as "right," and will be upheld by the dictionaries in doing so; yet, if it is contended that Stonore did not

[1] Y. B. Rolls Series, 18 and 19 Ed. III, pp. 378–379.

mean to say that law is "right," but that he meant to say that "law is reason," there can be little dispute but that one is equally right, and the dictionaries will be quite as accommodating. Let us look at this question a moment. Thorpe is arguing in the manner of the blustering pettifogger, the conservator of things as they are, that his opponent will "do as others have done in the same case." Hillary, justice, seems to see in this remark of Thorpe's a slur of some sort and instantly counters with the plain remark that "it is the will of the justices," apparently meaning that when we do know what the law is, we know that it is their will. That has an extremely modern appearance; it looks as if there were people even then who calmly assumed that the common law was without any thing to guide it but the will of those upon the Bench—judge-made law with a vengeance!

But in Stonore we meet with material of a different type. He does not leave a moment for the theory of his companion to sink into the minds of counsel or spectator; he speaks immediately and with a certain tone of assured authority: "*Nanyl, ley est resoun.*"

Now what did Stonore really mean when he said "*Ley est resoun?*" It is of interest for us to know, for if we are to know what the common law really is, we must go back and find out what those who had its making in their hands thought of it, and how it worked out through all those early centuries of its growth into what we find it to be now. Had Stonore alone simply uttered his "*Nanyl, ley est resoun,*" it would probably have occurred to no one to doubt the accuracy of the translation of the phrase into "law is right," and it would have been of little value to any discussion as to what our law is. But this matter comes up again and again in the Year Books, and the phrase that Stonore used here seems to have been that well-known maxim of the law, afterward paraphrased and used by Coke. In the course of time, we find Wampage using it in a case in the fourteenth year of Henry Sixth.[2] The case that is being argued has been a difficult one, and it has been argued and adjourned, and re-argued until it seemed that there was but little hope of getting out of the petty tangles of involved precedent un-

[2] Y. B. 14 Hen. IV, p. 19, pl. 60, see page 21, for the remark of Wampage.

less something higher and more authoritative was mooted; and this something that Hillary seized on was that old maxim which Stonore had used in 19 Ed. III. "*Et Sir, le ley est fond de reson, et ceo que resoun est ley.*" Now, surely Wampage meant to say, "Sir, the law is founded upon reason, and that which is reason is law." It is the very phrase that Coke used when he said:

> "Reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificall perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for, *Nemo nascitur artifex.* This legall reason is *summa ratio.* And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law of England is."

They are all using the same word, and so were many other of the old lawyers, to denote what? Pure justice, or what we call "right," or that "reason" which Coke called the life of the law? It seems the latter, for the judges, while earnestly seeking that right should be done, did not mean that justice which might well be called the will of the justices, and which might be meted out by a benevolent judge, doing what he believed to be right, but that higher and finer right which is founded upon the reason of the law.

Well, and what then? Is it of any great importance to us what Stonore said, and Wampage thought; and do we not all know the ancient maxims of the worthy but archaic Coke? Was Coke not crabbed as well as worthy, and did not Wampage have precedent against him when he retired upon his general maxim; and Stonore, well, who was Stonore that we should stop in these busy days and hear what he had to say? What does it matter to us? Thus much it matters. If Stonore had not been able to say it, and without effective contradiction; if it had not been a recognized and fundamental maxim of our law through all those dark, or dim, or palely lighted centuries, when the common law was shaping the life of England and being shaped by it, we should have to follow the current course of criticism of the common law; we should have to grant that the common law of today is defective because of uncertainty; that it is a chaos to which our legal scholars have no clue; that those great foreign states which have worked out consistent codes have a scientific body of law for which we have no parallel. The

Thorpes of today are legion; they do not know what the law is unless it is to do as others have done in the same case. The decided case decides all; we depend not on justice or reason, and as the years go on *Similievitch* v. *Almansour*, 1179 Pa., and *The United States* v. *The Flying Icelander*, 979 U. S., will be decided according to the will of the Justices, for the precedents will be too many to examine and there is nothing else. If it be true that the decided case is all that we have to assist us, that it must be followed in all instances, whether or not it be based on false reasoning or on fallacious principles; if it diverges diametrically from all former cases that have been decided upon well-based reasons and the long continued and well thought out course of the law in such cases; then we should indeed have cause to wonder that the common law ever got past its first century, and became a system of law for all English-speaking people.

But we have not answered the question as to Stonore. Let us look at his record for a moment in passing, because we may as well know what sort of a man he was, and if he were likely to adopt a foolish theory to bolster up a weak bench. He was not a man whose fame has come down to us through the centuries; the reputations of those worthies of the Year Books have grown dim in these last years, while the Year Books themselves have sat dumbly on the shelves and seen men go seeking all about them for the wisdom they could have imparted had they had the power to reach out and claim the attention they deserved. Stonore was not among the great ones, and he is not here cited for his great authority, but yet he is one whose name occurs very frequently, and who helped to shape the law of his day. He was named John, a good old common name (to be sure it was "de" Stonore, which lifts him from the common mass again), in the County of Kent, or may be in Oxfordshire—the authorities are in doubt. The important fact remains that he was born in time to figure extensively as an advocate in the time of Edward the Second, and had become so important in the year six of that king as to be summoned to assist at the Parliament for that year. He prosecuted and defended suits for the king, and so we see him a Parliament man and a king's man as well; not too much of a commoner after all, a good royalist and busy doing the king's business. October 16, 1320,

he was constituted a Justice of the Common Pleas. The authorities differ as to his career at this point, but they seem agreed that he continued as Justice of the Common Pleas until the end of that reign and was re-commissioned by Edward III, shortly after he came to the throne. Later he became Chief Baron of the Exchequer (in 1329) and Chief Justice of the Common Pleas later in the year. With the exception of one or two years, he retained that honor, and died Chief Justice of the Common Pleas, in 1354, leaving, as is reported, "large possessions in nine counties." It seems, therefore, that the man was of some standing in the land and in the law; that he was no mere theorist, no dreamer of dreams, no student merely. On the whole a rather practical, hard-headed man of the world, who won honors and kept them—though the hold may have been precarious at one or two points of the game—and who died, even though he said, as Mr. Pike declares he did, "Not so, law is right," "leaving large possessions in nine counties." We have here, it would seem, a man as canny as Coke himself, yet to him "*ley est resoun*," as we would claim that it is today; and we would claim, as the dictionary allows us to claim, that the law is reason, and that it is right also. For, for what purpose can any system of law claim to be established? Is it not for the regulation of the relations between nations, so that justice may be done to each; and for the regulation of the relations between individuals so that justice may be secured to all? Is it not simply for that and for nothing more? And how can that object be attained more simply, more easily, and more surely, than by working out the system by which such regulation may be set to work through the acquired experience and the accumulated knowledge which is attained by the practical use of those regulations in the courts, where they are tried by every practical and theoretical test? No system of law was ever worked out in any other way; but we are told today that chaos comes unless we crystallize the results and form a logical scientific system, thoroughly thought out, and apply it to the common law which is the root of all systems. It seems true enough on the surface—it seems obvious; therefore it is to be distrusted, for the obvious is usually the untrue.

The critics of the present day who attack the Common Law seem to forget that it has more than one attribute; they claim

that it places its whole reliance upon precedent; that it must follow all precedent slavishly—and there they leave it, with its one attribute attacked and defeated, as they most complacently imply.

It would seem that this point of view could not be seriously advanced and adhered to by thinking men, if we had not written evidence before us in a multitude of articles, monographs, papers, and after dinner speeches which have been crystallized from their original fluid forms into solid documents. These otherwise possibly negligible declarations might not be taken seriously if it were not that they have created a sort of general feeling among those who have not given the subject enough thought to enable them to feel the fallacies of the argument, that it is true, and that the common law is really open to all the reproaches that have been heaped upon it. They have heard so often from legal lips that it is a "Codeless myriad of precedent" that they forget that Tennyson was a poet, and not a Justice of the Supreme Court of the United States, or a Lord High Chancellor of England. They believe that it is a "tangled mass of irreconcileable contrarieties," although this reproach again is made by one who is not a student of the law. They also hear—this time from a legal source—that it is "Chaos" tempered by various acknowledgedly unscientific tools. If a thing is said often enough, and loudly enough, some people will be sure to believe it; and this thing has been said long enough and loudly enough to get itself believed by many who should not depend on loud voices or much speaking for their convictions.

Doubtless, all these things must also seem true to the lawyer who has never looked upon, perhaps has never been able to look upon, the law as a whole; who has groped from precedent to precedent, and fought his cases upon precedent, and believes he has won them simply because he "had a case" in his favor. Such men there are doubtless, who do not look behind the case itself; who do not know why the case they cite decides the cause; who are bewildered sometimes when even though they have "a case," even the "latest case," they do not win; they darkly suspect the court of conspiracy with the other side, or have an heretical suspicion that the court may have counted wrong, and mistakenly believed there was one more case on the other side than they had on theirs! So may the man in the Culebra Cut believe that the

work is without plan and means simply digging long enough and deep enough and there will be the canal some day; to him the scientific plan is an unsolved mystery, and the shovels alone practical facts. But, it will be argued, it is not the man who digs at the law without skill and without knowledge who claims that the common law is without science and without plan; it is the man who does think; the man who does desire a scientific plan, who does want the law to be carried on in accordance with a great design and a skilled knowledge, who is making this attack, and making it for the purpose of improving our law. To some extent it is so; there are many minds to whom a mathematical demonstration is the highest attainment of human mentality. They forget that whenever the human integer is a part of the calculation the mathematical demonstration inevitably fails. The mathematical argument of a sociological fact always works out to the confusion of the demonstrator and the failure of the demonstration. The scientific code can be worked out with mathematical exactness, but when it comes into contact with that humanity for which it was worked out, it is denied and put to rout by that infinitely varied mass which refuses to be reduced to either scientific formula or mathematical exactness.

But was Stonore alone when he stood there in his sturdy strength and uttered his short defiance to all who would claim that that Common Law of which he was a part was merely precedent, or the "will of the Justices?" Were all his kind, who from the earliest Year Book steadily supported his "*Nanyl, ley est resoun,*" mistaken, and was that reason of which they prated merely abstract justice and the law of nature, which they called upon for support when precedent went against them, as a last desperate resource? *Nanyl,* and again, *nanyl.* Through all the centuries there have been men of his calibre, and through all these centuries they have stood firmly for that life of the common law which is the soul of precedent and formula.

One there was who, in the opening days of our own great Commonwealth, was called upon to speak as the first law lecturer of the University of Pennsylvania. Conspicuous above his fellows in the Convention which framed the Constitution of the United States, he had been the chief factor in securing its adoption

by the State of Pennsylvania, and was the member of the Convention most deeply learned in the civil law; that last factor should not be forgotten. When James Wilson undertook to expound a subject he did it thoroughly. His was no superficial brilliancy of intellect, content with the obvious and the easily seen. When he would find if a thing were true, he began with the beginning of history and followed it down through the ages to the least and latest data on the subject. It was his method in all matters and he followed it in his lectures upon law. One of these lectures is—for to say "was" relegates them to the past where they do not belong—a lecture upon the Common Law. Now, I do not think it can be claimed that Mr. Wilson was a student of the Year Books. We may, perhaps, assume that he was not, and it would not have occurred to me to go to Mr. Wilson's lectures, in 1790, for a proof that when Stonore said "*Ley est resoun,*" he did not mean "right", but did mean "reason." But Mr. Wilson had no superstitions about "bewildering precedent" or any other narrow interpretation of the Common Law; he brushed such things aside in the true style of Stonore. Just as he gets fairly started in his lecture, he turns aside to say that the term common law is not confined to England—it is the term for other laws also. "Euripides" (we have at last another poet to offset Tennsyon) "mentions the common law of Greece, and Plato defines common law in this manner: that which being taken up by the common consent of a community is called law." In another place he names it the golden and sacred rule of reason which we call the common law. "This," he says "is very notable; it opens the original first beginning of the common law; it shows the antiquity of the name; it teaches common law to be nothing else but common reason—that refined reason which is generally received by the consent of all."[3] Surely Stonore knew of what he spoke; here is nothing about doing as others have done.

Wilson was a civilian, a deep student of the continental and the Roman law, yet he had no thought that those systems were the only logical systems ever produced by the human mind; and further, he recognized, what the modern critics fail to notice, the

[3] Wilson: Works, Vol. 2, p. 4, 1st Ed., 1804.

great part which the common law, in its broader sense, plays in all these systems. The modern critic speaks as if codes and systems did away with the common law. "Rome retained her common law as long as she was free and powerful; no state either is or has been without a great body of the common law—that law whose authority rests upon reception, approbation, custom, long and established. The same principles which establish it, change, enlarge improve and repeal it."[4]

Any system which did not rest upon reason would be destined to death before it had really begun to exist. No one claims that any system ever did rest upon anything else, except those who claim that the common law is a mere mass of undigested cases. And they would see this claim in its bald absurdity did they think for a moment of the impossibility of the thing. A system of law growing up through centuries, playing its important part through eight or more centuries in a civilization advancing steadily in everything that goes to make for the healthful growth of mankind; art, letters, morality, wealth and the social condition of the people. That system of law of which Dr. Francis Lieber spoke in this fashion:[5]

"A living common law is, as has been indicated, like a living common language, like a living common architecture, like a living common literature. It has the principle of its own organic vitality and of formative as well as assimilative expansion, within itself. It consists in the customs and usages of the people, the decisions which have been made accordingly in the course of administering justice itself, the principles which reason demands and practice applies to ever-varying circumstances, and the administration of justice which has developed itself gradually and steadily. It requires, therefore, self-interpretation or interpretation by the judiciary itself, the principle of the precedent and 'practice' acknowledged as of an authoritative character, and not merely winked at; and in general it requires the non-interference of other branches of the government or any dictating power. The Roman law itself consisted of these elements, and was developed in this manner as long as it was a living thing.

"The common law acknowledges statute or enacted law in the broadest sense, but it retains its own vitality even with reference to the *lex scripta* in this, that it decides by its own organism and upon its own principles on the interpretation of the statute when

[4] Wilson: Works, Vol. 2, p. 38, 1st Ed., 1804.

[5] Lieber: Civil Liberty and Self Government, Vol. 1, pp. 222-223.

applied to concrete and complex cases. All that is pronounced in human language requires constant interpretation except mathematics."

"So long as the Roman law was a living thing" it remained a common law; codified it ceased to live and became, like those planets which whirl in space, perfect worlds, but cold and dead; unfitted for humanity, while the common law lives in its as yet unattained perfection, a warm and living thing, where humanity may still find shelter and put forth new and fresh life with every passing season.

Rome died, but left as a legacy to those peoples who should come after it a system upon which they might model their own systems of law. The continental nations have done so; they have adopted and adapted the Roman system, and it is continental law we are told to follow because of its scientific form, its greater clearness, its sureness, its practical convenience.

Does the actual practice of the civil law, as systematized and condensed into codes show it to be so much more simple, so much more condensed, so much more certain? To take an example from the law of Germany. It is popularly supposed that one has only to go to the Bürgerliches Gesetzbuch (endeared to the public mind by its diminutive, the "B. G. B.")[6] to find all the law applicable to his case, in clear and definite language, so that nothing more has to be done; there is the law, under a scientific definition, and if it does not agree with his theory of what the law should be for his client's case, so much the worse for him. That is the law; there it is, and there is nothing more to it. Quick, simple, efficient; no looking after decided cases, no bewildering precedents; just plain, clear scientific demonstration; everything settled in a trice.

Take the simple matter of the working out of a contract, and a contest upon the contract; one suing because it was not carried out; the other defending because according to the code there was a carrying out so far as was possible. There is the code, that shows just what the parties can do, what they should do, what their rights are. But upon appeal to the code it is found that this is a com-

[6] This code, by the way, has been called "a scientific body of law, a system of principles supported by a sound philosophy which . . . . has awakened the admiration of the civilized world." Introduction, p. 10, Guide to the Law and Legal Literature of Germany, Borchard.

mercial contract; the civil code does not contain the principles of the commercial code; we must turn from the B. G. B. to the H. G. B. (Handelsgesetzbuch) and we must construe the law we find there in accordance with the general provisions found in the B. G. B.; we must decide if the provisions of the H. G. B. are in accordance with the B. G. B. or not, before acting upon its provisions. Further, after making up one's mind on that point, one must go to the commentaries upon both the B. G. B. and H. G. B. to find what is the interpretation they have put upon these sections of the Code; these commentaries not being clear expositions of the law, fortified by references to the reported cases as deciding the matter, but rather analytical or theosophical theses upon the subject matter in general. But still they do contain references to the decided cases of the Supreme Court of Germany, and perhaps to the lower court decisions; these reports now being contained in long sets much like our own sets of reports. But having reached this point no decision is arrived at, for while these decisions are cited, and have an influence upon the court, they are not considered to rule the specific case; they are but matter to aid the judges in forming their opinion as to what the law was intended to be by the framers of the code. . . . We are, therefore, thrown back, for our reason for the law, directly upon the reasoning powers of the judges, without binding authority—that reason which, however well trained and enlightened, is but the reason of the individual—in contrast with that reason of the common law, which is that of the trained and enlightened reason, guided, sustained and directed by that reasoning of the ages of judicial decision, by which the principle to be applied to the case is found, and when found followed. The true value of the common law lies here. Other systems have crystallized their law at a certain period or certain periods; they have then depended upon the reasoning of the individual interpreters of that law, furnished with guides who do not have to be consulted, but who may be consulted if the judge thinks necessary; with precedent at hand, but not authoritative precedent; with reason, not of the individual but of the collective generations, at hand— if cared for, but only if cared for. The common law has garnered the reasonings of all its conscious generations, and made them authoritative. The reasonings, not the cases. No case is

of any authority if it is not based upon firm and well-sustained principles. Any case based upon weak or insubstantial reasoning is liable to be overturned at any moment; it is not the case that counts, it is the reason that underlies and supports it. And when the case is so overturned men cry, "See the uncertainty of the law; one day it is this, the other that; give us codes so that we may know what the law is." They do not see or do not understand that it is because the law is based upon principle and upon reason that the mere mistaken dicta of a careless or unintelligent courts cannot stand when once the error is observed.

The codes, again, are defective because of their very virtues. They are the product of the trained minds of earnest thinkers, devoted to the law and to the working out of a perfectly coherent, well-balanced theory of that law. They are, or they are intended to be, creations without flaw; worlds without tempests, without earthquakes or floods; all is still and serene; no imperfect buds appear on the parent stem, leading to no fruit. No meandering streams lose themselves in marshy meadows; all turn the mill-wheels which produce the perfect product. And this perfect product is to be used by imperfect man, with all his defects, and made the rule of all his actions. A splendid mechanical system admirably adapted to a mechanical man. A Cinderella's slipper forcibly fitted to the awkward feet of the generations who climb slowly along the steep pathways of life; feet that must try to wear them, though they cause many a stumble. We have come to believe in these latter days—although there are still many heretics—in the possibility of self-governing peoples. We have even come to the belief that with all their faults, such self-governing peoples represent the highest type of humanity as yet evolved. We think we see infinite possibilities of further development through the further growth of the power to govern itself which humanity is constantly showing. This being granted—and we in turn concede that all will not grant it—we must look for our ideal law in that which is the best adapted for growth and expansion; for the keeping pace with the footsteps, fast or slow, of the marching masses of men, who must live in accordance with its rules. And as that progress cannot be by force of initiative from the more enlightened minds, by means of being forcibly drawn forward by those in advance, but

can only be worked out as an individual development, by the slow and stumbling progress of humanity itself; so that law which will be the best adapted to such a progressive humanity must be a law which has likewise been worked out slowly, roughly, circuitously, by the same slow and rude methods. Such a system of law has been growing up through all the centuries since the first Angles and Britons, Saxons, Danes, Normans and Celts, began to lay down rules for their own government. It has never ceased to grow with the growth of the civilization of which it has been a part, in which it has been as Lieber again says:

> "One of the mainstays of civil liberty; and quite as important as the representative principle. . . A great element of civil liberty, and part of a real government of law, *which in its totality has been developed by the Anglican tribe alone.* It is this portion of freemen only on the face of the earth which enjoys it in its entirety. . . . The independence of the law, or the freedom of the *jus* in the fullest and widest sense, requires a living common law, a clear division of the judiciary from the other powers, the public accusational process, the independence of the judges, the trial by jury, and an independent position of the advocate."[7]

A "living common law" is the well spring and source of a living commonwealth. We can and do crystallize our fundamental law into constitutions, but we have each year, or at least every second year, a living mass of legislation which frames the more ephemeral rules under which we live and by which our conduct is regulated. If we compare a constitution to a code, we make a mistake, since we only place within our constitutions such fundamental principles as we believe need no changing for, it may be, generations. In our codes we place the whole field of the law. We may place in the constitutions the crystallized product of our experiment in government, for government is a stable thing, not to be lightly changed, but the law by which the peoples live is as fluctuating by its very nature as that life that is regulated by it. Those philosophic systems which have been produced with great care and moulded into codes are magnificent specimens of that which the trained intellect can produce—the best of them are

[7] The italics are mine.

splendid examples of technique. But the attempt to make the tumultuous, surging life of humanity flow according to such systems is to reduce to the canal-like docility of the English streams, the Mississippi in the spring floods. To make a net work of placid canals of this mighty river of the common law, so that any man, however unskilled, might take his little row boat and row placidly about on it, would doubtless be very pleasant for the little man; but the life of humanity and the life of that law by which it lives are one, or else humanity is "cabined, cribbed, confined," and ceases to grow, or grows distortedly.

The people who are cramped on their spiritual side, or their physical side, or on their legal side, suffer, and, growing old, decay and die. The people who keep themselves uncramped, spiritually, physically, legally, live on, constantly growing up toward a fuller and a fuller life.

Yet we do not want to carry the argument too far; it is but in revolt against the extravagant mis-statements of those who have failed to see the reason of the common law; who have denied to it coherency and clearness, that these arguments are used. It is not contended that there should be no analysis; no synthesis, no grouping of the principles of the common law. There should be all these, and first of all, there should be that developing of the principles; that logical outlining of the theories; that clear statement of the growth and conclusions of the law on fundamental topics, which make up the true treatise upon the law. That is the sort of treatise we do not have today. It would seem that the treatise writers are content with the ordinary title of "text book" writers, and with the ordinary function of such writers. They seem also content with that definition of the common law against which we are contending; and rest satisfied with gathering together the greatest mass of precedents possible, threaded together with a thin stream of general remarks. They give us no reasoned theory; no scientific analysis; no skillful summing up, which shows the defects of the reasoning of the cases, or the result which should be attained. They are doubtful as to the law, because they find that decided cases differ; forgetful that it is their province to sift all this matter, and show where the principle—the immutable principle—must rule. There are a very few exceptions, of course,

but the need of the common law of today is the learned, the philosophic, the reasoned treatise. Not the long drawn-out, minutely tedious, over-detailed production of the German press, with its awkward phraseology, or the rather too swift and easy French adaptation of the same thing; but the production of the true scholar, who does not give you a reproduction of every mental twist and turn he took in evolving his production, but does give you the clear product of all these twists and turns, and gives it to you in a simple and effective language, like, if heaven has so gifted any one now living, the language Maitland gave us in his later years.

Neither is there any reason against simplifying the legislation of years and bringing it all into a simple and practical shape; there seems to be no reason why that should not be done regularly and, as a matter of course, at stated times every few years; that is not codifying the common law; that is simply untying legislative knots made by the unskilled fingers of the legislature, whose constituents think "there should be a law" on every subject under the sun. To do this is generally to go back to the common law and out of the reasoned mass of precedent, select that which has been found most reasonable; that is most adapted to the life of the people. It should be a mere matter of simplification, and if it is to be useful should, as has been said, be done as a matter of course every few years. There is nothing inimical to the common law in any of these things, but neither are any of these things anything more than mere mechanical aids to the administration and execution of the great system of the common law; that law which, teaching the people and being taught by it, modulating it and being modulated by it, is unvarying in its underlying principles, and ever changing in its superficial manifestations. The objection to the Code system seems to be that it endeavors to crystallize the superficial manifestations, as well as the underlying principles, and it necessarily fails; in a few years the manifestations have changed and the Code has become a nuisance; it no longer represents any phase of the life of the people and is simply in the way.

Let us again appeal to Mr. Wilson to state in his dignified and measured phrases the true theory of the common law:

"In all sciences, says Lord Bacon, they are the soundest that keep close to particulars. Indeed, a science appears to be best formed into a system by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper. The natural progress of the human mind, in the acquisition of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the instauration of the common law. In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former by attending, in the same manner, to those of man and society. Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the more diversified and disjointed appearances."

Margaret Center Klingelsmith

Biddle Law Library,
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[8] Wilson: Works, Vol. 2, pp. 43–44. First edition, 1804.