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SOURCES OF LAW—NEW AND OLD

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The Common Law had a great distaste for officious intermeddling in other men's business. It was prone to tell a man who had voluntarily conferred a benefit to look to his own conscience for his reward. It even imposed liabilities on good-natured people who insisted upon managing the affairs of others without special request, as in the case of the executor *de son tort*. In this way it was very different from Roman Law where the *negotiorum gestor*, the bona fide officious intermeddler, received encouragement and recovered compensation.

But it was not so in matters of law. Here the officious intermeddler was more than a tolerated nuisance. He was a person with a definite title; he was an *amicus curiae*; a stranger who of his own motion offered his learning and advice to a court that had not indicated any need of such advice, and had certainly not asked for it. And yet, even by their testy and self-important lordships of the Benches, the propriety of such volunteering was never questioned. Ancient statutes refer to it, and the Year Books and older cases show many examples of it. The *amicus curiae* was not a supplementary counsel for plaintiff or defendant, but a man sufficiently zealous for truth or justice to offer an unsolicited guidance to the court directly.

Law dictionaries treat the *amicus curiae* as an unmistakable part of our system. The article in *Bouvier's Law Dictionary* does so with many citations and even learned references to Latin authors, as well as to those of the Common Law.¹

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¹The learning of the article, I fear, needs a little revision. The passage from Suetonius, should not be LIB. 33 but TIB. 33, the printer having in this case turned an emperor into a book. Nor is the expression *amici* really to be found there or anywhere, since it is merely stated that the emperor chose his friends (*amicos*) as members of his *consilium*—a not unnatural proceeding. Then, what does "Cic. Quint. 2 Gell. 14, 2" mean? Gellus, NOCTES ATTICAE B. 14, c-2, contains a passage in point but the preceding abbreviation is somewhat cryptic.

The suggestion in the article that the English *amicus curiae* has any connection with the Roman *consilium* cannot be maintained. The *consilium* was the group of expert advisers which the magistrate, who was generally a layman, summoned to assist him. The members were wholly unofficial at first and their advice was not binding. In the later Empire, they became a permanent part of the judicial system, and like the *Schöffen* of the German courts and the modern "assessor", were subordinate magistrates themselves. The term *consiliarius* was the ordinary word to describe the member of the *consilium*, though it was hardly a technical expression and *amici* was not used in that sense at all. It may be noted here that the term *consiliarius* has risen in rank until *conseiller* means nothing less than a member of the highest court in France, the *Cour de Cassation*.

It will be seen that the *consiliarius* was essentially different from the *amicus curiae* of the old English law. The latter was a volunteer. He was a private person, a stranger to the case. Doubtless he had some interest in it or he would not interfere, but his interest might be merely a desire to see that no judicial error be committed. So in 1685, Sir George Treby in a case upon the Statute of Frauds *ut amicus curiae* said that he was present at the making of the said Statute and that such and such was the intention of the Parliament.²

The *amicus curiae* in modern American cases appears with a certain formality and his arguments are heard as though he were of counsel in the case. This practice has had the result that the *amicus curiae* differs from regular counsel on either side only in the fact that he is paid by neither or not paid at all. The brief he presents is treated as a brief for one side or the other and opposing counsel naturally desires the privilege of replying to it.

Again the statement that "there was in that day also an *amicus consiliari*—who was called a *ministrator*" is a curious jumble. "*Amicus consiliari*" may be a misprint whether for the singular or the plural it is hard to tell. But *ministrator* means simply a junior counsel who spoke after the principal advocate and was not a member of the *consilium* at all.

But a more serious misprint is the reference to "2 Co. Inst. 178". The reference is certainly wrong and seems to come from WHARTON'S LAW LEXICON which gives "Coke upon Lyttelton 178"—which is also wrong. What the correct reference is does not appear. As the citation is copied from BOUVIER INTO CORPUS JURIS, it is likely to reverberate in handbooks and decisions for an indefinite time.

²Horton v. Ruesby, Cumberbach, 33, 90 Eng. Rep. 326 (1686). Cf. also Smith v. Harmon, 6 Mod. 142, 143, 87 Eng. Rep. 901 (1705), and Falmouth v. Strode, 11 Mod. 137, 88 Eng. Rep. 949 (1708).

It is quite proper that he should ask for this privilege and quite just that he should receive it. But he certainly would never claim the right to be at the judge's elbow and to meet each point which appears in the court's research if that point seems to be against him. Nor would he venture to demand a list of the authorities the judge intends to consult and require the court to confine itself to such a list. For, at least one of those authorities is that judicial breast wherein are authentically deposited the august principles of the Common Law itself. Or, to speak in more modern terms, the judge's sense of justice and fairness plays a large part in determining his decision and here argument and counter-argument are of limited efficacy.

If it could ever be seriously maintained that an appellate court must confine itself to the arguments raised by counsel and must not go outside of the briefs, our theory of appeal would have to be changed. An appeal would resolve itself in theory, as it sometimes seems to do in practice, into a formal debate, into a battle of wits, and the decision of the court would be merely a determination of who was the more skilful debater, without reference to the merits of the controversy. But that is not the avowed doctrine in any court and no appellate tribunal will accept that as a description of its function. The court may properly explain an inadvertence on its own part by the fact that its attention had not been called to the point by counsel. In other words, the court may, if it chooses, confine its examination of the question to the points raised in argument, but it certainly is under no compulsion so to limit itself, and very few courts will consent to do so. Courts have sometimes with admirable industry and fine judgment followed a question into ramifications that counsel had never so much as suspected and the fact that the court frequently reads cases and books and articles which counsel has altogether omitted to study will not surprise the bar of any state. Nor is it material that counsel had no access to the sources from which the court derived its learning. It is quite possible that in South Forks or Three Rivers, an attorney may have no copy of *Plowden* or *Salkeld* or *Cumberbach*. But if the court has, it is certainly not precluded from citing these ancient but still authoritative persons.

The point is that the court is exclusively interested in the law and not at all in awarding prizes for argumentation. If somewhere—let us say in a rare book or in an article just

published in a law journal, which respondent cannot have seen—new points are urged which support the appellant, we may assume that the refutable contentions there presented can be met by the court as well as by the respondent. And if there is the least feeling on the part of a judge that the respondent has been left at a disadvantage, a simple solution is before him. He need not read the article in question. It is not a brief called to his attention in a formal way. It is not even a pronouncement of the older *amicus curiae* rising in open court to warn the judges of threatened error. It is simply the irresponsible opinion of some person uttered *dehors* the case with no reference to it except as a basis for discussion.

It is this discussion that is important. Our law is constantly being made and constantly being learned. And whereas the budding barristers and full blown counsel of Inn and Temple ate and drank their law as well as talked it we must confine ourselves to the last named method. And since we are not all crowded into a few courtyards of the Strand and Fleet Street, we must discuss it in the only available medium, the rapidly growing body of legal periodicals.

There can in theory be no limitation to the amount of permissible discussion except the tolerance of editors, hearers and readers. We may safely assume that this tolerance is not infinite and that long before the possibilities of a topic are exhausted, the patience of those who are invited to listen to it will be.

There is no limit in amount but there is an obvious one in manner. It is the peculiar tradition of the English bar that no adjective can be applied to contemporary bad law except the term "erroneous". No legal opinion can be "absurd", "outrageous", "stupid", "unjust". If these amenities have not always been practiced in America, we have at least accepted them as ideals. In some continental countries, the ardors of advocacy are allowed a wider latitude. We have curbed our words—or admitted that we ought to curb them—partly by habit and partly by the salutary reflection that law is so difficult to ascertain that our most confident conclusions are not surely and irrefragably right.

And just as there is no limitation of amount there can be none of time. In every *ordo judiciorum* there must be an appreciable interval between a decision rendered by a trial court

and its final adjudication in the last appellate instance. That the legal questions involved may not be discussed in public can be maintained only on the debating or duelling theory of a litigation, in which the belligerents have a fair field and no favor. Here, as elsewhere, it is the manner of doing a thing that is important. If the discussion of a pending case is published for the purpose of creating a professional opinion which may exert an improper pressure on the court, it is not merely an unmannerly act, or a professional impropriety, but it may be a contempt, and can be dealt with as such.

The writer in a law journal is not an *amicus curiae* but he does profess with greater or less modesty to be a *consiliarius*. He cannot thrust his learning at the court, but must await the court's pleasure as to whether or not he will be consulted. That courts have generally ignored him and only very recently and slightly taken cognizance of his existence, is part of our general problem of sources of law. It can be adequately considered only in that connection.

Where does the court find its law? Where does any one find law? That part which is not found in the judge's breast, in the kind of person he is, in his sense of justice, in his education and his environment, must be found in books. What books?

We have been taught to answer: the books containing the statutes and the reported decisions. And it is still a correct answer, as far as it goes. But—I think we shall have to admit—it does not go as far in 1928 as it did in 1828. Courts rely for guidance not merely on their understanding of the statutes, not merely on precedents in their own and other jurisdictions, but also on books, on treatises written by persons whose only authority was the learning they displayed.

A notion was once prevalent that law-treatises could be cited in Common Law courts only if the authors were dead. Mr. Komar in two interesting articles³ has shown that this notion is an error except for a limited period of time in England, and it can hardly be said that it was ever the rule in America. It may be noted that whether or not books by living authors could be cited, there was nothing to prevent the judges from

³B. M. Komar, *Text Books as Authority in Anglo-American Law* (1923) 11 CAL. L. REV. 397; *Probative Force of Authoritative Law-Works* (1924) 4 BOST. U. L. REV. 191 and (1925) 5 BOST. U. L. REV. 32.

reading them and we cannot suppose that they did not. But in America, early courts, leaning heavily on Blackstone, found it easy to lean almost as heavily on Story and Kent while they were still alive. And present courts feel a sense of gratification, when they quote *Wigmore on Evidence* or *Williston on Contracts*, in the fact that these eminent jurists are still preparing new editions of their great works.

But one need not be Story or Kent or Wigmore or Williston to be cited by our courts. One can pick up at random a recently published volume of the *Northeastern Reporter* (Vol. 158) and turn its pages casually. We shall find cited: *Blake-more on Prohibition* (p. 136), *Underhill on Criminal Evidence* (p. 405), *Cooley on Constitutional Limitations* (p. 421), *Babbit on Law applied to Motor Vehicles* (p. 15), *Huddy on Automobiles* (ibid.). Except *Cooley*, no one of these books is of outstanding eminence. There are scarcely ten pages of the *Reporter* in which some treatises do not appear and certainly not ten in which there is no reference to one of the many existing cyclopedias, repertories, handbooks, or digests or dictionaries.

Besides, there is a great deal of indirect citation. The chief authorities cited are, as it is natural to expect, adjudicated cases. But many of these cite treatises and text-books and in more than one instance base their decisions very largely upon the rules there formulated. This formulation accordingly appears in the new case by incorporation in the old. It is the same with dictionaries which are cited in cyclopedias which are cited in cases which are cited in other cases and these last cases cited in treatises which are then cited in other cyclopedias and dictionaries, so that the wheels are perpetually turning and the ultimate source even of the formulation of a doctrine not easy to find.

If we place the authorities cited in the order of apparent importance, we should find the following series: first, reported cases of the same jurisdiction; second, reported cases of outside jurisdictions; third, cyclopedias and repertories; fourth, recent treatises; fifth, old treatises; and sixth and last, articles in legal periodicals. Citations of the last class are very few indeed, although they are increasing slightly.

Is this the order of intrinsic importance? It would be a bold assertion. If we look at the fourth source, we must note

that—except here and there—there is apparently no gradation. Books written by eminent men and those written by men not so eminent are almost on a par. There is an air of anonymity about these treatises. It is almost as if the court were quoting some current treatise on Contracts, Automobiles, Corporations, in which the author's name did not much matter. In the case of old books of course, that is not so. Bracton, Coke and Blackstone, Story and Stowell were and are cited because of the weight of their names, and if they have made bad law as well as good, we at least know whom to hold responsible. It is a little unfortunate that this does not quite hold for modern treatises. Authority is not everything but it is something. With Lorenzen or Williston or Wigmore as authorities, there is less likelihood of error than if John Stiles or Richard Roe were quoted. One wonders how much is gained by reference to a writer who as far as anyone can tell has no better right to speak authoritatively than the judge who quotes him.

The quasi-anonymity of some treatises becomes complete in the case of cyclopedias, repertories, handbooks, law dictionaries. To say a word in disparagement of these absolutely essential instruments would be the blackest ingratitude. It is not too much to say that Anglo-American law would be an impassable morass but for them. With all their imperfections, they present means of orientation that digests could not quite give us and citators even less. But there is a wrong way and a right way to use them, and sometimes even in high places they seem to be used wrongly. Articles in cyclopedias are occasionally cited as though their presence in such compilation gives them a weight and an authority they would not have if they were issued separately over the author's names. This surely is to confuse values seriously.

The industrious and systematic gentlemen who prepare these articles are entitled to high commendation. But if we scan the list of the collaborators, we must admit that in only a few cases are the names such that the authorship would in itself demand immediate and respectful attention from bar and bench.

It is therefore not as an authority but as a convenient labor saving device that cyclopedias have a proper and legitimate function. Their articles may give us succinct summaries of the cases which they quote and in giving us that they serve an excellent purpose. They have at least the value of the cases

which appear in the notes, and the additional merit of bringing the cases to our attention. But when through inertia or haste we accept a statement in the text without examining the cases advanced to support it, we are giving an unnamed writer a weight we should not think of giving him if his name were mentioned. That does not sound very reasonable.

The attitude of courts in this matter is in contrast with their attitude to articles in legal periodicals. There was and is a distinct hesitation in utilizing material of this sort. It is not wholly the fact that legal periodicals are relatively new things. In part there remains the slight hostility which the law school itself still encounters from the professional lawyer. Legal periodicals are often organs of law schools, in fact are so in most cases, and there is a normal enough feeling that fledglings trying their wings can give little assistance to fullgrown and seasoned practitioners.

Yet cyclopedias are as new as law reviews and those who get the articles up are rarely of greater experience and capacity than the law-students who prepare the notes of law reviews. The articles in the best known reviews on the other hand are frequently written by men of first rate eminence whose names on the title page of books would carry enormous weight with judicious readers. It may seem invidious to single out particular persons but Pound and Beale and Cook and Oliphant can be consulted chiefly in the pages of law reviews and we should be hard put to it to find many names to rank above these in any of the sources, new or old, used by our courts.

The experience of other countries may be helpful. There is the common impression that the Continental courts, of which those of France and Germany may be taken as outstanding examples, do not consider precedents at all but confine themselves to a citation of statutes and a doctrinaire discussion of principles. Perhaps there is a notion that continental judges are unpractical and pedantic persons, given to the reading of ancient books and the citations of obsolete authorities.

That is a great error. Continental judges are intensely practical men and like all practical persons feel it necessary to manifest at times a certain repugnance to doctrines, professors, writers, jurists and philosophers, and they have always studied precedents and have had their law largely determined by them. It is not the practice of the highest French courts—the *Cour de Cassation* and the *Conseil d'État*—to cite cases, but

the highest German court—the *Reichsgericht*—frequently does. At any rate when these cases are published, the decisions, which are extremely brief and often not as extensive as many headnotes are in our cases, are regularly accompanied in France by a most exhaustive discussion in which cases and treatises are fully and critically examined. Further the decision itself frequently follows a report made to the court by a member of it, the *rapporteur*, and in this report, in which the arguments on both sides are summed up, cases and other authorities are not infrequent.

One of the three collections of French reports, the *Dalloz*, the *Sirey*, or the *Gazette du Palais*, is read by almost every lawyer in France and the brief decision would be unintelligible and useless to him without the notes which are attached to them.

As to these notes, we must confess that they far surpass the notes in our cyclopedias or collections. They are written by the most eminent experts in their special field that can be obtained. To take a random instance, the most recent number of the *Dalloz* collection⁴ has a note on the first case, involving a public lease, by M. Henri Capitant of the University of Paris, one of the most eminent jurists in France and co-author with M. Colin, now in the *Cour de Cassation*, of one of our widely used text-books on the Civil Law. Another note is by M. Rouast of Paris, another by M. Pic of Lyons.

In almost any one of these notes, we are likely to find something like the following. M. Cremieu of Aix is discussing a case in the conflict of laws just decided in the Appellate Court of Douai.⁵ He states, "This view has been taken in the following French cases—[he then cites two], in the following foreign cases—[he cites three]. It is approved by the following authors—[he cites four well-known writers on Conflicts and, interspersed with them, two articles in law journals]."

The term "doctrine"—which we might call learned discussion—may in France and Germany be applied to legal discussion either in cases or in books. But since the decisions rarely do more than present the bare bones of the judicial syllogism, it is most frequently applied to the "doctrine" of books and articles, while "jurisprudence" is exclusively applied to the decisions. Now it happens frequently enough that

⁴2nd. fasc. 1928.

⁵D. P. 1928, 2.33.

"doctrine" and "jurisprudence" are at odds on a given question and it is generally a question of time before "jurisprudence" accepts "doctrine", or "doctrine" adjusts itself to what is obviously to be permanently the law. A striking case is the complete opposition between "jurisprudence" and "doctrine" in the matter of renvoi in the conflict of laws.⁶

The relation between "doctrine" and "jurisprudence" has been well set forth by the eminent jurist and scholar, M. Esmein, in Volume 1 of the *Revue Trimestrielle de Droit Civil*.⁷ But, indeed, the entire second volume of M. Gény's admirable *Méthode d'Interprétation*, especially Part III, chapters 1-11, is an extended presentation of the same question.

The common-law courts attempted in the seventeenth and later centuries to make a sharp distinction between "doctrine" and "jurisprudence". We are prone to forget that reporting cases, in anything like a way that courts could use, is relatively recent, and that while Plowden in the sixteenth century made a brave beginning, it was not till *Coke's Reports* achieved their extraordinary popularity in the seventeenth century, that we may say that judicial precedent, "jurisprudence", begins to have a real binding force. It is therefore almost as a new source of law that the authority of decided cases crowds out the authority of text-books or treatises; until in the early nineteenth century there was a widely held belief that only the former had authority and that the latter were devoid of it.

Recent study has shown us⁸ that the severance of these two sources of law was never quite so complete and treatises were never quite so summarily neglected as has often been supposed. Still, it is undoubtedly true that even now counsel hesitates to quote a book if he can find a case, and hesitates still more to cite an article in a law journal.

Perhaps courts have thought the cyclopedias a revival of the ancient abridgement and that therefore in citing them, they are really citing cases. Unfortunately they are not abridgements since the process of selection and restatement is much more freely employed than was the case with the ancient abridgers. They are in all respects treatises and articles and

⁶Cf. Hans Lewald, *QUESTIONS DE DROIT INTERNATIONAL DE SUCCESSIONS* (1926) 28-29, reviewed in (1928), 16 CAL. L. REV. 397.

⁷(1902) 5-19.

⁸WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* (1925) c.ix; HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY* (1928) 27-34.

they ought to be rated by the same standards as other treatises and articles would be.

In American courts the common-law opposition between "doctrine" and "jurisprudence" shows signs of breaking down. It will be unfortunate if "doctrine" continues to be, for so many of our courts, the articles in cyclopedias or in a sort of standardized treatise. "Doctrine" may be good or bad. The most effective way of dealing with it is to examine it critically on its own merits. But if we are disinclined for this effort, we ought to distinguish between the doctors who vouch the doctrine, as they do everywhere else. Doctrine in France means the opinions and arguments of men like M.M. Capitant, Josserant, Pic, Wahl. Men of this caliber frequently enough appear in our law reviews, often in treatises, rarely elsewhere. In listing sources for the courts of the future, we may hope that this fact will be taken into account.