

THE SCIENCE OF LAW
AND
LAWMAKING

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BEING

AN INTRODUCTION TO LAW, A GENERAL VIEW OF
ITS FORMS AND SUBSTANCE, AND A DISCUSSION
OF THE QUESTION OF CODIFICATION

BY

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"Jus summum sæpe summa est malitia"

(The strictest law is often the greatest injustice)

TERENCE, HEAUTON-TIMOBROUMENOS, IV. 5. 48

New York

THE MACMILLAN COMPANY

LONDON: MACMILLAN & CO., LTD.

1898

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**Norwood Press
J. S. Cushing & Co. — Berwick & Smith
Norwood Mass. U.S.A.**

PREFACE

THIS book is an attempt to make clear to the average reader some of the truths of Law and Jurisprudence. The object is to introduce Laymen to a true conception of the system of law under which they live, a system whose rules constitute bonds restraining their activities, less palpable, yet no less effective, than the iron bars of the captive's cage. It is a curious fact that no work exists in which the general outlines of legal systems are explained in popular terms so as to be intelligible to the ordinary mind not versed in the technicalities of the subject. And it is especially strange that no work exists which explains to such readers, and to the law student just beginning his course, the fundamental truths contained in the two forms of expression in which it is possible to embody a system of law. Yet a complete knowledge of these fundamental truths lies at the base of the correct decision of a question of great importance now agitating the legal world. And this question — the question of Codification — is one whose decision will rest more in the hands of laymen than in the hands of lawyers. These facts suggested to the writer the idea of a book which, in the first instance, should be an introduction to the study of the law; and, in the second instance, should use this introduction as a groundwork on which to build up an argument on codification intelligible to the lay mind. And it was considered

that labor bestowed on a full and complete examination of the familiar truths of the subject matter, would not be thrown away, even in so far as the professional audience might be concerned. For, it is deemed that the reiteration of fundamental truths, half forgotten because assumed without clear statement and demarcation, and the contemplation of concrete instances and examples of the working out of the contradictory principles involved, will refresh the recollection of the professional reader, and aid to a clearer conception by him of the generalizations involved in the further arguments herein contained.

To what extent success has been attained in making this essay intelligible, instructive, and convincing to the two classes of readers for whom it has been written, only the future can determine.

This much, however, may be said. The attempt has been,—

First: To write an introduction to law which shall enlighten the intelligent lay reader as to the beauty and interest of its problems;

Second: To remove the discussion of the Code Question from the generalities in which it has always been obscured to the contemplation of the practical working of the two systems in concrete instances (*see* Chapters V and VI);

Third: To elaborate the idea of the fundamental and intrinsic difference between the two forms of writings, statute and case law (*see* Chapters X and XI); and

Fourth: To draw the proper conclusions and apply these principles to actual legislation, judicial or legislative, and to determine by a practical test the provinces of each and the best way to conserve them (*see* Chapter XI).

In this age when the common people, populists or otherwise, look up to the legislature as the *deus ex machina*, capable by its action of ameliorating their social, political and financial condition; and when men of mark and influence are urging the adoption of favorite schemes for social or individual advancement; and when the keen few, realizing the practical supremacy of legislation, no longer seek rights or redress in the courts, but create them by gaining in their behalf the fiat of the legislature — it is fitting that an attempt should be made to delimit the proper provinces of legislative and judicial action.

If the writer has succeeded in this, he has added his mite to the true solution of the complex problems ever presenting themselves for solution.

R. FLOYD CLARKE.

NEW YORK, August 20, 1897.

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THE LAYMAN'S IDEA OF LAW

To laymen,¹ and to some of those who attempt the study of law, it seems a crabbed, difficult and dry pursuit; in a word, a study no less uninviting than the dusty tomes in which it is so often found imbedded. The ideas of the average citizen about it are well outlined by one of our great novelists in the inimitable interview between Mr. Pickwick and his leading counsel, Sergeant Snubbin:—

“With this hint that he had been interrupted quite long enough, Mr. Sergeant Snubbin, who had been gradually

¹ Among lawyers persons not “learned in the law” are called “laymen” to distinguish them from the “professional men,” the lawyers. In some of the old books it is said that exceptions were allowed in certain cases to general legal rules “on account of the ignorance of the laity.”

growing more and more abstracted, applied his glass to his eyes for an instant, bowed slightly round, and was once more deeply immersed in the case before him; which arose out of an interminable lawsuit, originating in the act of an individual deceased a century or so ago, who had stopped up a pathway leading from some place which nobody ever came from, to some other place which nobody ever went to." And the poet voiced the feelings of all of us when he sang of

"Mastering the lawless science of our law,
That Codeless myriad of precedent,
That wilderness of single instances."¹

While it is true that the detail doctrines and the applications thereof of any system of law have, to the general student, these forbidding qualities; yet there is wheat to be gleaned from all this chaff, gold to be extracted from all this ore. The differences in size, proportions and arrangement of certain fossil bones of extinct animals appear of no special interest to the ordinary man; yet, when from delvings into the earth's crust, there emerges the special instances of the five types of American horse, ranging from the four-toed *Orohippus* of the Eocene period, through the three-toed *Mesohippus* of the Miocene period, to the single-toed *Equus* of our own times, these dusty bones, of no apparent value or interest, have furnished demonstrative evidence of the great doctrine of Evolution. And evidence of a kind which men not versed in the sciences involved can grasp and appreciate, and evidence whose immense value to the cause of progress it would be hard to overestimate.²

And so while the decision of special law cases, petty or otherwise, that arise in daily life, may embrace complicated deductions to be made from technical rules, and end in results of interest only to the professional man, and which to the unlearned mind appear to have no reason for their

¹ Tennyson, *Aylmer's Field*.

² Huxley's *American Addresses*, p. 88.

existence; yet other special cases may require in their decision the assertion and application of most important general principles; principles of interest to every one, and whose assertion either way reacts upon the future well-being of all. In every case where these latter conditions occur, the special decision made is itself an instance, and a proof, of the broad general rule, and valuable and interesting as such to the intelligent mind, lay or professional.

The consequence is that in so far as the discussion of law becomes abstracted from the discussion of the proper way to decide any one or more of its "myriads of single instances," to the discussion of the underlying principles governing its creation and expression, the truths of law approach in their matter and in their mode of expression the truths of other sciences. Law is thus recognized as one of the family of sciences, subject like the rest to certain fundamental principles. Thus it becomes interesting to the general student. Hence it is that jurisprudence is fully capable of being made clear, instructive and interesting to those having only a slight acquaintance with the details of actual law study and practice. Between the jurist and the practitioner exists the old difference between the specialist and the generalizer, the observer and the philosopher—as it occurs in science. In science the philosopher cannot generalize correctly unless he has thoroughly imbibed and apprehended the facts furnished him by the special observers of nature. So also in law, and to an even greater extent, the jurist cannot generalize correctly as to the truths of jurisprudence unless he is well acquainted with at least the typical instances of the legal facts on which he bases his conclusions.

And while you or I, the laity so to speak when Professor Huxley unfolds to us some truth of Zoölogy or Palæontology, can grasp the idea because the guide to the solution of the problems of the science is reason, and reason alone; the same does not hold true as to the laity

grasping the truths of law in an equally ready manner. For it has not always been reason, but sometimes its opposite, which has dictated the decision of the problems of law. Thus have been developed anomalies and inconsistencies; an absence of scientific classification; and resulting absurdities. The result is, that some instruction in the technicalities of the law, and in its peculiarities as an art, is absolutely necessary, before the average man of liberal education can apprehend its contents, and become interested in its problems. Yet the amount of this necessary preliminary study is entirely overestimated.

Professors Huxley,¹ Tyndall,² Clifford³ and others have done noble work in expounding scientific truths to unscientific minds. No practical lawyer has yet attempted to explain the principles of law and jurisprudence to laymen.⁴ The fact may be due to this necessity of some preliminary technical study. Yet law in its broad sense, as including not the details of "little treatises on servitudes," but the fundamental rules of jurisprudence, is a science of surpassing interest. And as such, it well repays the effort required to master the few of its technicalities needed to be understood before its hidden charms can be revealed.

THE NATURE OF LAW—ITS PRACTICAL INTEREST

Law is the science of right living as expressed, enforced and applied by the State;⁵ it is so much of applied or relative ethics as society sees fit to enforce. It is a branch of the Science of Sociology. Its rules are derived from and founded on the ethical, political and economic ideas entertained by the society in which it exists as law. Hence, in determining what should be the decision of some con-

¹ Essays and Reviews. ² Fragments of Science. ³ Clifford's Lectures.

⁴ Perhaps we should note the exception of Mr. Pollock's First Book of Jurisprudence (1896), yet even this is written more for the law student than for the man of liberal education.

⁵ Meaning by the "State" the political unit prescribing the law; namely, England, France, New York, etc.

trovcrsy, — for instance, whether or not Judge Woods, in 1894, had the power to restrain the members of the American Railway Union led by Debs from burning cars and stopping traffic on the railways of Illinois, and having the power whether he should exercise it by injunction, — we often find ourselves face to face with governmental and social problems, still unsettled, of transcendent importance and interest.

THE DEBS CASE

This Debs Case was a remarkable one. To rightly understand it, the reader must know something about our peculiar form of government. The question presented was a question of Federal power. Are we a Nation? or a Confederation? States Rights and Centralization again joined battle.

The facts are shortly these. Our form of government is a dual whole made up of a sovereignty called the United States of America, which was formed by the compact and consent of the original thirteen States of the American Confederation and the distinct sovereignties, the States, which have been since added to the Union. The Constitution of the United States of America is a written document whereby the President, the United States Courts and the Congress are granted certain specific powers of Government, Executive, Judicial and Legislative. These powers are granted in express terms, and there is a solemn article that all powers of government not expressly granted to the United States are reserved to the respective States.¹ The final jurisdiction to settle all questions under the Constitution is vested in the United States Supreme Court. Hence that Court construes these grants of sovereign power. It early construed them as including all powers necessarily or properly implied in those expressed.² There is a special provision in the Constitu-

¹ U. S. Constitution, Tenth Amendment.

² *McCulloch vs. State of Maryland*, 4 Wheaton, 316.

tion giving the President power on requisition from the legislature or the governor of any State to call out the United States troops and employ them in maintaining order in such State.¹ Except for the unsettling precedents of the Civil War, and of the reconstruction period, it had been the received doctrine of the strict constructionists; that, in case of internal dissensions in a State, the United States Government had no right to interfere save on this requisition from the State authorities.²

There are also express powers given by the Constitution to the United States Government to regulate commerce between the States, to establish post roads and to maintain a postal service.³ It happened in 1894 that a labor organization known as the American Railway Union, of which Mr. Eugene V. Debs was president, declared a strike on the Illinois Central Railroad. The strike lasted for some time. The men, finding the railroad company was succeeding in filling their places, at length grew desperate. Under the instigation of their leaders they resorted to violence and riots. They stopped the trains, maltreated the "scabs" (workmen who had taken their places), and, in some instances, burned the cars. The condition of affairs became serious. For a time, as the American Law Review says, "the people of the United States were under two rulers, President Cleveland and 'President Debs'; and railway trains were in the hands of trespassers carrying the flag of 'A. R. U.' instead of the Star-Spangled Banner."⁴ Meantime the United States mails on these trains were delayed or destroyed. The Attorney General of the United States applied to the United States Circuit Court for an injunction restraining Debs and his associates from interfering with interstate commerce and the United States mails. The injunction was obtained and disobeyed. An application was then made to punish the rioters for contempt of Court. Ques-

¹ U. S. Constitution, Art. IV, § 4.

² 28 Am. Law Rev. 592.

³ U. S. Constitution, Art. I, § 8.

⁴ 28 Am. Law Rev. 591, 592.

tion then arose as to the power of the Court to punish for this disobedience; and so related back to whether the Court had the power, in the first instance, to grant the injunction. The first question presented was whether a Court of Equity had any power to restrain by injunction continued and organized rioting of this description — acts within the jurisdiction of the criminal law and there only punishable after trial by jury. The Court decided that it had such jurisdiction, basing its power upon the old law as to nuisances and purprestures (*i.e.* unlawful encroachments upon highways).¹ The next question was whether a United States Court could enjoin such rioting in a State, or whether such jurisdiction was vested in the State Courts alone. It was decided that a United States Court had this power in this instance. The decision was based on the express grant to the United States of the right to regulate interstate commerce and to carry on the mail service, and hence on the implied right to protect them against interference.² While the dispute was going on in the Courts the trains were held up, the cars were burning and for a while pandemonium reigned. Mr. John P. Altgeld was governor of Illinois at that time. He was inimical to capital and corporations, and a friend of organized labor. The railroad company, assuming that it would be useless to apply to him for protection, or to ask him to requisition the President for aid, applied, in the first instance, to the President of the United States. They represented that interstate commerce and the mail service were obstructed, and requested his interference to put a stop to the lawless acts prevailing. The President, by proclamation, commanded the rioters to desist; and sent to Illinois a force of United States soldiers, who promptly restored order.³

¹ See an able article contending strongly against this doctrine as an unwarranted usurpation of power by a Court of Equity, entitled, "Government by Injunction," by William H. Dunbar, 13 *Law Quar. Review* (October, 1897), 347. ² *United States vs. Debs*, 64 *Fed. Rep.* 724.

³ 9 *Political Science Quar.* 769, 770.

These acts of the Federal judge and of the President were looked upon by a large portion of our people as a dangerous stretch of the Constitutional Powers of the President, and of the Courts of the United States. The decision of Judge Woods in this case punishing Debs for contempt of Court was upheld later by the Supreme Court of the United States.¹ In spite of this fact many sound constitutional lawyers deem the decision an unwarranted usurpation of Federal and equity powers and a precedent fraught with danger to the liberty of the citizen and to republican institutions. One point taken is that equity usurped the jurisdiction of the criminal law, and so denied to the alleged offender the right of trial by a jury of his peers which all Constitutions since Magna Charta have guaranteed.²

And the platform of one of our great parties—the Democratic party—in the Presidential election of 1896 contained the following distinct planks repudiating the action so taken by the Federal Executive and Judiciary: “We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States, and a crime against free institutions; and we especially object to government by injunction as a new and dangerous oppression by which Federal judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners.”

A WILL CASE

Even where mere property rights are involved the conflict between the equity of the individual case, and the safeguard of formalism necessary to cover all cases, may produce strange, and interesting, and important results. Witness the following case. A man having made his will giving all of his property to his friend B. afterwards

¹ *In re Debs*, 158 U. S. 564.

² See able article above cited in 13 *Law Quar. Review* (October, 1897), 347.

changed his mind ; and, intending to destroy the will, threw it into the fire. The legatee, being present, rescued it from the fire ; she afterwards told the testator that she had burned the will. The man died without making a new will. The legatee thereupon produced the will, and claimed the property under it. The heirs objected that the will had been revoked. The statute governing the case prescribed as a rule of law, that if a testator desired to revoke his will he must do it in one of two ways. He must make a new will revoking the old, and make this new will before witnesses with the formalities the statute required ; or, he must actually destroy the old will. The rule of the statute is founded on the public policy of precluding the upsetting of valid wills by perjured oral testimony. The judges held, that in spite of the fraud of the legatee whereby the testator's wishes were frustrated, the will stood, and the legatee was entitled to the property. The equity of the special case had to yield to the public policy covering the multitude of cases. One judge said : " It is argued that if the testator throws his will on the fire, with intention to destroy it, and some one, without his knowledge, takes it away, it is a fraud which ought not to defeat his act. But so it might be said that, if the testator sent a person to throw it on the fire, and he did not, the revocation was still good. Where could such constructions end ? The effect of them would be to defeat the object of the statute, which was to prevent the proof of a cancellation from depending upon parol¹ evidence."²

WITH SLIGHT PREPARATION A LAYMAN MAY GRASP THE CODE QUESTION

And so we may observe that this dry subject is not so dry as it is represented to be ; — that under its unprom-

¹ Parol — oral evidence, or the testimony of witnesses as distinguished from a signed writing.

² *Doe, ex dem Reed vs. Harris*, 6 Adolphus & Ellis, 209 ; *S. P. Clingham vs. Mitchelltree*, 31 Pa. St. 25.

ising exterior lie practical, living questions, fit for all of us to discuss and understand, and worthy of our careful attention and study. As is shown by example in succeeding chapters, a little explanation of its leading terms, some insight into its history, sources and practical workings, and a few concrete examples of its modes of expression, are all that is absolutely necessary to enable an average layman to understand, and perhaps be interested in, the most important and profound and practical question now agitating the professional mind—shall the law of England¹ be codified?

And here, at the outset, we are met by one of those difficulties that must beset a writer introducing a technical subject to untechnical minds. We say: "Shall the law of England be codified?" The reader answers: "What do you mean by 'codified'? What is a Code?" To fully explain the meaning of the word to the lay mind requires an explanation of what law is, and in what forms of expression it exists,—requires, in fact, several chapters of this essay. And if we pursue the other course of giving the usual definition of a code, we will have defined an unknown thing in terms themselves requiring definition. And so the writer must either stop here to explain in learned terminology what a code is,—in which case each of the terms he uses would probably need a footnote for its full understanding,—or he must give a totally inadequate definition, begging the reader to accept it for the present, and fill out the concept as he reads further on in the subject.

SHORT DEFINITION OF A CODE

In short phrase, then, a code is a statute of a certain kind. It means a statute which covers the whole law, or the whole of some branch or province of the law. A

¹ We say the "law of England," thereby meaning the common law of England and that of each of the States of the American Union derived from it.

statute is a law enacted, *i.e.* passed by a legislative body, Parliament, Congress, or a State legislature, as distinguished from law declared by a Court in deciding a case, or case law.

THE TWO WAYS IN WHICH THE LAW CAN BE DECLARED

In the nature of things, a rule of law can only be declared in one of two ways. Either some one must write it down in general phrase as a general rule to cover future cases, in which instance it is Statutory, or Legislative law; or, assuming that no such actual prior prescription of the law has been made, some dispute between members of the society must needs be settled by the tribunal to which the litigants appeal. In deciding the case in hand, the judge declares the reason of his decision, basing it upon some alleged principle which he says applies. Thus a rule of law is declared as existing in that case and others like it, in which instance it is Case Law, or Judge-made Law. In order that the reader may clearly apprehend the difference in form and substance between the two modes of enactment, we set out an instance in full.

It is a rule of the Common Law that the finder of an article, if he takes possession of it, is the owner of the property against all the world except the true owner, and with the rights and duties of a gratuitous bailee. A bailee is one who holds property for another, in this instance for the real owner; and a gratuitous bailee, as distinguished from a bailee for hire, is one who so holds property without the right to any reward for his keeping it.

THE CODE WAY—§ 938 OF THE FIELD CIVIL CODE

The general principle as to the rights of the finder is expressed in statutory form by Mr. Field in his proposed New York Civil Code as follows: "938. One who

finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire." (N. Y. Civil Code. Commissioners' Report, 1865, p. 291.) A depositary for hire is held to greater care than a gratuitous bailee, and in this respect this code section changes the former law.

THE CASE WAY—ARMORY *vs.* DELAMIRIE

The rule of the Common Law as to the rights of a finder, in property found, was practically first established and declared about a hundred years ago (1795) under the following circumstances. A case arose in the Courts wherein Armory sued Delamirie for the value of a jewel. It is reported in the Book of Reports known as 1 Strange, 504. This means that a Mr. Strange reported cases arising in the Courts, and published a volume of such cases, which the Courts afterwards referred to as precedents to be followed. The facts are set out in the report, and were substantially these. Armory, a boy chimney sweep, found a valuable jewel. He took it to Delamirie, a jeweller, to ascertain its value. The jeweller told him it was of no special value, and offered him three half-pence for it. The boy declined the offer, and demanded back his jewel. The jeweller refused to give it up. The boy then sued for the value of the jewel. The jeweller defended, probably on the ground that the boy was not the owner; and he, the jeweller, in the absence of the owner, was as much entitled to the stone as any one. The Court, in passing upon this dispute, decided in favor of the finder on the ground "That the finder of a jewel though he does not by such finding acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover" (*i.e.* maintain an action for its value against one who took it from him). *Armory vs. Delamirie*, 1 Stra.

505. *Mr. Shirley*, in his *Leading Cases Simplified*, states the ruling in this case as follows: "You have fairly found this jewel, and nobody except the real owner has a better title to it than yourself; till he shall appear, you may keep it against all the world, and maintain trover for it."

Armory vs. Delamirie, 1 Stra. 504; 1 Sm. Ld. Cas. 471; *Shirley Lead. Cas.* in the *Case Law*, 329.

THE DIFFERENCES BETWEEN THE TWO WAYS

These examples indicate the difference in origin, authorship and expression between Statute and Case Law. Thus in the statute above given, the rule of law, that the finder is entitled to the thing found against all the world, is embodied in the statutory declaration that: "One who finds a thing lost . . . is a depositary for the owner," *i.e.* can hold it as such a depositary does against all the world except the owner. In the case of *Armory vs. Delamirie*, on the contrary, this rule was not prescribed by anybody in the first instance. The rule is inferred from the decision made by a Court of the special case before it, and from the reason given for the decision. Thus a dispute arising between the chimney sweep who found the jewel, and the jeweller to whom he delivered it in order to ascertain its value, as to which of the two was entitled to this "treasure-trove," the Court had to decide it. In deciding the issue the Court gave a reason; and, in giving the reason, declared: that on principles of natural justice, in the absence of the owner, the one who found and took possession was entitled as against everybody except the true owner. Note here a distinction between the form in which enacted or Statutory Law is written, and the form in which Case or Judge-made Law is written; for it is one which will be insisted upon at length hereafter. The distinction is this. A rule of law declared by a statute is expressed in the words of the writing in which it is embodied; it is, as it were, *express* written law. A rule

of law declared by a case is not formally embodied in the words of the opinion given by the Court, the writing in which it is partially contained, but is also modified by the facts of the special case stated and the inferences and deductions that can be drawn between them and the rule; it is, as it were, *implied* written law. The only absolutely fixed element about written law, as expressed in the form of a reported case, is that a certain decision was made on certain facts: *i.e.* judgment for plaintiff or defendant on the facts existing. The rule of law established by the decision, the reason lying back of the result, is not limited to a grammatical construction of the words used by the judges in giving their reasons for deciding as they do. On the contrary, the true ruling of the case is implied from the combination of the facts of the case, the decision on the facts, and the reasons given for such decision. Thus the rule of law established by this case of *Armory vs. Delamirie* might, by the use of different words and phrases in different order and combination, be expressed in many different forms. At least three forms of its expression are contained in the foregoing statement of the case. Yet, although changed in the form of words in which it is expressed, it is still the "*rule of Armory vs. Delamirie.*" Also, in deciding other cases in obedience to the rule established by this case as a guiding precedent, no inconvenience results because of this interchangeableness of different modes of expressing the rule. This is so because the facts of the special case are always there to be read in connection with any formal statement in written language of the ruling made, and so to check the possibilities of misconstruction arising from the necessary ambiguity of general statements. If, however, you were to change a single word in the code section above quoted, or were to write a different version of the rule in its place, changing the words or their order, most important changes would be effected in the rule, and in its meaning, when consulted as a guide to the solution of other cases that

might arise. But all this is more fully explained in subsequent chapters. (See Chapters V and VII.)

THE BOOKS IN WHICH LAW IS WRITTEN

The books that contain the law as declared by the legislature in statutes are called the Statutes.¹ When a statute covers, or attempts to cover, the whole law, or a province of the law; and expressly or impliedly assumes to furnish guidance throughout the entire subject, excluding all reference by the Courts to any other source of law than the language of the statute, then a statute becomes a Code.² This idea is implied in the continental conception of a Code. It is not, however, an essential part of the conception. Codes can and do exist in conjunction with a Case Law, construing and applying them. The result is, that this Case Law becomes more important than the Code itself.³ In most States whose laws are codified (France, Germany, etc.), Case Law does not exist except clandestinely, or by sufferance. In other words, the decisions made by Courts of special cases arising under the Code are not reported; or, if reported, they are not binding as precedents upon the judge in deciding like cases afterwards arising. But even in those systems of law where penalties have been fulminated against those who would create or follow precedents, the natural tendency of the human mind to rely upon and follow past experience has proven too strong to be wholly fettered by legislative fiat.

The books that contain the law as declared in the cases are called the Reports. These books consist of written reports of certain disputes that have arisen between litigants regarding their rights; and embody an account of who the parties were, and what they quarrelled about, and

¹ See Exhibits A and B, Chap. V, for concrete examples of statutes.

² See Exhibits M, N, and O, Chap. VI, for concrete examples of codes.

³ See Chaps. VIII and IX for a full discussion of this.

how the judges decided the quarrel, and the grounds the judges gave for deciding as they did. In theory, and generally in practice, the statute law is supreme. When a case arises which the Court must decide, the source at which the Court seeks the law is, first, the statute book. If nothing is found covering the case, the Court then seeks the rule in these reported cases, and in the principles involved in, and established by, them.

The law of England, then, consists of these two kinds of law, Statutes and Cases. The law of the different States of the European Continent consists of Codes. It is, in theory at least, all composed of Statutory Law. A question of transcendent importance to the English-speaking people of to-day is, whether they, likewise, shall reduce all of their law to Statutory form.

CHAPTER II

THE FORMS OF LAW

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In the last chapter we ascertained that there could be but two forms of law: either a rule laid down in express language to cover future cases, — Statutory or Code Law; or, a rule asserted or implied in the decision of a tribunal deciding a special case and so applicable to the decision of other like disputes, — Case or Judge-made Law. The history of legal systems bears out the statement.

THE TWO GREAT SYSTEMS OF LAW

Two great systems of law exist to-day in our Western civilizations. On the one hand the Code system. On the other hand the Common law. On the one hand the Code systems of Germany, France, Austria, Switzerland, Italy and Spain derived from the Roman law; on the other hand the Case law system of England, America, South Africa¹ and Australia derived from the Common law of England.

¹ Except as modified by the Roman Dutch Law prevailing at Cape Colony. See 19 Law Magazine and Review, 94.

“The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code,”¹ says Sir Henry Maine. He refers to the Roman law, its beginning in the Twelve Tables, and its ending in the Codes of Justinian. Out of this prototype have been built up the systems of law prevalent in Continental Europe. However striking the epigram, Maine himself calls attention to its incompleteness. He proves that Case Law, the decisions by judge or king of special cases, constitutes a beginning of law earlier than any Code of Greece or Rome.

The celebrated system of jurisprudence known to the world as the Common law of England emerges from an unknown antiquity as a whole composed of two distinct parts, the Case and the Statute law; and so, through many centuries down to our own times, continues the same.

Sir Matthew Hale spoke of attempts to fathom the dark origin of the English Common law, the unwritten laws of the Britons, Romans, Picts, Saxons, Danes and Normans as “an unsearchable inquiry.”² Yet recent investigations have done much to shed light into this dark corner of our legal history.³ So far as we have gone we have still found Case and Statute Law. On the other hand, as Maine has shown, the Roman and Grecian Law can be traced back to an era before the Codes when the decisions — the Cases — the Themistes, were the only law known.⁴

THEIR ORIGIN IN A COMMON FORM

Is it possible, then, that these two systems were differentiated from the first? The trained lawyers have given us the result of their researches. It remains for the Man of Science to answer the question by a broader generalization.

¹ Maine's *Ancient Law*, Chap. I, p. 1.

² Hale's *History of the Common Law*, 60.

³ Pollock and Maitland's *History of English Law before Edw. I.*

⁴ Maine's *Ancient Law*, Chap. I, p. 5.

On first principles it might be argued that if the Roman law, which has developed into a Code or complete body of Statute law, began as a series of particular decisions; then it is more than likely that the English Common Law, which still remains a discrete whole made up in part of statutes, and in part of particular decisions, should have begun as a series of particular decisions. Curiously enough, the common lawyers of one and two hundred years ago held the view that the original fountain head of all the law was the legislature, and that so much of the common law as they could not find in the Rolls of Parliament were but ancient statutes worn down by time.¹ Thus Lord Chief Justice Wilmot in *Collin vs. Blantern*, WILS. Part 2, pp. 348, 351, said, "The common law and the statute law flow originally from the same fountain, the legislature, the statute law being the will of the legislature, remaining on record in writing; the common law, nothing else but statutes anciently written, but which have been worn out by time. All our law began by consent of the legislature and whether it be now law by custom, by usage or by writing it is the same thing." This was written in 1767. The last sentence breathes the spirit of the exploded "Social Contract" theory of Society.

While historical research fails to lift the veil of antiquity, a comparative study of like civilizations leads to true conclusions. There was a time when legislatures did not exist, and hence there could not have been Codes or Statutes. To arrive at just conclusions as to how laws arose in the societies formed by our immediate ancestors, we may best study savage societies of this date now passing through like stages of civilization. From these we learn that first and last "law is mainly an embodiment of ancestral injunctions."² And that "while in the course of civilization written law tends to replace traditional

¹ Hale's History of the Common Law, Chap. IV. See also p. 3, note E.

² Spencer's Principles of Sociology — Political Institutions, § 535, p. 535.

usage the replacement never becomes complete.”¹ And the beginnings of law in special judgments on special cases is clearly traced in barbaric customs of existing tribes, and in ancient history.²

The decisions of special cases antedate the institution of the courts or regular tribunals themselves.² In the law of England we can trace the development of the King’s Courts, and with them the Court of Chancery, out of the King’s Prerogative; and we can see how the judicial power, at first merged in the political power which decided all special cases, gradually differentiated from it with the evolution of the Society.²

And so both the Roman and the English systems may be safely said to have arisen from the same sources,—the judgment of the particular case, and the custom. Here we use the word “custom” in the sense of rule of law, as when we say,—The common law of England is based on the “customs of the realm.”³ And whether, as Sir Henry Maine insists, the cases, *the themistes* or judgments, preceded the custom and were evidence of it; or the custom preceded *the themistes*, and enforced a decision in accord with it, is unimportant. Thus Markby says: “The idea of law cannot arise until after a number of special decisions.”⁴

The probability is that in the beginning, as now, the two grew together, reacting upon each other, the judgment on the one hand evidencing the custom, and the custom compelling the judgment to be made according to some fixed rule.

THE SOURCE OF LAW AN ORAL TRADITION

The point to be noted is that this rule was an oral, an unwritten tradition.⁵ The truth of this is manifest when

¹ Spencer’s Principles of Sociology — Political Institutions, § 529, p. 514.

² Spencer’s Political Institutions, Chaps. XIII and XIV.

³ See Spencer’s Political Institutions, Chap. XIV.

⁴ Markby’s Elements of Law (4th ed.), Sec. 95.

⁵ Spencer’s Political Institutions, Sec. 467, p. 529.

we reflect that writing is a modern invention; and that existing savages, ignorant of the art, are ruled by ancestral customs; and that among these, special judgments are rendered through the medium of Chief, Medicine Man or Tribal assembly. As Sir John Lubbock remarks: "No savage is free. All over the world his daily life is regulated by a complicated and apparently most inconvenient set of customs (as forcible as laws) of quaint prohibitions and privileges."¹ Not all *customs* as the word is used in the above citation have developed into laws. We may say roughly that customs involving the relations of the society to the individual, and of the individuals as between themselves, so far as concerns questions of life, liberty and property, are the domain of law.

ITS DEVELOPMENT INTO TWO TYPES

And, in the course of development of the two types of Anglo-Saxon and Roman Civilization, these legal customs or rules have received different forms of expression.

On the one hand, in the Roman Civilization, they have been reduced to writing in the form of a Code. On the other hand, in the English Civilization, they have been reduced to writing in two forms—a comparatively small portion in the form of Statutes, the remaining portion in the form of Reports of Cases. For samples of Reports and for a further explanation of their nature, see Exhibits C and D, and the notes to those exhibits in Chapter VI. In short phrase the Reports are histories of the special disputes, the cases which have been decided by the Courts. These histories include in their statement the detail facts of each case, the issues presented, the decision made in the case and the reasons given by the Court for such decision.

The grand distinction, then, between the Roman law and the Common law lies in the fact that, while the rules

¹ Lubbock's *Origin of Civilization*, 303.

of both are in writing, the form in which they are written is different.

Sir Henry Maine implies that a rule of Case Law is no different from a rule of Statute Law. Referring to the abstracting of a rule of English Law from written precedents,¹ he says: "But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case law, and only different from Code law because it is written in a different way."² In the course of this essay we hope to prove the fundamental misconception implied in this statement that there are no characteristic differences between rules of law as expressed in Cases and as expressed in Statutes.

THE DISTINCTION IS BETWEEN CODE AND CASE LAW — NOT CODE AND COMMON LAW

Since a portion of the Common Law is expressed in Statutory form, there is no distinction between that portion and Code Law. The distinction between the forms of writing only exists between that portion of the Common Law now known as the Case Law, and that portion of a Code which would deal with the same subject-matter. The distinction then is this. The Code system expresses all rules of law in Statutory form. The Common Law system expresses some rules in the form of Statutes, and some in the form of Reported Cases. The first inquiry therefore is: whether this difference in form is in any way implicated with difference of subject-matter.

THE INTERACTION BETWEEN THE FORM AND THE SUBSTANCE OF LAW

As will be more fully shown in succeeding chapters, difference in the subject-matter involved is the scientific

¹ A precedent is a former case reported in the books of the reports. It thus becomes a guide for use in future like cases as to the existence of the rule of law stated to apply, and as an instance of the application made of it.

² Maine's Ancient Law, p. 13.

basis of the distinct uses made by the Common Law of these two forms of writing. The Code system, in attempting to obscure this difference by the adoption of one cast-iron mode of statement for all subjects, is scientifically unsound.

THIS PROPOSITION DISPUTED BY THE CODIFIERS

Many jurists, however, claim that the question between Code and Common Law is merely a question of form.¹ It is said that whether a rule of law is in substance to one effect or another, is of no consequence, so far as concerns the question of whether it shall be expressed in the form of a statute, or in the form of a code.² The advocates of a code system have treated this proposition as a self-evident truth. Yet the error involved in the statement can be proved with little difficulty.

THE ARGUMENT FOR THE PROPOSITION

The statement may be examined from two points of view,—as applying to law when once enacted or written down and thereafter referred to as a guide for subsequent cases arising, or as applying to law before it is made.

Let us look at the statement from the first point of view. While a rule of law expressed in a Statute or an opinion³ may, because they are both in writing, appear to embody the same substance, this appearance evaporates when we consult these dissimilar classes of writings to obtain light from them for the solution of subsequent problems. As is shown in detail hereafter, the substance of the rule expressed in formal language and contained in a Statute, whose meaning is arrived at by the rules of grammatical construction, is quite a different substance from the same rule expressed in the same identical language but contained

¹ Holland *Forms of Law*, 26; *Encyclopædia Britannica*, 6th vol., p. 104 (9th ed.).

² Austin's *Province of Jurisprudence*, § 950.

³ The writing in which the court states its reasons for deciding a case as it does.

in an opinion, whose meaning is arrived at by a scientific interpretation. This latter kind of interpretation checks the construction of the language used by reference to the facts of the special case, the environment out of which it arose and by which it is modified.

The fact is we apply, to these two forms of writing, different rules of construction to ascertain what is the substance of the rules of law therein expressed. And a rule of law, which when implicated with the facts of the special cases from which it is created by induction means one thing, is quite another thing when expressed in formal language, apart from these instances of its application. As to this, however, we must beg the indulgent credence of the lay reader. We can only state our view here in the form of a generalization intelligible to the lawyer. The proof in detail of this statement will be presented in subsequent chapters.¹

Looking at this assertion of the identity in substance between these two forms of law from the point of view of applying it to law before law is made, we may remark the following. A rule of law must originate by an effort of the human mind. It is the product of such intelligence as the judge or legislator may have. The judge or legislator enacting it attempts to arrive at justice. When he promulgates a rule of law by means of a Statute, he provides, in general terms, for future cases which may or may not be fully within his ken, or within his powers of verbal expression. When he decides an individual case, and, in such decision, asserts the application of a rule of law, thereby implying the existence of such a rule, his mind is occupied mainly with the correct decision of the case before him. He searches out a true principle which will decide that case correctly. Where the decision of the case involves no particular equity, it is a matter of indifference how the decision may be made. Under such conditions a conventional rule, established to cover the case,

¹ Chaps. V, VI and VII.

violates no principle; and is consonant with convenience. Where, however, questions of equity or inequity arise, dependent upon different combinations of fact, it is not always easy to lay down beforehand a rule which will produce a correct decision of all the possible cases that may arise. In other words, where questions of equity are involved, it is much easier to decide a given case correctly by enunciating and applying a true general principle than it is to express a general principle so that it will include and embrace, and correctly decide, not only the case in hand, but other complicated cases not arisen, or in mind. It follows that in cases whose subject-matter involves considerations of equity, a system of decisions of special cases will produce more justice than a system of general rules expressed so as to govern all cases. The Case Law decides one case, the Statute Law attempts to solve many. In short, it is easier to decide one case correctly and give a true reason therefor, than it is to decide all cases that may possibly arise correctly, and by one form of words express the general rule, and its exceptions.

THE SELECTION OF CASE OR STATUTE LAW A QUESTION OF MIXED FORM AND SUBSTANCE

Thus, although whether a rule of law shall be expressed in the form of a statute, or in the form of a reported case, appears to be a question of form; yet the limitations of our intellectual faculties and of our powers of expression make it a question of mixed form and substance. It follows that if it is more important that the law should be just than that it should be expressed with logical order and consistency, the method of expression which produces the greatest average of just results is best fitted as the form in which it should be expressed.

If rules of law evolved through the gradual inductions established from reported decisions of individual cases are, on account of their easy flexibility and power of accommodating themselves to the circumstances and

equities of each individual case, rules which result in a greater number of ethically right decisions than would be possible under a system wherein all combinations of fact are decided by a rigid rule expressed in formal language, then the case system approaches nearer than the Code system to that absolute excellence which a legal system should possess. We may conclude, therefore, that the form in which the law is expressed reacts upon the merit of the substance of the law. And we may no longer say that the question of the form in which the law shall be expressed is a question entirely apart from the substance that is expressed in it. But this anticipates the question to be discussed.

THE CONFLICT IS BETWEEN CODE AND CASE LAW

The truth with which we are here concerned is this. The question of Code *versus* Common Law is, then, not a question whether all law shall be expressed in statutory form or in case form, but whether portions of it embracing certain subject-matter shall be expressed in the form of a Statute, or in the form of a Reported Case. To restate the question it is more correct to say that the conflict is not between Code and Common Law, but between Code and Case Law.

THE CRY OF THE CODIFIERS

And the time has now arrived when many jurists, viewing the English Law, the voluminous character of the reports of cases, the divergences between authorities, the difficulty of extracting a rule from the precedents and the immense mass of heterogeneous material, have sought for a way out of the wilderness, and for that purpose have advocated codification. Beginning with Bentham, they have longed for an orderly restatement of this mass of conflicting material. Thus Bentham advised the new Colonies and States of America to "shut their ports against the common law as they would

against the plague.”¹ Austin says: “Such are the evils of judicial legislation that the expediency of a Code or a complete or exclusive body of Statute law admits of no doubt; provided that the chaos of judiciary law and of the Statute law stuck patchwise on the judiciary could be superseded by a good Code.”² Professor Amos, admitting the arguments against codification to be unanswerable, yet deems the “general gain is likely to outweigh the loss.”³ Sir Frederick Pollock, in an essay on some defects of our Commercial Law, says: “The remedy lies straight before us, and has already been applied with success by the majority of civilized nations. It is the statement of the law by the Supreme Authority of the Legislature, and in an orderly and lucid form; in one word, codification.”⁴ Ex-Judge John F. Dillon believes in a partial codification rather than in the detailed code of Bentham’s idea.⁵ He says, “There comes a time when the law becomes so voluminous and vast” that a systematic compilation and restatement is necessary.⁶ This is unquestionably true of Statute Law. It is not true of Case Law when Case Law is confined, as it should be, to its proper province. A gradual growth and advance slowly modifies former doctrines along fixed lines of development, so that reason becomes as certain a guide to prediction as the nature of the problems admits. Even away back in the time of Bacon complaints were made of the inconsistencies and bulk of the Common Law, and he was probably the first to make proposals to simplify the law by digesting or otherwise.⁷ Mr. Clark, while admitting the advantages of Case Law,⁸ deems codifica-

¹ Bentham’s Works, Edinburgh, 1843, Vol. III, p. 304.

² Austin’s Province of Jurisprudence, § 968.

³ Amos’ Science of Jurisprudence, 478. An English Code.

⁴ Pollock’s Essays in Jurisprudence, p. 90.

⁵ Dillon’s Lectures on Jurisprudence, p. 181.

⁶ Ibid., pp. 269, 347.

⁷ Ibid., p. 273.

⁸ Clark’s Practical Jurisprudence, p. 263.

tion the only remedy.¹ Ex-Judge Dillon draws attention to the immense bulk of the Case Law, and cites the fact that down to 1881 the English reports numbered 2944 volumes, and down to December 31, 1885, the American reports numbered 3796 volumes, the bulk of these latter being reports of the last fifty years.² These statistics, in support of the charge against the Case Law system of unwieldy mass, become less conclusive if we sift the evidence. This matter is further discussed in Chapter VIII. (See pp. 300-302.)

And from far and wide, from professors, jurists and students, and from some practising lawyers, comes the demand that all this mass of undigested learning should be reduced in bulk, its incongruities and contradictions eliminated and its conclusions restated in an orderly and scientific form; in other words, the demand for codification.

THE ANSWER OF THE PRACTITIONERS

On the other hand, jurists and practising lawyers have again and again asserted that the English Case Law is "the perfection of human reason." Kent, speaking to those bold projectors who think of striking off a perfect code of law at a single effort, suggests to their consideration "the just language of Sir Matthew Hale," that "the Common Law of England 'is not the product of the wisdom of some one man or society of men in any one age; but of the wisdom, counsel, experience and observation of many wise and observing men.'"³ Benjamin R. Curtis, in a report made to the legislature of Massachusetts in 1851, said: "From the days when Mr. Locke created a constitution down to the production of the last Code which came out of the closet of the last professor, we believe one important lesson has been taught: that all law

¹ Clark's Practical Jurisprudence, p. 380.

² Dillon's Lectures on Jurisprudence, p. 380.

³ 1 Kent's Commentaries (12th Am. ed.), 536 (1st ed. p. 471).

should be derived, not created; deduced by experience and careful observation from the existing usages, habits and wants of men, and not spun out of the brains even of the most learned." And in a later opinion he said: "The progress made by the Courts of Common Law, particularly in this country, in adapting its rules to the actual affairs of men, affords, in my opinion, the shortest argument in favor of our unwritten system of law; and this progress has been made, not under a claim of right to alter the law, but by treating ancient rules, established under different circumstances, with the strictness which is appropriate to them, and by admitting exceptions which changes in the affairs of men have both assumed to exist and have rendered necessary."¹ United States Attorney General Legaré, in his paper on Codification, thus states his final objection:² "Our objection depends upon the difference between written and unwritten law, and the danger arising out of the essential character of the former. The difference, as we have endeavored to show, is between what depends upon general reasoning and what depends upon verbal criticism. A rule is laid down in a digest; if it be inaccurately enunciated you go to the *case* which has settled it. Your remedy is in the report; you detect the error and rectify it; and the precision and uniformity of the law is maintained. But from the moment you *enact* all these rules, they are adopted and promulgated as positive law, and must be interpreted as such. You are to make a great bonfire of your libraries and take a new start. If there is the least change or obscurity in the language, verbal criticism begins, everything that has been settled is afloat once more, and the glorious uncertainty continues until as many more camel loads of reports take the place of the old ones. Even supposing a Code perfectly well done, we do not think the game worth the candle in the actual state of things; but if it be inartifi-

¹ Quoted in Van Cott on Codification (pamphlet), p. 7.

² *Ibid.*

cially executed, the labors of six centuries are utterly thrown away." Mr. Justice Coleridge, in the report of the judges of England on the pending bill to codify the Criminal Law of England, says:¹ "I cannot conceive that language can ever be used with such precision as to meet all complications and varieties of circumstances. If you are very definite in your law, you will very often find something in the case which distinguishes it. If you are very general, you run a risk of including many things which clearly were not intended. Now, at present, every judge and lawyer is aware that when you come to apply law to facts you have, ordinarily and practically, more difficulty if the law be found written in a statute than if it be a portion of the Common Law. In the former case your rule is inflexible; it may be the best, in the case of a Code, which one set of able and learned men can collect from the past and devise for the present, but if there be an omission you cannot supply it; if the words mean clearly one thing, you cannot call in supposed intention, or strong probability, or clear reasonableness to make them say another; if, in such cases, the judges strain the law, which, I conceive, would be clearly wrong, and their decisions prevail, a new unwritten law is gradually grafted on your Code; if they do not, and you are driven to enact supplemental statutes, the very principle of your Code is departed from, and gradually its supposed advantages lost."

And in the same report Mr. Justice Talfourd says:² "To reduce the *statute law* into a narrow compass is an object entirely free from objection, and which, if accomplished with care, can produce nothing but good; but to reduce unwritten law to statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible adaptation.

¹ Quoted in Mr. James C. Carter's Proposed Codification of our Common Law (pamphlet), p. 77.

² *Ibid.*, p. 77. See British Parliamentary Papers, 1854, Vol. LIII, 303.

“I do not think any greater certainty can be obtained by a Code of the unwritten law to compensate for the loss; but that, on the contrary, new questions of the construction of the words of the same statutes will arise, unforeseen difficulties in construction would be suggested, and new decisions, more unsatisfactory than those which expound and apply principles, would become necessary.

“How little the utmost learning and care which can be bestowed in framing a statute may avail to prevent a number of questions from arising in its language, may be gathered from the example of the Statute of Frauds, which, framed by one of the greatest lawyers who ever lived, has been the subject of almost numberless decisions.”

And among others W. M. Best,¹ of the English bar, and Mr. James C. Carter,² of the American bar, have expressed in forcible argument the inexpediency and unwisdom of codifying the case law.³

THE IMPORTANCE AND PRACTICAL NATURE OF THE QUESTION

A disagreement so complete and so fundamental between the experts in the art renders necessary a careful reconsideration of the entire subject. Although since the death of its indefatigable advocate, David Dudley Field, the Code question now lies dormant in America, it is a question which, from its very nature, will not down, and must be squarely met on its merits. It is to-day a practical question in England.⁴ It may become such at any moment

¹ See able article, “Codification.” 1 Juridical Society Papers, 209.

² See his able papers, *The proposed Codification of our Common Law, and The Province of the Unwritten and the Written Law*. These are unfortunately in pamphlet form only. The first was printed by the New York Bar Association, and is out of print; the second by Banks Brothers, New York, 1889. The merit of his contributions to the subject demands their preservation in permanent form.

³ See also Mr. Bishop in his introduction to his book on *Marriage and Divorce* (2d ed.).

⁴ The proposed Imperial Code of Commercial Law. 8 Juridical Review, 329, 396.

in the State of New York, and in the other States of the American Union. Four States have already codified their written and unwritten law; viz. Georgia, California and North and South Dakota.¹

The question is, therefore, not only of academic interest, but also of great practical moment. Its importance is increased by the fact that the step of substituting code law for case law is one which once taken cannot be easily retraced. All future development of the law must be on the lines of statutory amendment, and not on the lines of the gradual development of precedent. The Rubicon once passed, there can be no retreat. We must go forward in the path we have chosen. It therefore becomes of the greatest importance that we should consider well before we leap. This is especially true when the advocates of codification are unable to point to any greater merits which the systems of law of Continental Europe have, through the possession of a code system, over our Common Law system of mixed case and statute law. Even Austin, the great exponent of codification, deprecates any argument for or against the codification of the English law drawn from the success or failure of the French or German Code.² Amos likewise deprecates any argument for the same purpose drawn from the success or failure of the Indian Codes.³

The question of *Code versus Common Law*, or rather *Code versus Case Law*, must therefore be fought out on principle. It is the object of this essay to search for and apply the fundamental principles involved in this question.

¹ 27 Am. Law Rev. 552.

² Austin, Province of Jurisprudence, § 854.

³ Amos, An English Code, pp. 36 *et seq.*

CHAPTER III

THE CODE QUESTION

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THE CONFLICT IN NEW YORK

For many years a discussion went on between two factions of New York lawyers. The point at issue concerned the proposed adoption by that State of a codification of its Common Law known as the Field Civil Code. Year after year, the venerable author of that Code presented it to the Legislature for passage. Year after year, with equal untiring energy, the champions of the Common Law system met him in public and private debate. The result has been that the Field Civil Code remains neither a text-book nor a Statute.

Meanwhile that great body of New York's citizens known in technical parlance as "The Laity," pursued the even tenor of their way, oblivious of, and apparently uninterested in, the contest. Yet, in the field of jurisprudence, the adoption of the code in place of the Common Law system, would prove a departure no less momentous in its consequences, than, in the field of politics, the adoption of the Constitution of the United States in place of the

Articles of Confederation has proved in shaping and determining the future political life of the original thirteen States. Columns of the newspapers were devoted to the fisticuffs of Mitchell, Kilrain and Sullivan, when a few lines told the story of the last vote at Albany on the Code. The public, however, are not altogether to blame for this. This is an age when such prominent men as Canon Kingsley and the historian Froude are found denying the existence of a science of Sociology. It is not strange, therefore, that the average man should take little interest in the question, whether the laws which govern him should be written out in one way, rather than in another. Again, the effects produced by a change in the manner of prescribing laws for a community are, owing to the number of the facts to be observed, the intricacy of the interaction of the forces involved and the intermixture of the effects, worked out so silently and slowly, that it is long before the complexity of the process is unravelled, and the remote and unexpected results identified as effects flowing from the unsuspected cause. Much less, therefore, is it to be expected, that the results themselves should be foreseen by those who make no special study of the phenomena. And it is certainly not to be expected that such persons should realize that results, of far-reaching importance to them in their daily transactions and to the society in which they live, will flow from such an apparently simple thing as the expression in writing of the whole body of the civil law in one form rather than in another.

THE BROAD QUESTION — TO CODIFY OR NOT TO CODIFY

And yet this is the Code Question in a nutshell ; or to put it more fully : Shall the whole body of our Common law be written out now as a complete and finished science in the shape and form of a Code ? or, shall it remain written out in the Reports, so far as it has been decided, leaving future principles and exceptions to be established, in the future as in the past, as the cases presenting them arise,

by the same process of growth which has built up the present system?

Lawyers will understand the issue as so put ; it needs amplification to be clear to less technical readers. In the first place, the foregoing statement of the question implies the elimination from this discussion, except incidentally, of the merits or demerits of the Field, or any other Code, as a Code. The question to be discussed is the broad question : *to codify or not to codify*—whether it were better, to avoid the myriad mass of precedents with all their conflict and uncertainty arising from differences in judicial mental power and discretion, by expressing in authoritative legislative enactment rules to govern all the complex relations of social life, present and future ; or to rely in the future, as in the past, upon the principles of equity and right reason as sufficient guides, when occasion arises, both to the advising counsel and to the judge.

THE LIMITATIONS OF THE QUESTION

In the second place, a limitation is needed. No one disputes the existence of a great number of questions arising in every-day life, as to which codification of the rules applicable is not only proper, but advisable. The question of whether a note payable on sight should have grace or not, is one so dependent upon convention that a statute declaring the rule is proper. And so of all simple collocations of facts or of relations in society, as to which a decision one way or the other is of no ethical significance. In such cases a real advantage is gained by the authoritative and unmistakable establishment of the rule which shall govern. The certainty of the rule is its chief merit. Again, the organization of the State, and the component parts of the government, their powers and duties, the boundaries of Counties, the manner and times of election, the Charters of municipalities, the constitution and jurisdiction of Courts, and generally the essential facts and rules of Political and Civil Government, are by common

consent, at least in America, prescribed by the Statute law.¹ Here the questions are political. Certainty is of more importance than all else. And even where ethics would render a judgment, the rule of the majority must govern as to what is ethics.

THE TRUE DEBATABLE GROUND

The true debatable grounds, over which codifiers and non-codifiers dispute, are those broad fields of social activity wherein the disputed questions arising in the particular cases presented, necessitate the application of ethical principles, as guides to the attainment of an equitable result.

What, then, is the real difference between uncodified law and codified law? The examination of this question presupposes an intimate acquaintance with the subject-matter involved and the terms employed. Unfortunately, the requisite technical knowledge is generally only possessed by men trained to the profession of the law. It would be interesting to such a one to learn what conceptions, and to what extent vague or definite, are roused in the lay mind by the use of the terms "Common Law," "Civil Law," "Code," "Statute," "Report," "Digest," "Text-book," "Decision," "Judgment," "Opinion," "Dicta," "Ruling," "Holding." And yet a very definite conception of each of these terms, and a practical acquaintance with the things themselves, is required before any one can fully understand an argument relating to them.

THE ARGUMENT THAT CODIFICATION ENABLES THE COMMON MAN TO KNOW THE LAW

Some champions of Codification insist that a Code should be adopted because then the common people can find and know the law; and every man can be his own lawyer. Thus Mr. Fowler says: "When the Codifier

¹ Our English cousins appear to thrive under an unwritten constitution. Their political organization is dependent on custom and precedent.

has found these laws he lodges them between single covers that common people, and not logicians and experts alone, may better apply them to the myriad shifting phases of human affairs.”¹ “But this may safely be claimed for Codification. It will tend to certainty in legal administration; it will enable us to remove the enormities of the case law; *it will render the framework of the law more accessible to the unlearned*, and mainly it will afford more exact bases for forensic discussion.”²

Mr. Field says: “The only real question, if question there be, is whether there shall be any codification of the Common Law at all, that is to say, *whether the law shall be written in a Code where the people can find it, or left in thousands upon thousands of Reports where only lawyers can find it.*”³

THE ANSWER TO THIS ARGUMENT

Happily for the reputation of Codifiers as a class, not all of them use this *ad hominem* argument. Thus Austin, referring to this argument, says: “I am far from thinking that the law ever can be so condensed and simplified, that any considerable portion of the community may know the whole, or much of it.”⁴

Every man his own lawyer has a pleasing sound to the unlearned ear. The implied assumption, however, is contrary to the observed facts in the evolution of social life. The law of evolution is a growth from the simple to the complex; from the man who is the Jack of all Trades, with resulting defects, to the man who knows but one. Subdivision of Labor is the law of Industrial Progress; and so minute has become the division of labor in modern life that a man sometimes spends his life in repeating a simple operation; as in the case of the workman who does

¹ Codification in the State of New York, Robert Ludlow Fowler (pamphlet), p. 17.

² *Ibid.*, p. 53.

³ Answer to Report of New York City Bar Association Committee against the Civil Code, David Dudley Field (pamphlet), p. 4.

⁴ Austin, Province of Jurisprudence, § 935.

nothing all day but put heads on pins. It would be strange, indeed, if when the comparatively simple industry of weaving has become so complex that no one workman can know and attend properly to all of its steps, a profession so intricate and intellectual as the study and practice of the law could be carried on by persons trained to other pursuits. When there were no tailors, shoemakers, etc., there were no lawyers. Long after other trades were established there existed no lawyers or legal class.¹ Pollock and Maitland state that there were no lawyers or legal class in England until some time after the conquest.² Lawyers came into existence, as all other trades have done, under the natural law of demand and supply. It matters little in what form the law of the land might be expressed, laymen could no more dispense with lawyers than they can dispense with doctors, electricians, engineers, architects, etc., etc. As well might a lawyer attempt to be his own hatter, tailor or doctor.

If to this it be answered that the true meaning of the argument is that common men will not become lawyers, but will be able to better know or learn the law because in one volume instead of many, the reply is as follows. This answer implies one or two things. 1st. The law as it is now expressed is so imperfectly expressed that common men cannot know any part of it. 2d. If the law were expressed in a code, common men could more easily and quickly know about it, or learn its rules, than they can do under the present conditions.

Of course no advocate of codification assumes the truth of the first contention. Men to-day know in a general way that a widow has dower, a husband curtesy, heirs inherit land, children personal property, damages result from a broken contract, promissory notes have days of

¹ Sir Frederick Pollock in article on "The Nature and Meaning of Law." 10 Law Quarterly Review, pp. 228, 237, citing the Icelandic sagas.

² Pollock and Maitland, History of English Law, Vol. I, p. 190, etc.

grace,¹ an agent should sign for his principal; and a number of other ever-recurring rules. The Code advocates generally insist on the second assumption. The argument is sometimes conceded. And yet there is much reason to suspect that the concession is not necessary, nor strictly according to the fact.

THE COMPARATIVE INTELLIGIBILITY OF THE CODE AND CASE SYSTEMS

The code is a statute; and, as such, it is very plain as to some things, very obscure as to others. On examination of its working, in special cases, its clearness will be found to cover only those very general principles, and their application, the truth of which no one disputes. Such clearness can be even better observed in a well-written text-book, because the writer is untrammelled by the difficulties inherent in statutory expression. We confidently affirm that a common man can learn more of the accepted, established and undisputed rules of law from Kent's Commentaries annotated to date, supplemented by Bispham's Equity, — or say from Dwight's Municipal Law alone, — than he ever could gather from the Field Code, the Indian Code, or the Code Napoleon.²

Where the meaning of the statute is not plain, or the application is not clear, comes in the necessity of interpretation and construction. A code covers the entire body of the law. A few cases only can be clearly and explicitly provided for in it. The great majority of cases arising under it will require a construction of the statute before they can be decided. No one is competent to discover the

¹ A Statute has changed this in New York since the above sentence was written.

² As an example of this, let the reader compare the statement of the law of Contracts in Restraint of Trade contained in Pollock on Contracts (see Exhibit E of Chap. V), and in Title V of Chap. V with the statement of that law contained in the French Civil Code (Exhibit M, Chap. VI), the Field Civil Code (Exhibit N, Chap. VI) and the Indian Contract act (Exhibit O, Chap. VI).

true meaning of legal language except a trained lawyer. So far as the statute is plain, as applied to certain classes of fact, the same certainty is to be found in any good text-book. So far as the statute needs interpretation and construction, in order to apply it to a particular case, the attempt of an untrained mind to fathom its meaning will lead him into error. He will think that clear which is obscure, and the chances are a hundred to one that he will mistake the meaning, or the application of the words.

Knowledge of law is like all knowledge. There is no royal road to its attainment. The subject is uncertain, because the science is new and growing. Law is the science of applied relative ethics. It involves politics, political economy, and ethics, sciences still in their infancy. How, then, can we expect to know it all; or how can we expect to express it all, in the covers of one book? Uncertainty, therefore, will creep in, whether the law is written in one book, or in thousands.

The uncertainty of the common law system is due to the imperfection of human reasoning powers, to the fact that human minds honestly weighing a question of logic or of equity will reach diverse conclusions. The uncertainty of a code system is due to a like diversity in the reasoning powers of the human mind, and to the imperfection of language as a vehicle to communicate commands.

Thus each system has its region of uncertainty, and they are not coextensive. Principles, and their applications which are certain in a common law system, would not necessarily be so under a code system, — this because of the difficulty of condensation. Whether they were so or not, would depend upon the skill of the man, or body of men, who drafted the code. The particular cases about which there would be uncertainty under both systems would be those in which the facts are new or complicated, and the equity doubtful, by reason of doubt as to the application of different and conflicting rules. In

such cases, and these are the majority of cases in which laymen need to resort to the law, the layman is equally at sea whether he resorts to a code or to the system of statutes and reports. He needs a lawyer.

The lawyer now takes up the question. We show hereafter in detail how he examines it (see Chapters IV, V and VI); and the substantial result. We may summarize the results as follows: If the matter comes up under a code system, he resorts to the code. Under the hypothesis of a Code consisting of one volume, the code he consults must necessarily be a Code of principles, and not a detail code. In such a code he finds general principles stated, but no definite information as to the rule governing the special collocation of facts involved in his case. (See French Code, Exhibit M, Chapter VI, and Field Civil Code, Exhibit N, Chapter VI.) Since the Code furnishes no explicit guidance, he must decide it as best he may. (See the examples given below of the workings of the code, and common law system, as applied to contracts in restraint of trade, Chapters V and VI.) If the matter comes up under a common law system, he first resorts to the statutes, and then to the reported cases. He usually finds some cases involving facts like his own; and from these, and the reasons given for their decision, he may work out the principle applying to and governing the case he has in hand. (See Chapter V, *infra*.)

In fact, it stands to reason that a compilation of law consisting of many volumes must necessarily express the various rules to cover more special cases than can be done in the space of one volume, however transcendent the genius of the author. It follows that neither for the layman nor for the lawyer, can it be said that the law can be successfully limited to one book of a few hundred pages. The history of every Code that has ever been in operation—with its numerous volumes of commentaries, decisions of Courts as to its meaning, and revisions, repeals, and reënactments, gives the lie to the contention.

THE NECESSITY OF MEETING THE QUESTION BEFORE
THE POPULAR FORUM

In spite of these facts, however, some advocates of a Code system (see Mr. Field and Mr. Fowler above) have thus courted the popular vote; and have demanded decision by the multitude of a scientific question. The system of universal suffrage exists. The popular vote can and will decide the issue. The people are the judges. No advocate, no matter what the merits of his cause, who based his case upon the argument that the decision of the merits of the dispute was beyond the intellectual capacity of his judges, ever yet won his case. Just as our intelligent voters cast their ballots for protection as against free trade and for free coinage of silver at the ratio of 16 to 1, and laugh down the wind the teachings of the High Priests of political economy, so will they accept jurisdiction and decide the contest of Code *versus* Case law.

The advocate of the common law system must therefore meet the advocate of the Code system on his chosen ground. This is all the more imperative for another reason. In appealing for the popular verdict these Code advocates have charged that professional opposition to codification is due to the jealousy felt by priests of a cult, at having the mysteries by which they profit revealed. The issue must then be met in the popular forum. And this cannot be avoided, although the actual existence of these very mysteries renders real comprehension by the voting public of the merits of the dispute, and the relative weight of the arguments presented, almost an impossibility. As well might a body of doctors learnedly argue before a popular assembly, over the pathological effects and causes of such effects produced in an organ by some complicated drug; or dispute over the efficacy of Koch's consumption, or Pasteur's hydrophobia treatment.

NOT DIFFICULT FOR THE MAN OF EDUCATION TO
MASTER THE PROBLEM AND DRAW HIS OWN CON-
CLUSIONS

Yet it is quite possible to unfold this subject to men of liberal education in such a way that they can understand it, and perceive the merits of the dispute. And since the discussion is to be carried on for the benefit of the public at large, let us at least make provision that, at least this portion of the public, may have definite, concrete ideas as to the subject-matter discussed. In speaking of Codified and Uncodified law, a lawyer is apt to forget that an ordinary business man has probably never seen a Code, or a volume of Reports; and that his conception of the term "law" must necessarily be exceedingly shadowy and uncertain. Indeed, it is safe to assume that not one in ten could give a satisfactory definition of the term "Municipal Law." Let us then clear up these conceptions by concrete statements and examples before proceeding further.

CHAPTER IV¹

AN INTRODUCTION TO THE STUDY OF LAW

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WHAT IS LAW

It is sometimes best to begin an explanation of what a thing is by a statement of what it is not. Law in the sense here intended is not law in the sense the word is used in the Physical Sciences. When we speak of the "Law of Wills" or the "Law of Corporations," we use the word in a sense different from its use in the phrase "Law of Gravitation." Law in the sense of a Law of Nature implies the inevitable sequence of cause and effect, and does not necessarily imply any personality as the author, or object, of its operation. Again, law in

¹ The professional reader may skip this chapter without breaking the thread of the argument.

the scientific sense is supreme in its action. No possibility of disobedience or of failure in its inevitable sequence is implied. On the other hand, law in its judicial sense implies a person laying down the law, and a person obeying or disobeying it. Law in this sense implies a command. It has been defined as follows:—

“A law is a command of the Supreme Political Authority of a State purporting to control the acts of persons in the Community.”¹ Law, therefore, implies a command from a person or set of persons to others, and is so distinguished from a law of Nature. Austin says: “The matter of jurisprudence is positive law; law strictly so called, that is, law set by political superiors to political inferiors.”²

The law thus defined is distinguished from morality. Not all legal rules have moral sanction; and many moral rules have no existence in positive law, and some can never be part of the positive law. Here we have twice used the term “positive law,” which is “law” in the sense we are to use it in this chapter. It is called “positive” to distinguish it from its other meanings. Thus positive law trenches upon morality, but is not coextensive with it; nor does it always agree with it. The following are examples of the truths just stated:—

A glaring instance that all legal rules have not moral sanction was presented by the institution of slavery. The title of the slave master to the custody and service of his slave was at one time fully protected by the positive law of the Slave States and of the United States. In the celebrated case of *Dred Scott*, 19 How. 393, the Supreme Court of the United States held that a slaveholding citizen of a slave State, migrating into the Territory of Upper Louisiana, was, under the provisions of the United States Constitution, protected in his ownership of his slaves to the same extent as any other citizen of the

¹ Amos, Science of Jurisprudence, 73.

² 1 Province of Jurisprudence, Sec. 1.

United States would be protected in other rights of property, and that no legislation which attempted to deprive him of his slave property was constitutional.

An instance of the fact that some moral rules have no existence in positive law is afforded by the following: There is no legal duty resting on a father to support a son similar to the legal duty of a husband to support his wife. While a wife can, under certain circumstances, bind her husband on a contract for necessaries, — namely, for board and lodging or clothing, — a child cannot so bind a parent. Says Jervis, C. J.: “If a father turns his son upon the world, the son’s only resource in the absence of anything to show a contract on the father’s part is to apply to the parish.”¹ The application referred to is one made, under a statute, by the Overseers of the Poor to a Court to compel the father to support the child, and to prevent it from becoming a public charge.² There are *dicta* in some American cases sustaining the contrary rule.³

An example of the fact that some moral rules can never be a part of the positive law is the following: Thus the moral rule “that children should treat their parents with respect, kindness and devotion,” is, in substance, impossible to be incorporated into positive law.

Again, leaving the theoretical jurists for a while, this law which Austin calls “positive law” is known to practising lawyers as “Municipal Law.” This Municipal Law is defined to be: “A rule of civil conduct prescribed by the Supreme Power of the State.”⁴ In this connection Municipal law is distinguished from International law. Austin has claimed that International law is not true law, because not a command from a political superior to a political inferior. We do not agree with this view,

¹ *Shelton vs. Springett*, 11 C. B. 452.

² See Cockburn, C. J., in *Bazely vs. Forder*, L. R. 3 Q. B. 559, 565.

³ 2 Kent’s Commentaries (12th Am. ed.), Eds. note 1, p. 229.

⁴ 1 Kent’s Commentaries (12th Am. ed.), 507 (1st ed. 446).

mentioning it only to dissent from it; but it would be impracticable to go into this discussion here.

Municipal law deals with the legal rules between the individuals and the nation, — Constitutional law, — and the relations of individuals under the State towards each other, — the law of Persons and Things. The units of Municipal law are: on the one hand, the State, on the other, the individuals governed by it.

International law deals with the rules existing, or supposed to exist, between separate independent sovereignties in their relations as States with each other. The units of International law are the Sovereign States or Nations; and there is no overruling central authority. The law of Nations is in its infancy; as was once the case with the Municipal Law; or, as it might be called in this connection, the law of individuals. In the earliest stages of Civilization individuals are governed not by a central authority, the State, for there is none, but, by a shifting mass of custom dependent upon the views and opinions of their fellow-savages.¹

And so at the present time the alleged rules of International law have no other warrant than the tacit agreement and consent of the Nations that they ought to be observed. In case of their infraction there is no agency to vindicate them. The tendency, however, seems to be towards a possible combination among other and neutral nations to prevent infractions of the Code by some one nation.² A case partially in point was the proposal urged from many quarters in 1896 that the United States should recognize the Cuban insurgents. This course was favored by many in the interests of civilization to prevent Spain from treating the insurgents as bandits and traitors, and from denying them the rights of belligerents according to the laws of war — a part of the law of nations.

Returning from this digression into the nature of Inter-

¹ Spencer's Political Institutions, Chaps. V and XIV.

² Maine's International Law, Chap. XII.

national law, the first peculiarity we notice about Municipal law is, that there must be as many Municipal laws as there are Independent States. There is a Municipal law of Germany, of France, of England, of New York, of New Jersey, etc., and likewise of other countries, as of Turkey, China, etc. At the first glance it would seem from this that the systems must be bewildering in their number and diversity. Certain historical facts, however, have prevented the extreme diversity that might otherwise have existed.

The laws of a race are, in a certain sense, its customs. "From the old books it manifestly appears that the whole of the common law was regarded as based upon immemorial custom. The law of the realm and the custom of the realm are used as equivalent expressions."¹ The customs of a race are the product of its history. A conquering nation often imposes its own laws upon the vanquished. The Roman arms carried the Roman customs, the Roman laws, far and wide throughout Europe.

Curiously enough, when later the Barbarian hordes swept over all opposition and overran the Roman Empire, though the Roman arms went down before them, the Roman customs, the Roman laws largely remained.

There arose in Europe two great systems of law: the Roman, or Civil law, and the English, or Common Law. And when the New World was discovered and settled, the settlers took with them the laws of their origin. Thus it came to pass that the Civil law is the basis of the Municipal law of the Spanish and French settlements in America, of the States of South and Central America, of Cuba, and of the State of Louisiana; and the English Common Law is the foundation of the law of the different States of the United States of America except Louisiana.² The exception is due to the fact that Louisiana was a French Colony. Again in Texas, California and the

¹ Salmond, *First Principles of Jurisprudence*, 241, 244.

² Bishop's *First Book on Law*, Sec. 58.

Western States, once a part of Mexico, there still remain certain rules taken from the Civil law. Louisiana and Texas retain the civil law doctrine of the community property¹ of husband and wife. In other places (New Mexico, etc.) the peculiar Spanish laws as to mines and minerals still prevail. It follows, therefore, so far as concerns our Western Civilization, that in spite of the diversity of Municipal laws arising from the number of nations, certain general principles of either the Roman or English law run through them all; and the divergences are exhibited in minor points. In the foregoing statement we have used the terms "Civil Law" and "Common Law" and these terms need further explanation.

CIVIL LAW

This term has several meanings usually determined from the context. Thus the "Civil Law," as contrasted with the "Common Law," is the system of law which grew up under the Romans and now forms the substratum of the Law of Germany, Italy, France, Spain and other Continental nations; as distinguished from the system of law called the Common Law, which grew up in England under the Saxons, Normans and English. Again, the Municipal Law of all of these countries, whether basing their jurisprudence on the Roman or English systems, is divided into two branches, Civil and Criminal Law; the latter the Law of Crimes, the former all the remainder of the law.

¹ By the English Common Law the indefeasible right of the wife in the property of the husband is limited to what is known as the Dower right. This is the right, in case she survives him, to an interest for her life in one-third of the real estate he owned at any time during marriage. The husband had a similar life estate in the whole of the real estate of his wife, under condition of having had issue by her. This was known as Curtesy.

These rights are unknown to the civil law. In their place we have the right of Community property. This is the right of the survivor, whether husband or wife, to a one half of all the property of any kind acquired by either during marriage; and also, under some circumstances, a right of administration of the other half, and a usufruct interest in it, if there are children of the marriage surviving. 3 Am. & Eng. Ency. of Law, 361.

COMMON LAW

This term has widely different meanings. Generally it means the system or body of Municipal law developed in England, as distinguished from the Roman and Continental systems generically referred to as the Civil Law. It sometimes means, in either system, whether English or Roman and Continental, that portion of the law derived from ancient customs and usages—the customary law referred to as a guide where the Statute or written law is silent. And from this point of view the Municipal law of England is divided into two parts: the Common Law—the unwritten law—the reports of the cases decided by the Courts, and the Statute law—the written law—the acts passed by the parliament. In this connection the Common Law means the law made by the Courts, the Judge-made, or Judiciary law, as distinguished from the law made by the Legislature. Again the Municipal law of England was divided into the following four great divisions:—

Common Law—the law administered by the Law Courts;

Equity Law—the law administered by the Court of Chancery;

Admiralty law—the law administered by the Court of Admiralty;

Ecclesiastical or Canon Law—the law administered by the ecclesiastical tribunals.

(There is a fifth relatively unimportant division, the Military law, the law administered in the army and navy by Courts Martial.)

In this connection the common law means all the law—Statutory and Judge-made Law—except such portions as are included in the other subdivisions. In other words, it is the residuum.

Thus the words “common law” have a variety of meanings. Sometimes they mean the entire body of Eng-

lish law — Statutory, Judge-made, Equity and otherwise. Sometimes they mean the Judge-made, as distinguished from the Legislative-made Law; and sometimes they mean the Statute and Judge-made Law, not included in the provinces of English law, known as Equity, Admiralty, etc. And now having obtained some insight into the different meanings of the terms “Common law” and “Civil law,” we have, in doing so, opened up new avenues of investigation. Our terms Common law, Equity law, Admiralty law and Ecclesiastical or Canon law, themselves need explanation. And, in explaining these, we will find it convenient to begin at the last and go backwards.

ECCLESIASTICAL OR CANON LAW

This branch of the law now deals with the estates of deceased persons, wills and administrations. In its origin its jurisdiction was vested in the Clergy, — the Bishop or other high Ecclesiastical dignitary.¹ The Court that now exercises this jurisdiction is called the Probate or Orphan’s Court, the Surrogate’s Court, or the Court of the Ordinary. Most of its principles are derived from the Roman law, and in English law it now exists chiefly in the form of statutory law and interpretation of these statutes by the Courts.

Ecclesiastical law once claimed and exercised a much more extensive jurisdiction. Among its subjects were its exclusive jurisdiction over the Clergy,² and special jurisdiction over wills and intestacy.³

In Glanville’s time (about 1179 A.D.) breaches of mere verbal promises were not enforced in the King’s Courts, but were enforced *in foro conscientie* by the Ecclesiastical

¹ 1 Reeves’ History of English Law (Finlason’s notes), 99.

² It was the old law that a clerk could not be tried even for murder before the Common Law Courts, and this gave rise to the old phrase, “benefit of clergy.” 1 Reeves’ History of English Law (Finlason’s notes), 102, note b.

³ 1 Reeves’ History of English Law (Finlason’s notes), 100, note a.

Courts.¹ Among other matters, these Courts at one time had jurisdiction of matrimonial causes; and, under that head, of divorces, of pious uses, and the crimes of blasphemy and incontinence, etc.²

The struggle for supremacy between the temporal and ecclesiastical power, as exemplified by the jurisdiction of the King's Courts and that of the Ecclesiastical Courts, reached its culmination in the great struggle between Henry II. and Becket.³ The Constitutions of Clarendon, A.D. 1164 (*i.e.* certain statutes passed at that place in that year by the great Council of the Realm), cut down the growing power of the Ecclesiastical Courts. And, while the jurisdiction of these Courts was afterwards somewhat increased, the law Courts eventually excluded them from all jurisdiction except over their special departments of estates and matrimonial causes. And, finally, this jurisdiction, instead of being exercised by a church dignitary, came to be exercised by a judge appointed by the temporal, not the Ecclesiastical, power.

ADMIRALTY LAW

This branch of the law is otherwise known as the law of the sea. In its origin it was a jurisdiction over sea matters granted by the King to the Admiral. It began in England about the time of Edward I. Afterwards the Admiral tried to usurp an extensive jurisdiction and came into conflict with the Common Law Courts. By a statute passed in the reign of Richard II. the jurisdiction was confined to matters on the sea and rivers below the bridges.⁴ The jurisdiction is now vested in Courts called Admiralty Courts. The jurisdiction extends, roughly speaking, where the tide ebbs and flows. In the United States it extends to the navigable waters of the nation,

¹ 1 Spence Eq. Jurisdiction, 119.

² 3 Reeves' History of English Law, 70 *et seq.*

³ 1 Reeves' History of English Law, 125.

⁴ 2 Reeves' History of English Law, 472.

the great rivers and lakes, even though the tide does not there ebb and flow—in other words, it extends “wherever ships float and navigation successfully aids commerce, whether internal or external.”¹ The subjects of the jurisdiction are maritime contracts, charter of vessels, supplies to, or services on, vessels, loans, or insurance, on vessels and marine torts, *i.e.* collisions, captures by right of war, seizures under revenue laws, etc. Somewhat curiously a contract to build a vessel is not within the Admiralty jurisdiction.²

In short phrase, the admiralty law is the law of ships and shipping, collisions, maritime liens, etc. It has become a sort of law of Nations, in itself, in the sense that a number of its rules are recognized everywhere, although contrary to the Municipal law of the country where the Court sits. For instance, it is a rule of the common law, that if two persons driving teams on a highway come into collision, and both drivers are at fault, the loss remains where it falls. Thus, assuming both drivers to be in fault, and that a driver of a big brewery wagon runs into a handsome carriage and smashes the carriage without injury to his own heavy vehicle, the owner of the carriage cannot, at the common law, recover any part of his loss. If, on the contrary, two ships come into collision, and the blame is on both sides, the loss, according to the English Admiralty Law, is divided. Thus, if one ship is sunk, and the other is practically uninjured, the owner of the lost ship can sue the owner of the uninjured one for half the loss.³

¹ *The Hine vs. Trevor*, 4 Wall. (U. S.) 565.

² *People's Ferry Co. vs. Beers*, 20 How. (U. S.) 393.

³ *The Hercules* (U. S. Dist. Ct., E. Dist. of Va.), 70 Fed. Rep. 334. The Admiralty Law of different nations, however, differs on this point. Some Courts adopt the English rule of dividing the loss, some adopt the rule of proportionate loss according to degree of negligence and some adopt the rule that the loss lies where it falls. See article “Collisions at Sea, where both Ships at Fault.” 13 Law Quar. Rev. (Oct., 1897), 17, 241.

THE COMMON LAW AND EQUITY

It is best to treat these two together, for these two systems cannot be properly understood except through the history of their development. In sketching this development, it is necessary to sketch the development of the judicial power in the common law itself; for the jurisdiction of the chancellor was a later offshoot from the same source — the political head. It is also necessary to sketch the general theory of social evolution, at least in so far as it is involved in the development of Courts. This has been done in a masterly way by our great philosopher Mr. Herbert Spencer, and we cannot do better than follow the path he has opened up.

Mr. Herbert Spencer has proved the existence of a triune structure in Society; the undistinguished mass of individuals; the distinguished few — the leading men, the elders, — and the chief or leading man — the one of these who exercises a controlling influence. Speaking of an unorganized horde determining a question of migration, or of defence against enemies, he says: "That is to say, the entire assemblage will resolve itself into three parts. To use a biological metaphor, there will, out of the general mass, be differentiated a nucleus and a nucleolus."¹ He calls attention to the fact that while during political evolution these three primitive components alter their proportions in various ways and degrees, yet all political forms are derived from this primitive form; and a despotism, an oligarchy, or a democracy, is a type of government in which one of the original components has greatly developed at the expense of the other two; and that the different types are to be arranged, according to the degrees in which one or the other of the original components has the greater influence.² Developing the idea through several remarkable chapters dealing with political heads,

¹ Spencer's Political Institutions, Chap. V, § 464, p. 312.

² Ibid., § 465, p. 316.

consultative bodies, representative bodies, ministries, local governing agencies and military systems, Mr. Spencer then treats of Judicial and Executive systems, and of laws.¹ He shows the original identity of the Judicial, and of the Military Power; and that, in the course of evolution, the judicial power becomes vested in that component of the triune structure which obtains the ascendancy over the others.² Where the power of the King becomes predominant, "his supremacy is shown by his judicial absoluteness, as well as by his absoluteness in political and military affairs."³ Where the second component of the triune political structure becomes supreme, this, in its turn, monopolizes judicial functions.³ As examples of this he cites the cases of the Spartan Oligarchy, the Athenian aristocracy under the Eupatridæ, the Venetian Council of Ten. And when the predominant power vests in the third element, there goes along with it the exercise of judicial functions. The democracy of Athens after the Kleisthenian Revolution, and the Bodthing of the Frieslanders, are cited as instances of this.

In continuation Mr. Spencer says: "A truth above implied and now to be definitely observed, is that along with the consolidation of small societies into large ones effected by war, there necessarily goes an increasing *discharge of judicial functions by deputy.*"⁴ Numerous instances of this are cited, and he then calls attention to the progressive differentiation in the Judicial organization which goes along with such differentiation in the other organizations of society. He says: "From those early stages in which the popular assembly, with its elders and chief, condemned military defaulters, decided on ecclesiastical questions and gave judgments about offences, there has gone on a divergence which, accompanied by disputes and struggles concerning jurisdiction, has parted ecclesias-

¹ Spencer's Political Institutions, Chaps. VI to XIV, inclusive.

² Ibid., § 524, p. 496.

³ Ibid., § 524, pp. 496, 497.

⁴ Ibid., § 525, p. 499.

tical courts and courts martial from the courts administering justice in ordinary civil and criminal cases.”¹

He then calls attention to the facts that the ruler who decides is originally also the person who executes the sentence, and that “when a ruler employs assistants to hear complaints and redress grievances, he does not give them absolute authority; but reserves the power of revising their decisions.”² He then proceeds:—

“Returning to the time when the king with his servants and chief men, surrounded by the people, administers justice in the open air, and passing to the time when his Court, held more frequently under cover and consequently with less of the popular element, still consists of king as president and his household officers with other appointed magnates as counsellors (who in fact constitute a small and permanent part of that general consultative body occasionally summoned); we have to note two causes which coöperate to produce a division of these remaining parts of the original triune body — one cause being the needs of subjects, and the other the desire of the king. So long as the king’s court is held wherever he happens to be, there is an extreme hindrance to the hearing of suits, and much entailed loss of money and time to suitors. To remedy this evil came, in our own case, the provision included in the Great Charter that the common pleas should no longer follow the king’s court, but be held in some certain place. This place was fixed in the palace of Westminster. And then as Blackstone points out:—

“This precedent was soon after copied by King Philip the Fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that Metropolis; which before used to follow the person of the King wherever he went. And thus also in 1495, the Emperor Maximilian I. fixed the imperial chamber, which before

¹ Spencer’s Political Institutions, § 527, p. 505.

² *Ibid.*, § 527, p. 506.

always travelled with the court and household, to be constantly at Worms.'

"As a sequence of these changes it of course happens that suits of a certain kind come habitually to be decided without the king's presence: there results a permanent transfer of part of his judicial power. Again, press of business or love of ease prompts the king himself to hand over such legal matters as are of little interest to him. Thus in France, while we read that Charles V., when regent, sat in his council to administer justice twice a week, and Charles VI. once, we also read that in 1370 the king declared he would no longer try the smaller causes personally. Once initiated and growing into a usage, this judging by commission, becoming more frequent as affairs multiply, is presently otherwise furthered: there arises the doctrine that the king ought not, at any rate in certain cases, to join in judgment. Thus 'at the trial of the Duke of Brittany in 1378, the peers of France protested against the presence of the King.' Again, 'at the trial of the Marquis of Saluces, under Francis I., that monarch was made to see that he could not sit.' When Lewis XIII. wished to be judge in the case of the Duke de la Valette, he was resisted by the judges, who said that it was without precedent. And in our own country there came a time when 'James I. was informed by the judges, that he had the right to preside in the Court, but not to express his opinion:' a step towards that exclusion finally reached.

"While the judicial business of the political head thus lapses into the hands of appointed agencies, these agencies themselves, severally parting with certain of their functions one to another, become specialized. Among ourselves, even before there took place the above-named separation of the permanently localized court of common pleas, from the king's court which moved about with him, there had arisen within the king's court an incipient differentiation. Causes concerning revenue were dealt

with in sittings distinguished from the general sittings of the king's court, by being held in another room; and establishment of this custom produced a division. Adaptation of its parts to unlike ends led to divergence of them; until, out of the original *Curia Regis*, had come the Court of Exchequer and the Court of Common Pleas; leaving behind the Court of King's Bench as a remnant of the original body. When the office of justiciar (who, representing the king in his absence, presided over these courts) was abolished, the parting of them became decided; and though, for a length of time, competition for fees led to trenching on one another's functions, yet, eventually, their functions became definitely marked off. A further important development, different but allied, took place.

“We have seen that when appointing others to judge for him, the king reserves the power of deciding in cases which the law has not previously provided for, and also the power of supervising the decisions made by his deputies. Naturally this power comes to be especially used to override decisions which, technically according to law, are practically unjust: the king acquires an equity jurisdiction. At first exercised personally, this jurisdiction is liable to be deputed; and in our own case was so. The chancellor, one of the king's servants, who ‘as a baron of the exchequer and as a leading member of the curia’ had long possessed judicial functions, and who was the officer to present to the king petitions concerning these ‘matters of grace and favor,’ became presently himself the authority who gave decisions in equity qualifying the decisions of law; and thus in time resulted the court of Chancery.”¹

Having thus traced the general outline of Social Development so far as concerns judicial power, we in the last part of the above quotation catch a glimpse of the rise of Equity jurisdiction — for the Court of Chancery is the Court of Equity. A closer view, and more detailed statement of

¹ Spencer's Political Institutions, § 527, pp. 507-509.

that origin, is, however, necessary before the exact nature of Equity as distinguished from Common Law can be perceived.

In the foregoing abstracts from Mr. Spencer's work, we see how the judicial power followed the political power. From the time of William the Conqueror up to the Wars of the Stuarts, the English Constitution, in effect, vested the Chief political power in the King.¹ In those days the divine right of Kings was not an unmeaning phrase. The King then was the fountain head of judicial power, and all jurisdiction to hear and decide causes sprang from him. The organization of the English nation under the Conqueror was sufficiently advanced to necessitate the exercise of most of the judicial functions of the King by deputy. The Executive and Judicial power, and to a certain extent the Legislative power, was vested in the King and his councils. These councils were² two in number — the great council which afterwards developed into the Parliament, and the small council consisting of the great men of the King's household, which afterwards developed into the High officials of the State, the King's Judges, and in early history the Cabinet. Both councils were known as the *Curia Regis* — court of the King — a name that was afterwards applied to the smaller Council only, and later only to the Court of King's Bench.

This *Curia Regis* — the smaller Council was the source from which all justice emanated. The old county courts of the Saxon times were continued ; but, by degrees, the King's Courts, as they were called, absorbed jurisdiction and became the usual courts to which disputes were referred. Thus in the time of Henry II. the King's Courts had exclusive jurisdiction of all cases involving disputes over land, because all land was held of the King.³

Out of this *Curia Regis* sprang and developed the three

¹ 1 Spence's Equity Jurisdiction, 101.

² Ibid. 328 and notes.

³ Ibid. 111.

great Courts of Original jurisdiction — the King's Courts; namely, the Exchequer, the Common Pleas and the King's Bench. The Exchequer was, as its name indicates, an office for collecting the King's revenue.¹ There would come before these officers questions between the King and the taxpayers relating to rates, assessments, and the like; and so arose a Court to decide such cases — the Court of Exchequer. This Court was forbidden by its constitution from taking cognizance of the ordinary Common Pleas suits between one man and another. But this difficulty was overcome by a fiction. The plaintiff would bring his suit before this tribunal, alleging that it had jurisdiction because he, the plaintiff, was a debtor of the King, and needed the aid of the Court to compel the defendant to pay him, so that he could pay his debt to the crown.²

The Common Pleas was an early offshoot from the *Curia Regis*. This Court followed the King in his travels through England. Suitors were thus put to great inconvenience, delay and expense; until, in pursuance of the provisions of Magna Charta, it was located at Westminster Hall. This was the Court whose jurisdiction in John's reign extended to civil suits between man and man for land and other matters.²

The King's Bench, the part which still followed the King, was then the highest Court for Criminal matters, treason, murder, homicide, arson and some other crimes;² and also for the following matters, — cases involving trespasses with violence, civil corporations, and cases of debt against its own officers. It also took jurisdiction of ordinary civil actions between man and man where the defendant was already in the custody of the Court, *i.e.* under arrest under its process in some other matter.² By means of this latter branch of its jurisdiction the Court extended its jurisdiction to all civil cases. This was done by entertaining a legal fiction that the defendant was in the custody of the Court because within its territorial

¹ 1 Spence's Equity Jurisdiction, 102.

² *Ibid.* 114.

jurisdiction,¹ and by other devices. The King's bench was also the Court of appeal from all other courts except the Exchequer.¹ Thus the three courts resorted to various shifts and devices to obtain jurisdiction. The result was that while the original exclusive jurisdiction of the King's Bench and Exchequer remained, they became Courts of Coördinate jurisdiction as to civil suits. Spence says the secret of these contrivances to usurp jurisdiction lay in the fact that the judges received a profit from the fees.¹ Any one who has noticed the growth and extension of the jurisdiction of the Federal Courts in America under the Constitutional and Legislative Grants *as interpreted and expounded by those courts themselves*, will need no other explanation of the phenomena than the natural human tendency — from which judges are not exempt — to reach out after more power. On the reverse of the picture should be noted the numerous decisions of the State Courts construing the same Statute law so as to curtail the jurisdiction of the Federal Courts, — decisions which have so often been reversed or overruled, whenever the Federal Courts have had the opportunity to pass on the same questions.

Thus the three King's Courts — King's Bench, Exchequer and Common Pleas — became of substantially coördinate jurisdiction, so far as actions between subject and subject were concerned. They were known as King's Courts to distinguish them from the local tribunals, and they gradually absorbed nearly all the business and jurisdiction from these local courts.²

But while these Courts existed as tribunals to try cases, it was a peculiarity of their organization that, unlike modern courts, the writ or process which the plaintiff had to obtain and serve upon the defendant before the defendant could be brought into court, was not issued by the

¹ 1 Spence's Equity Jurisdiction, 114, 115.

² 2 Reeves' History of English Law (Finlason's notes), 147, 1 id. 80-94.

court itself, nor by the judges, nor by the clerk or other officer of the Court.¹ When a man had a claim against another man on which he wanted to get "the law on him," the complaining party had to go to the Chancellor, or rather to the office of the chancery. There certain clerks would deliver to him, on his proper application, a writ under the great seal of the State requiring the Sheriff to summon the defendant to appear in some one of the King's Courts, and to answer to the complaint of the plaintiff.² Originally a fine was paid for the writ — in other words, justice was sold. But this was done away with by *Magna Charta*.³

It happened that these writs which were issued out of the "*officina brevium*," the writ office, or "petty bag office" of Chancery, were the measure of jurisdiction of the King's Courts. They were adapted to certain kinds of cases, and to the relief required in those cases. In this way arose the distinction in the kinds of actions dependent on the object, and subject-matter, of the litigation; as, actions to recover real property, or personal property, or on contract, or in tort, etc. In legal theory the maxim "*ubi jus ibi remedium*" — where there is a right there is a remedy — applied; but was no more absolutely true in early law than it is to-day. Thus these clerks in chancery were, in theory, possessed of the power to issue writs to cover any and all cases that might arise. It happened, however, after some thirty or forty actions, and some hundreds of forms of writs, had been adopted and issued,⁴ that, either through laziness, ignorance, or narrow-mindedness, these clerks⁵ refused to issue any new writs.

¹ This is the popular way to put it. Mr. Finlason states that the writs hereinafter mentioned as issued from Chancery were issued not like a process to the party sued, but to the sheriff as the warrant or commission to him to act and bring the defendant before the King's Court. 2 Reeves' History of English Law (Finlason's notes), 112.

² Reeves' History of English Law (Finlason's notes), 95.

³ Bispham's Equity (2d ed.), 7.

⁴ Pollock and Maitland's History of English Law, 563.

⁵ 2 Reeves' History of English Law (Finlason's notes), 112, note a.

It must be remembered that the writ had to set forth in brief the grounds and cause of action. A divergence between the writ and the facts constituting the cause of action was ground of good defence to quash the writ. Thus upon a writ of trespass for taking goods the defendant could successfully object that the goods had been received on a bailment; and that, therefore, the action should be detinue, and the writ a writ in detinue. So an action against an innkeeper should be against him as such, and not a writ of trespass.¹ The Clerks in Chancery were not wholly to blame for this. Although the Chancellor issued the writs, the law judges passed on whether, when issued, they were valid or not. And the law courts had become so set in their procedure, and so wedded to old precedents of kinds of writs, and forms of action, that they often declared certain new-fangled writs of no effect. Hence the court of Chancery, or rather the Office, could not force the Courts of law to take up the extraordinary jurisdiction that was needed to do justice.² Nor could the Chancellor declare what facts would constitute a good defence.² To cure the first of these defects the Parliament passed the statute of Westminster II. Chapter 24 of the statute gives a reason for its enactment; and, at the same time, mentions the hardships arising from the absence of a writ in Chancery to cover the cases mentioned.

The statute says that where complainants come into Chancery for relief against another's wrong, they should not depart from the King's Court without remedy, because the land was transferred from one to another.³ The hardship here referred to was that while you could get a writ in chancery for a suit in the King's Courts against the wrongdoer who erected a nuisance as a house or wall, you could not get one against the man to whom he might, pending suit, transfer the land.³ And so this act was

¹ 2 Reeves' History of English Law (Finlason's notes), 113.

² 1 Spence's Equity, 325.

³ 2 Reeves' History of English Law (Finlason's notes), 113.

passed to cover this defect, and to remedy other omissions mentioned. And the act, after mentioning several special instances, gives general authority to the Clerks of the Chancery as often as cases happen — “in consimili casu” — like others in which writs had previously been allowed, — to write writs to cover them so that the King’s Courts shall not fail to do justice.¹

Out of this statute, and out of the new writs issued from chancery under its authority arose the common law “actions on the case.” These might have developed into an equity system had they not also become curtailed by the force of judicial precedent and conservatism. Some centuries after the statute, the general principle was laid down, that when there was an injury to a legal right “action on the case lay if no other remedy was provided.” Year Book 14 Hen. VIII. 31.²

Yet certain titles to property, afterwards known as Equitable titles, still had no writ that would fit them; and certain necessary kinds of remedies, like injunctions, afterwards known as Equitable Remedies, had no writ that could grant such relief. The suitors who needed either protection to these classes of rights, or the application of these kinds of relief, could find no relief in the petty bag office of Chancery. Being so debarred from recourse to the King’s Courts, they were compelled to resort for relief to Royalty itself. The King at first hearing and granting relief in his own person soon delegated the authority to hear and determine these applications to the Secretary of his Household, the Keeper of the Great Seal, the Chancellor.

As showing the curious changes and growth of jurisdiction as between the different classes of courts we may note the following. At the present day nearly all contracts, whether under seal, in writing or oral, are protected in a Court of Law by the proper action adjudging

¹ 2 Reeves’ History of English Law (Finlason’s notes), 114.

² Ibid. 113, note.

damages for their breach. In olden times this was not so. Thus in Glanville's time Courts of Law took no cognizance of breaches of mere verbal promises.¹

A contract to be enforced at law had to be either in writing under seal, or completed by a delivery of the consideration.² The jurisdiction to enforce such cases of oral promises or written promises not under seal, and other kinds of breaches of faith, was vested in the Ecclesiastical Courts. There was no remedy in the King's Courts.³ But the Constitutions of Clarendon, above referred to, restrained the Ecclesiastical Courts from meddling with breaches of faith and oaths.³ And from this time on there was no remedy at law for breaches of faith, and they could only be relieved by the King; and so arose one source of the origin of Chancery.⁴

A subsequent development of legal writs, under the operation of the statute of Westminster II., above referred to, led to the new "actions upon the case" including "assumpsit." Under this new form of action the Courts of Law took jurisdiction of such breaches of faith as were involved in the breaking of certain verbal contracts. These were mutual promises, whose only difference from other contracts long protected by these Courts was, that they were not in writing under seal, or had not been partially acted upon. This left a number of engagements, verbal or otherwise, such as an agreement to hold land in trust for the benefit of another, still unenforced by the law Courts.

So arose what has been often called the origin of equity jurisdiction — the Chancery jurisdiction over Uses and Trusts. Thus if A conveyed his lands to B on B's promise to hold them for the benefit of C, and the transaction was closed with B in possession, B might thereafter refuse to recognize any rights of C in the land. If he did so, the

¹ Promises not in writing under seal. Holmes' Common Law, 264.

² 1 Spence's Equity Jurisdiction, 119.

³ Ibid. 118, 119.

⁴ Ibid. 118.

King's Courts refused to give C any redress for this injustice. There was no writ to fit the case, and the Clerks in Chancery would not invent a new one. To right this wrong, the Chancellor stepped in with a new, and to the common law unknown process, the subpoena — a writ issued by the Chancellor himself under the great seal, requiring the defendant to appear before the Chancellor and answer under oath as to the merits claimed in the complainant's bill.¹ And this writ was followed by such further exercise of authority as might be necessary to right the wrong, if found to exist, the Chancellor having behind him the power of the King to enforce his decrees. Other examples of omissions in the common law writs were as follows: No common law writ existed by which a deed or contract executed under circumstances of fraud, or mistake, or accident, could be cancelled or reformed. Again, where certain special kinds of relief were needed to attain full justice, the common law was unable to give them. Thus a purchaser of land by contract, when the vendor refused to convey, could, at common law, only get damages for the breach of contract, and not the land itself. A court of Equity, on the other hand, can by its decree give him the land itself. And so injunctions, and the proper kind of an accounting, could only be obtained in equity. Again, a great head of equity at once arose out of bills filed by defendants in lawsuits, to enjoin the plaintiff in the lawsuit from prosecuting his action, until an alleged equitable defence could be tried in equity. This was done whenever the defendant in the lawsuit had a defence to it, good in equity, but unavailable at law.

A once important head of equity jurisdiction was relief against penalties and forfeitures. An instance of this was the following. A man would give his bond for £1000 conditioned to pay £500 on a day named,

¹ See the conflict in the time of Henry VIII. over this right to issue subpoenas in Chancery. 3 Reeves' History of English Law (Finlason's notes), 396.

—say in six months. The law courts, in case the party who gave the bond did not pay the £500 on the day named, would give judgment for the £1000. The enforcing, by the courts of law, of this apparent hardship, arose in a curious way. The penalty named in the bond was originally inserted as a means of evading the Middle Age rule which prohibited the taking of interest on money. The law courts, not being able, as the law then stood, to give judgment for the loan and interest, treated the penalty as the real debt.¹ When statutes allowing interest were passed, the reason of the rule ceased. But the narrow and formal manner in which the law courts of that time construed their precedents, prevented the judges from altering the rule. A manifest injustice was thus done to the debtor. Resort was had to chancery. The Chancellor at first took jurisdiction on the ground that accidental circumstances had prevented payment on the day named, and hence the debtor should be relieved on payment of the real debt and interest. Afterwards the jurisdiction was asserted over all cases on the broad ground of equity. And this rule of chancery has since found its way into the statute book, and the rule of law has been changed, so that now the Courts of Law afford the same relief.¹ The jurisdiction thus claimed for the Chancellor was only established after a great conflict between the Chancellor, Sir Thomas Moore, and the Judges of the Law Courts, in the time of Henry VIII.

In this Reign the Statute of Uses was passed, by which it was declared that wherever a man held land to the use of another, that other should have the legal title. The object of the statute was to make equitable estates in land legal, and so protect them in the law courts. Had this object been carried out, the great head of Uses and Trusts, in equity jurisdiction, would probably have been decapitated. But by a curious aberration of the Law

¹ Bispham's Equity, § 178.

Courts, the entire jurisdiction was practically saved to the Court of Chancery. Where a deed read as a grant "to B to the use of A," the old law held that B was the owner, and A had no interest. Chancery, however, seized on the evident intent of such a conveyance, and made B account to A for the rents and profits of the land. The statute was passed while these rules of law and equity were in existence. It in effect said, that wherever any person was seized to the use of another, that other should have the entire title—thus passing the legal title on to the person theretofore having only the equitable title. After the passage of the statute, its operation on a deed so worded was declared by the law courts to have the following effect; namely, to change the legal title from B to A. A case now arose where the language was in the form of a grant "to B to the use of C, to the use of A." It will be noted that this adds four words to the deed above mentioned. Here a liberal construction of the statute, according to its intent, would have made the legal title pass through the chain of holders to the end. But no. The old common lawyers, trained in the logic of the schoolmen, were too astute to permit any such simple result. They argued that the effect of the statute was exhausted in transferring the legal title from B (who but for the statute would have retained it) to C, and the remaining use to A, could not be recognized in a court of law. For was it not the fundamental axiom that the common law was not presumed to be changed? If Parliament desired to change it, they must use clear words to that effect. So jealously did the old common lawyers uphold the majesty of their beloved system. Hence A went into Chancery to protect his rights. That court accepted jurisdiction, and enforced his rights. In consequence the only effect of the Statute of Uses was to require conveyancers who wanted to raise an equitable estate in any one, to insert in the deed or will four additional words; namely, the words: "to the use of."

Another historic struggle for existence between the Court of Chancery and the Common law Courts will further exemplify its jurisdiction and powers. In an action tried before Coke, the plaintiff lost the verdict through one of his witnesses having been artfully kept away. Plaintiff then sued in Chancery to compel an answer under oath from defendant. Defendant refused to answer. The Chancellor thereupon committed him for contempt. Coke then had indictments preferred against the plaintiff and his lawyers for suing in another court after a judgment at law had closed the matter—a course alleged to be illegal under the statute of Præmunire. The Grand Jury, though pressed, threw out the indictment; and the King made an order in the Council Book declaring that the Chancellor had not exceeded his jurisdiction.¹

To sum up in a few words, we may say that the jurisdiction of equity, as distinguished from the common law, is an historical accident. As it exists it may be referred to two great heads.

First. Jurisdiction dependent upon equitable titles as distinguished from legal titles. An example is the case of Trusts above mentioned. A further example is the title equity recognized in a mortgagor to pay the debt after the due day and redeem from the mortgage, although the law held the mortgagee to be the sole owner. Another, is the recognition by equity of the rights of an assignee of choses in action — *i.e.* contracts, etc. — a right not originally recognized by the law courts, but now so changed by statute in most States as to make the equity rule the present legal rule. The heads of Accident, Mistake and Fraud are part of this branch of the Court's jurisdiction. Thus, originally, if a man when grossly intoxicated executed a bond which the obligee procured through fraudulent connivance at such intoxication, and without

¹ Hallam's Constitutional History of England, 472. 1 White and Tudor's Leading Cases in Equity (1st Am. ed.), 442.

consideration, a court of law would not listen to such an excuse when the obligee sued on the bond. Equity, however, would intervene on the application of the defrauded party to enjoin the obligee from prosecuting the bond at law.

Second. Jurisdiction dependent upon equitable remedies. Examples of these are the equitable remedies of Specific Performance of agreements to convey lands — or heirloom chattels, etc., Injunctions, Accountings, Marshalling of Assets, Adjustment, Set Off, Subrogation, Contribution, Exoneration, Discovery, Bills Quia timet, Receivers, Reëxecution, Reformation, Cancellation, Writs of ne exeat, etc. To explain in detail each of these would unduly extend this chapter.

Finally, the distinction to be kept in mind is as follows. On the one hand, the common law refused to recognize certain titles to property which justice required should be recognized, — hence arose the jurisdiction of equity founded on equitable titles. On the other hand, the common law could only give judgment for or against the plaintiff, or defendant, or all of the plaintiffs, or all of the defendants, for a sum of money or a specific piece of property, personal or real, and could not adjust equities and offsets, either between parties on the different sides of the litigation, or on the same side, — hence arose the jurisdiction of equity founded on its capacity to give extraordinary Relief, *i.e.* the equitable remedies of injunction, subrogation, accounts, etc., remedies which are in some instances absolutely necessary to do justice in the premises. Thus Equity, having arisen out of the fact that the narrow and illiberal construction of legal precedents prevented the Law Courts from originating new writs which the advancing complexity of social life demanded in order that justice might be done, and having extended its grasp over novel cases, and having usurped one branch of jurisdiction after another, has, at length, about spent its force of innovation; and has become almost as rigidly circumscribed by precedent and authority, both as to the field of its influ-

ence and the mode of its operation, as ever the old Law Courts were.

It is only necessary to add that of late years attempts have been made to amalgamate the Common Law and Equity Jurisdictions. In England in 1874, the Ecclesiastical, Admiralty, Common Law and Equity Courts were all merged into one Supreme Court of Judicature — having different divisions under the old names ; with this important provision, that all these courts should recognize equitable titles, or remedies, or defences, in the same way as a court of equity would have done.¹ In like manner in New York State, by the Code of Procedure of 1848, common law and equity have been amalgamated into one system of procedure, that is, so far as it is possible to do so having regard to the distinction between the jury trial in common law cases, and the trial by a judge in equity cases, and the intrinsic differences in the procedure and subject-matter dealt with.

The truth is, that between a law action on a contract to recover damages, and an equity action on the same contract to reform it for fraud, or mistake, and to enforce it as reformed, there is a difference, in the subject-matter and object of the litigation, requiring the application of distinct rules of evidence and procedure. And so of other differences in substance between law and equity cases. And our calling these particular combinations of facts, law cases, or equity cases, or by the same generic name, cannot obscure or change the truth. Intrinsic differences between these classes of cases existing as a fact, require different treatment by the Courts, if justice is to be subserved.

THE FOUR DIVISIONS

The Admiralty and Ecclesiastical law of England are not in a true historical sense a part of the English law. Both have been borrowed almost bodily from the Roman

¹ 36 & 37 Vict. c. 66, L. R. 8 Stat. 306, 317, 319.

law ; and the former also from customs of the sea derived from other nations. The Common law and Equity law are true growths of the soil, and of the national character. Equity has many senses. In the restricted sense it means that portion of the law of England which developed out of the reserve judicial power left in the King, after the rules of procedure and logic adopted by the Common Law Courts had begun to produce injustice through the failure of those courts to take cognizance of and redress certain classes of wrongs. To understand what Equity is, is therefore to understand the history of its development and growth.

THE DISTINCTIONS BETWEEN THE ROMAN AND THE ENGLISH LAW

As was said in Chapter II, the important difference between the Roman and the English law¹ is that the Roman law is a history of the development of a law of codes ; while the English law is a history of the development of a law of cases, occasionally modified by statute. What a code is will be explained in detail *infra*. For the present it may be taken to mean the enactment in writing by the Legislative body of the State of a series of rules intended to cover all possible cases. A Code is thus a statute passed by the Legislature covering all questions that can arise. In deciding any dispute, the Court must obtain the rule of decision from some part of the Code.

A Law of Cases consists of the rules deduced from the decisions made by judges of particular disputes coming before them. In deciding the case, the judge gives some reason, some principle. The case therefore becomes evidence of the existence of the rule of law which is referred to as deciding it and of which it is an example.²

Along with this distinction ran one of almost equal

¹ We use the term "English law" in the sense of the Common law as distinguished from the Roman Civil law.

² Salmond's First Principles of Jurisprudence, p. 244.

importance. This was a difference in the personality of the judges. Under the Roman Law the decision of the law and fact of any lawsuit rested with the judge alone. It is a peculiarity of the English Common Law that all common law cases—using Common Law in its sense of covering all disputes not belonging to the Equity, Admiralty or Ecclesiastical branches of the system—are decided by a mixed tribunal consisting of a judge and a jury. The jury are the sole judges of the facts. The judge is the sole judge of the law. The judge passes on the character and kind of evidence that can be produced to prove the case; whether a document tends to prove a fact, whether a witness may be heard to testify, and if so what questions can be asked of him, and what answers may be given; and he further instructs the jury that if they find such and such facts to exist, the law requires a verdict for one party; and if, on the other hand, they find the fact to be different, the law requires a verdict for the other party, etc. The jury, in theory, then take the case, and, having determined the facts to be one way or the other, deliver their verdict in accord with the law as laid down by the judge. This is no place to go into an extended discussion of the merits or demerits of the jury system. In passing, however, it may be remarked that, especially as applied to civil cases as distinguished from criminal, the increasing complexity of the transactions of modern life, and the increasing range of intelligence between the highest and the lowest classes of society, render it an unsafe tribunal.¹ In a comparatively primitive stage of society when all men were on a level of comparative ignorance, and their transactions were of a simple nature, it was undoubtedly an admirable institution. It might still preserve some of its excellences, if all the men in the community served on juries in regular rotation. The fact is, however, that the better and more

¹ See Judge Hoadly in 30 Am. Law Rev. 436, and Western Reserve Law Journal, Feb., 1896, "The Jury System, Objections to it."

intelligent classes, the men whose fitness to be jurors is greatest, on account of the loss of time involved in serving, evade the duty in every way possible. In consequence, the juries in our great cities are usually drawn from the less educated classes of society, the laborers, car-drivers, coal-heavers, clerks and small tradesmen.¹ Imagine trying before a tribunal of such men a case involving the complicated transactions of modern business. For instance, one involving the purchase and sale of certificates in a stock trust pool, and a guarantee against loss on the purchase, when some of the jury have never seen a stock certificate, know a corporation or a guarantee only by name and have no conception of what a stock trust is. Little wonder that one of the rules of thumb among our lawyers is: "If you have a good case, try it before a judge; if you have a bad one, insist upon a jury." To the objection that the abolition of the jury vests too much power in the judge, the answer is as follows. Three judges of the law and fact, the decision of a majority to bind, would be the ideal tribunal. The number would do away with the idiosyncrasies of a single mind; and confer the advantage of consultation, and of many minds; an advantage recognized by the size of our Appellate Courts, which finally pass on all law questions. Again the objection overlooks the fact that for more than two centuries the cases involving the largest amounts in value — namely, the Equity, Admiralty and Probate Court cases — have been decided on the law and fact by a single

¹ In New York City the only qualification of a juror is that he or his wife should own \$250 in value of real or personal property. (N. Y. Co. Civ. Proc., § 1079.) The amount of property exempt from levy and sale by virtue of an execution is \$250, plus other specified articles. The low grade of character and intelligence of juries in that City has become a matter of public scandal. Witness the fact that 1000 talesmen had to be called to get a jury of 12 men with the requisite intellectual qualifications in the trial of one of the "Boodle Aldermen" some time ago. Owing to the exposure of the abuses and defects in the system at that time, the character of the jurors has since changed for the better. The other classes of the community are being brought into service.

judge.¹ And no inconvenience has arisen out of the system ; nor is any complaint made against it.²

A third distinction, between the code systems derived from the Roman Law and the case system in the English Law, is of far-reaching consequence.

The English Law is a law of precedents. The code systems, as a rule, attempt to prohibit the growth of a law of precedents. A different weight is given in each system to the decision by a judge of any special controversy. The reason given by an English judge for his decision becomes a precedent to be followed. Not so in the French and German systems.³ This difference is due to a difference in theory between the two systems. The English law, while tacitly assuming that all the law is known, does not assume that all the law has been written down. Hence, each case is evidence of some principle of the law, and a stepping-stone to its application in future cases. The Continental Codes, on the contrary, not only assume that all the law is known, but also that all its general principles and their applications, so far as convenient, have been written down in the code ; and hence, that intelligence, working from the code provisions alone, is a sufficient guide to the decision of each particular case.

How these theories work out in practice is a portion of the inquiry before us ; and is dealt with in the succeeding chapters. For the present we note the importance of the distinction between the Municipal Law of England and

¹ It is true that in Admiralty in America under the U. S. Revised Statutes in cases relating to a vessel of over twenty tons either party may insist upon a jury. (U. S. Rev. Stat., Sec. 566.) This, however, is an innovation on the system made at a time when juries were in higher repute than now. Again under some circumstances certain issues in an equity case are sent to a jury—but their decision may be adopted or rejected by the chancellor. And under our New York probate practice, questions of undue influence, etc., are sometimes sent to a jury.

² For an able article against the jury system, see Judge Hoadly, in 30 Am. Law Rev. 436, 437. "The Jury System, Objections to it." Western Reserve Law Journal, Feb., 1896.

³ Dillon's Lectures on Jurisprudence, p. 232. Markby's Elements of Law (4th ed.), p. 43, note ; p. 58, § 92 ; p. 59, note.

the Municipal Law of the Continental Countries in that, in the one case, a decision of a Court is an authority on which to decide a subsequent like dispute; in the other case, it is not.

THE MUNICIPAL LAW OF ENGLAND

Returning now to our definition of Municipal Law: "A rule of civil conduct prescribed by the State," we will for convenience confine the discussion of it to the Municipal Law of England—the law proposed to be codified. The definition involves the following facts. The existence of men in an organized political body known as the State, with the rules for their conduct in their relations as social units prescribed, and, on occasion, enforced by the Supreme Power of the State. What, then, is the Supreme Power of the State mentioned in this definition? In Russia, or Turkey, it would mean the Czar, or the Sultan. In England, it means the Parliament and the Courts.

SOURCES OF THE LAW

The important parts of this definition then are two.

First. The law is prescribed—made known—published, declared.

Second. This is done by a portion of the collective units known as the State.

In England, then, Parliament and the Judges declare the law. But how? The one by enacting an act of Parliament. The others by deciding a lawsuit in controversy before them, and declaring their reasons for the decision. The decision must be distinguished from the judgment. The judgment rendered in a particular case is not in itself a "rule of civil conduct." It only becomes such when the reasons for the judgment made are stated. For when these are stated, they may be applicable to the decision of other special cases that may arise involving like facts. So the rule enunciated in one case

becomes a rule of Civil Conduct. The decision and the reasons for it are stated in the opinions written by the Court, and it is these opinions which make up the body of a volume of Reports.

From early times the Courts in adjudging the special cases brought before them have thus been in the habit of stating in writing their reasons for the judgment rendered on the facts involved. Lawyers, or official reporters, have then collected statements of the facts embraced in these cases, together with the arguments of counsel, and the opinion of the Court, and have published them in book form for guidance in similar cases. These collections of reports of adjudged cases are called "REPORTS."

In all that has been said a patent fact has been implied; namely, that the Supreme Power prescribes the law by writing it down somewhere. All law, therefore, excluding as relatively unimportant the rules derived from local or mercantile customs applied in some cases, is written. The written declarations of the Legislature as to the law are contained in what are called the Statute Books. The written declarations of the Courts as to the law are contained in what are called the Books of Reports. The Statute Books contain the acts passed by the Legislature. The Books of Reports contain the facts, the arguments, and the opinions, and decisions, of the courts in the special disputes brought before them for adjudication.

The decisions of the courts are what is known as the "*Unwritten Law*." The statutes are what is known as the "*Written Law*." Thus Kent says: "Municipal law is composed of written and unwritten, or of statute and common law. Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities."¹

Again, of these two sources of English law, one is Supreme over the other. Kent says: "It is a principle

¹ 1 Kent's Commentaries, 446 (12th Am. ed., p. 507).

in the English law that an act of Parliament, delivered in clear and intelligible terms, cannot be questioned or its authority controlled in any Court of justice. 'It is,' says Sir William Blackstone, 'the exercise of the highest authority that the kingdom acknowledges upon earth.'"¹

England has no written constitution. The United States and its different States have written constitutions. These writings, so far as they apply, are the Supreme law of the land, binding on Courts and Legislature alike. In the Courts is vested the authority to declare what the constitution means, and when an act of the Legislature is in violation of it. With this exception, in America as well as in England, the deliverance of a Legislature on the law is paramount; and the courts must follow and obey it.²

So much for the persons who prescribe the English law. It remains to get a glimpse of the workings of law in a special case. Law cannot be successfully studied except with reference to some concrete application of it; in other words, its contents. Let us look at a concrete case, and see how the law is administered to-day.

A LAWSUIT—WITH SIDE NOTES

John Smith signs and delivers to Thomas Brown his note, payable in sixty days. This, for instance, is the writing:—

"\$100⁰⁰/₁₀₀.

NEW YORK, JANUARY 6, 1896.

"For value received, I promise to pay to the order of Thomas Brown one hundred dollars, sixty days after date, at the Chatham National Bank, New York, with interest.

"JOHN SMITH."

The note is not paid when due. Thomas Brown puts the note in the hands of a lawyer for collection. The lawyer

¹ 1 Kent's Commentaries, 446 (12th Am. ed., p. 507).

² Pollock's First Book of Jurisprudence, 246, 255.

brings suit upon it. Thomas Brown is entitled himself to bring suit on it without engaging a lawyer. But as he does not know how to draw the first paper to begin, or how to carry the suit on after it has been begun, his attempt to do so could only end in disaster. Now the lawyer, trained to his business, knows that the first thing to do is to find a Court that has jurisdiction over the defendant. This necessitates his bringing suit in a Court whose process,¹ when issued, can be served. Thus if John Smith stays in New Jersey, and has no property in New York, there is no use in suing him in a New York Court. You cannot serve him with process, and hence cannot obtain a judgment that would be binding. This necessity of catching a defendant within the jurisdiction of the Court, and of holding him so as to enforce the final judgment, if awarded against him, has always been a practical difficulty in bringing and prosecuting suits. In the old law every suit was begun by arresting the defendant, and holding him to answer. Later the defendant was allowed to give bail, *i.e.* security for his appearance and for his abiding by or performing the judgment. Now the rigor of the old law is done away with, except in a few special cases of fraud, etc., when you may arrest a man.

Assuming that John Smith can be found in New York, Thomas Brown's lawyer brings the suit there. This he does by drawing up a paper called a Summons. This summons stands in the place of the old writ we have above referred to as the necessary paper the plaintiff had to obtain from the petty bag office of Chancery, before he could set the sheriff in motion to hale the defendant before a King's Court to answer his suit. It differs from the old writ in that the old writ not only summoned the defendant to appear and answer on a day named, but also stated the

¹ The Summons, Subpœna, or paper, which when served upon, *i.e.* actually or constructively delivered to the defendant, notifies him of the pending suit and judgment if he fails to defend.

substance of the case made out against him which he was expected to answer. The present New York Summons simply notifies the defendant that he must appear and answer. It is a paper signed by the attorney for the plaintiff, and states the Court in which the action is brought, gives the names of plaintiff and defendant and notifies the defendant that unless he appears within twenty days after service of the paper, judgment will be taken against him by default for the relief demanded in the complaint. The service of this paper personally on the defendant begins the action.

There are certain special cases in which a judgment may be taken against a defendant without personal service of process; namely, on a substituted service, or a service by publication. In such cases, however, the proceeding is very technical in its formalities, and the judgment liable to be upset for the slightest error. What is called a substituted service — namely, a service on a person at defendant's residence — is good if the defendant, being a resident of the State, denies or conceals himself to avoid personal service. If the defendant is a non-resident of the State, and you cannot find him to serve the paper on him, you may sometimes resort to what is called service by publication. In this case on proving the facts to the satisfaction of a judge you get his order, allowing you to publish the summons in a newspaper — or to serve it on the defendant out of the State. In this connection it must be borne in mind that the process of a Court runs only within the territory of the political entity which creates the Court. Thus the writ or summons of an English Court, if served in Scotland, is of no effect. So a summons of a New York Court served on the defendant in New Jersey is of no effect. And so fundamental is this rule, that a judgment by default obtained against a defendant served outside of the jurisdiction in this way is void, not only in the Courts of the foreign jurisdiction where he is so served, but also in the Courts of the State where the judgment on such

service¹ is rendered. Two exceptions are allowed to this. The first and most important is where the plaintiff pursues the statutory method of service by publication, and, in connection with it, is able to attach goods of the defendant within the State where he sues. In such a case if the plaintiff, having so attached goods and served by publication, can get a judgment by default, the judgment is valid to the extent that it may be levied on the attached goods, and paid out of them. But it is not a judgment on which you could levy on any other goods of the defendant, not attached in the suit, which you might afterwards find in the State. And these principles hold good, not only in the State in which the judgment is rendered, but also in other States. The second exception is in divorce cases. In these cases either husband or wife is entitled to obtain a *bona fide* domicile, *i.e.* home with intention of remaining for good, in any State.² When such a domicile is obtained by a plaintiff who has a good cause of action for divorce, the plaintiff may sue on such cause of action in the State of domicile; and if the defendant cannot be found therein, may serve the summons by publication; and a judgment entered on default on such a service is valid everywhere to dissolve the marriage relation,³ but not as to property rights, *i.e.* as to a decree for alimony, etc. The rule as to service by publication being good to dissolve the marriage relation, is founded on the fact that marriage is a *status*; and, as such, a Court having jurisdiction of one of the parties has an *in rem* jurisdiction over the relation itself. In a recent case in California an attempt was made to extend this *status* rule so as to render binding in all jurisdictions that portion of a decree of divorce rendered on a service by publication which gave the party obtaining

¹ *Pennoyer vs. Neff*, 95 U. S. 714.

² *Cheever vs. Wilson*, 9 Wallace, 168.

³ This is the rule generally accepted. Cooley's Constitutional Law, p. 81. The New York Court of Appeals in *People vs. Baker*, 76 N. Y. 78, has grafted upon the rule a questionable exception, creating great hardship in special cases.

the decree custody of the children of the marriage. But the Court refused to so hold.¹ Of course, in all cases of this class of service above mentioned, it is implied that the defendant has not appeared in the suit, or answered — in other words, they are all judgments by default. If the defendant appears, or answers, this is equivalent to personal service, in sustaining any judgment then entered.

Coming back to the personal service of this summons by Brown's lawyer upon Smith, we may note that Smith is now required to appear by a day named. In the old law this meant actual appearance *in propria persona* before the Court; just as is still required in Criminal cases² where a man is out on bail. But this is all changed now. All a summons now means is, that, by the day named, the defendant, or the defendant's lawyer, must serve a notice on plaintiff's lawyer that he appears in Court, and is ready to defend the suit. Smith having thus appeared, Brown's lawyer now draws up and serves on Smith's lawyer another paper. Under the New York practice this paper might have been served with the summons. If it had been, the same subsequent steps would have to be taken as herein outlined, the effect of such early service only being to hasten plaintiff's suit that length of time. This paper states the name of the Court in which the action is brought, the names of the parties to it and the facts, viz. the execution of the note and the nonpayment of it, and prays judgment against the defendant for the amount claimed. This paper is called a complaint, and is one of the papers called the pleadings.

Here we must digress a moment to explain more in detail the general aspect of proceedings in a suit. The person who brings an action at Common Law is called the plaintiff; in Equity, the complainant; in Admiralty, the

¹ *De La Montanya vs. De La Montanya*, 32 Lawy. Rep. Ann. 82.

² This was the old common law rule. Under the New York Criminal Code the personal appearance of a defendant is not absolutely required in cases of misdemeanor.

libellant. Proceedings in the Ecclesiastical Court, and some proceedings in the Equity, Common Law, and Admiralty courts, are called special proceedings — the mover of them is called the petitioner, the person who defends the respondent. The person who defends an action at Common Law is called the defendant; in Equity also, the defendant; in Admiralty, the respondent. Some sort of a system of pleading is the first development of procedure in courts. It is the "I say you did," "I say I didn't," of the early disputes, acted over again before a judge. This is finally reduced to a set of technical rules, as to how the statements should be made, and in what order. From an oral dispute before the judge, carried on under fixed rules until some definite point in dispute decisive of the case emerged as the issue to be tried, it developed into a written dispute, carried on for the same purpose, and followed by a trial of fact or law, according to the question involved. The first pleading of the person who brings the suit is called at Common Law, the Declaration or Complaint; in Equity, the Bill; in Admiralty, the Libel. The first pleading of the defendant was called at Common Law and in Equity, a Demurrer, Plea or Answer, according to its character. A demurrer admits all the facts of the prior pleading, but claims that even so, the law is with the party demurring. A plea admits the facts set up in the adverse pleading; but insists on some special facts that change, or avoid their effect. An answer generally meets the whole case of the adverse pleading by a denial, or an admission and a setting up of new matter in avoidance. To the defendant's pleading the plaintiff might in all the systems demur. But only in the Common Law system was further pleading sometimes required. This pleading was called a Replication. The defendant's answer to this was called a Rebutter, and there might be to this a Surrebutter on behalf of the plaintiff. All of which was for the purpose of compelling the parties to come down to the statement of one issuable fact, decisive

of the controversy, alleged on one side, and disputed on the other. When this issue was once reached, that was the end of the pleading. The case was then ready for trial. At Common Law, if the question was one of fact it was tried by a Jury; if of law, by the Court.

Returning to the suit of *Brown vs. Smith*, we had reached the point where the summons and complaint had been served on the defendant. The defendant now has a certain time, twenty (20) days after service, to answer the complaint. If the defendant fails to appear in the suit, or having appeared fails to answer, the court with or without evidence, as the practice may be, grants judgment. Then another officer of the Court is set in motion to carry out the decree. The defendant's property or person is seized, as the exigency of the case requires, and performance of the judgment is enforced in one of two ways. If it be a judgment for a sum of money, his property is seized, and sold to satisfy it. In some cases he may be put in jail until he pays. The old law enforced all of its judgments in this way. Imprisonment for debt is now generally abolished. If it be a judgment in equity, — as that the defendant must execute a deed of certain land to the plaintiff, — the judgment is enforced by notifying the defendant of the decree, and requiring action by him in pursuance of it within a certain time. Should the defendant default in his performance, he is seized and imprisoned for contempt of Court, until he purges himself by signing the deed. Or, if he still refuses, the Court appoints its own officer to sign the deed, and decrees that such signing shall have the same effect as though defendant had signed.

Should John Smith answer the suit, he must file his answer in writing. Question may then be raised as to whether by the rules of law the plaintiff's complaint has any merit; or granting that, whether the defendant's pleading is good, or whether judgment should go against him without further investigation. If the complaint and

the answer are each good upon its face, and require further investigation to determine what decision should be made upon them, they are said to raise an issue. This issue is either of law or of fact. Issue of law arises when the defendant's plea, admitting plaintiff's statement of facts, alleges he should not recover. So if plaintiff stands upon the complaint and answer, on the theory that admitting all the answer says to be true, nevertheless, he is entitled to judgment. In each of these cases the party so pleading is said to demur, and his pleading is a demurrer.

This issue is always tried by the Court — *i.e.* the Judge. Issue of fact arises when some material fact in the pleading of either party is denied by the other. Issues of fact are sometimes tried by the Judge — *i.e.* Equity cases ; sometimes by the Judge and Jury — *i.e.* Common Law cases. And in this last event the conduct of the trial, the witnesses that may be examined, the questions that may be asked and the legal effect of uncontroverted facts rests entirely with the Judge ; while disputed facts are left to the Jury to determine ; the Judge charging them that if they find so and so to be the fact, the verdict must, by law, be for one party or the other.

For instance, in the case proposed, Thomas Brown having sued John Smith upon the note, John Smith may admit he made it ; but he may plead that he was under twenty-one years old when it was made. Thomas Brown thereupon replies, denying that John Smith was under age, or raises the question that the note was given for necessaries. In either case an issue of fact is raised on the pleadings. This issue is one that goes to a judge and jury for trial. On the trial John Smith, to prove his case, may attempt to prove his age by putting in evidence his family Bible. The parent who made the entry may be dead. The judge must then determine whether proof of the entry is competent evidence ; and, if so, how the handwriting of this parent may be proved. If Thomas

Brown brings in other evidence to prove that John Smith was over twenty-one when he made the note, as by evidence to show that the Bible entry was always known in the family to be incorrect, or the testimony of some one else showing Smith was born at an earlier date, or produces evidence to show that the note was given in exchange for necessaries, and evidence to dispute this last issue is given by Smith, the whole question goes to the jury. Smith's counsel then sums up to the jury on the facts. Brown's counsel follows.

Then the judge charges the jury as to the law. This he might, in the case supposed, do substantially in this way.

Gentlemen of the jury:

First. If you find that John Smith was of age when he made this note, the rule of law is that a man who executes a promissory note must pay it, and your verdict must be for the plaintiff.

Second. If you find that John Smith was under age when he gave this note, then the verdict must be for the defendant; because the rule of law is that an infant is not liable on his contract.

The counsel for Brown, the plaintiff, may then request the judge to charge that if the jury find that the note was given in exchange for food and clothing, board and lodging, or other necessaries, furnished by Brown to Smith, and that the amount of the note is the reasonable value of the same, the defence of infancy is unavailing; and the verdict must be for the plaintiff.

The request raises a question of law which is an example of one of the minor divergences of the Municipal law of different States founded on the English common law. Thus in New Jersey, and New Hampshire, the judge should refuse this request. The law there is that an action on a note against which the plea of infancy is proved, cannot be sustained by proving that the note was given in exchange for necessaries. *Fenton vs. White*, 4

N. J. L. 100 ; *McCrillis vs. How*, 3 N. H. 348. The plaintiff ought to have disregarded the note and sued for the value of the necessaries, as for goods sold and delivered, for instance. In this form of action he could recover. *McCrillis vs. How*, 3 N. H. 348. Yet in Massachusetts, Vermont and Texas, the law is as expressed in the request ; and if the Judge refused so to charge, and the verdict was against the plaintiff so requesting, he would be entitled to reverse the case on appeal ; and have a new trial. *Earle vs. Reed*, 10 Metc. 387 ; *Bradley vs. Pratt*, 23 Vt. 378 ; *Askey vs. Williams*, 74 Tex. 294.

This contradiction between the Case Law of the different States is not, however, a true instance of a defect in the Case Law. In the first place, the rule laid down is one of procedure, not of substance. Since a recovery in some form is allowed, there is no denial of justice. Hence, there is no equity involved — it is only a question of convenience, and of orderly procedure. As much can be said on this head for one ruling, as for the other. This, therefore, is one of those cases where certainty is more important than the character of the decision. Once settled either way, the rule is fair enough in all cases. Hence, it is a case that with some propriety may be claimed to be properly within the province of Statute Law, and not within the province of Case Law. (See Chapter IX, *infra*.)

The Counsel in *Brown vs. Smith* having requested the Judge presiding at the trial to so charge the Jury on the law, it would then become the duty of the Judge to so charge, or refuse to charge, or to charge a modification of the law stated in the request. The Judge would probably tell the Jury that although, as a general rule, an infant is not bound by any contract, yet he is liable on a contract to pay for necessaries the reasonable value thereof. The Judge would further have to explain to the Jury what are generally considered necessaries under the rule. This instruction would probably be that the ques-

tion of what is a necessary, for which an infant is liable on his contract, is a question of the intrinsic nature of the article, and the station in life, and circumstances of the infant. A saddle horse would not be for the son of an ordinary tradesman, but it might be for the son of a Vanderbilt.

Under such instructions the matter would generally be left to the Jury to say whether, in the special case under the special circumstances, the article was a necessary, or not. The Jury would then render their verdict. On this a judgment for one party, or the other, would be entered. From the judgment entered on this verdict either party might appeal, and have these law questions re-tried in the Appellate Court. If the Judge in laying down the law has made no mistake, the verdict will stand; if otherwise, the case is reversed and comes back for a new trial before another Jury.

So much for law as it is administered—the way in which a suit at common law is brought, defended, tried and the judgment enforced. An equity suit would go through the same general stages, except that no jury would be involved, and the relief granted, and form of procedure, would be slightly different. In an equity suit also there is no new trial. If the first judge makes a mistake as to evidence, etc., it scarcely matters; for when such an error is found, the appeal becomes in itself a new trial on all the merits of the case. The sample case of *Brown vs. Smith* mentioned has been dealt with chiefly from the side of procedure, or adjective law, and yet some rules of substantive law have been recognized.

THE SOURCES FROM WHICH THE JUDGE OBTAINS HIS LAW

The general rule has been laid down that a party who breaks a contract must pay damages. An exception has been admitted where the person breaking the contract is an infant; and an exclusion of this exception, where the

contract of the infant involves the purchase of necessities.

Now how did the judge know these rules and exceptions which he lays down to the jury? From what source did he derive them? The answer to this question is that he found them in certain writings. If it be asked what writings? and where are they to be found? the answer to such questions would be different, according to the law under which the judge is acting.

Thus, if the case had arisen in France, the judge would have consulted the Code Napoleon, the decisions of the Court of Cassation and the Text-book Commentaries upon the Code running up into hundreds of volumes. In the absence of a definite rule deduced from these to govern the case, he would have consulted his "*Bon sens et équité.*" This would mean his own ideas of right, justice and expediency. But in arriving at his own opinion he could not, at least in theory, consult or have regard for the prior decisions of other judges on similar states of facts. As shown above, the search for and following of precedents is forbidden in France.

If the case had arisen in England, the judge would consult —

First. The Statutes of the Realm.

Second. The prior decisions of the courts.

If the case had arisen in one of the United States, the judge would consult —

First. The Constitution of the United States and of the State.

Second. The Statutes of the Legislature of the State — this from a point of time generally settled by statute. In New York State this time is fixed as of the date of the Battle of Lexington, April 19, 1775.

Third. The reported decisions of the Courts of the State.

Fourth. The law of England from the earliest times down to April 19, 1775.

From these sources if he found any rule governing the special case, it would be his duty to apply it; and so decide the case. The question of whether any rule or exception so discovered applied to the special case, might itself be a question of doubt or argument.

In passing, it is to be noted that there is no presumption that such search of the former Common Law will disclose a rule or exception which applies. Here note an important distinction between a Common Law and a Code system. Under the Common Law the rule or exception declared may be altogether new — not included in the prior law — one discovered, as it were, to meet the necessities of doing justice in the special case. Under the Code system the rule that is applied must be some one of those laid down in the Code. No new one can be created by the court.

Again, if the case had arisen, say, in West Virginia, the judge would consult the West Virginia law back to 1863, when the State was carved out of the original State of Virginia, then the law of Virginia back to a certain date about the time of the Revolution, and then the law of England. And so in each of the States some date is fixed from which its law begins, and back of that you consult the law of the older civilization from which it sprang. A notable exception to this final reference back to England, and its common law before the Revolution, is the case of Louisiana. Louisiana was a French Colony, and came into the Union by purchase, bringing its own peculiar law derived from the Civil law. It has a Code which is chiefly derived from the Code Napoleon.

And when the judge had made this search through these laws — would he find that at all times during those periods the rules of law were the same as those he has above laid down? The answer is no.

THE LAW CHANGES AS THE TIMES CHANGE

Even so elementary a principle of modern law, as that a man who breaks his contract shall pay damages, was not

originally enforced by the courts. Time was when contracts did not exist. The position of men in society, their rights, duties and burdens were determined by the accident of birth, tribe and environment of custom. In our own English law, we can trace the development of contract, from a time when the courts would not enforce a contract unless it was in writing under seal,¹ to the present time when all oral² contracts except those covered by the Statute of Frauds, or some like statute, are valid. So in the special branch of the law mentioned the judge would find a time when all contracts made by a person under twenty-one were declared to be utterly void, and would trace the gradual change to a time when they are determined to be voidable, but not void.³ So he would find a time when it was the law that a man could sell his lands, and then with the introduction of the feudal system, a time when it was illegal for him to do so, and so on down to the rule of the present day again allowing him to do so.⁴ And so in every branch of the law the judge would find changes and alterations. And these complete reversals of a former policy would as often be found to be the result of silent and slow changes wrought by a line of decisions, as of the sudden enactment or repeal of a statute.

¹ "The rule was laid down 'by parol the party is not obliged.'" Holmes' Lectures on the Common Law, 264.

² Contracts by word of mouth as distinguished from contracts in writing, signed or sealed by the party charged.

³ The difference between void and voidable may be expressed in this way. If a contract is void, it is a nullity and cannot be reinstated. If voidable, an act or absence of action when the party comes of age may validate it. Thus if an infant bought land and held it after coming of age and was then sued for the price, the plaintiff would win or lose his case according to the rule of law as to whether the defendant's, the infant's, contract was void or voidable. If the infant's contract was void, the infant could hold the land and not be liable for the price. If the infant's contract was voidable, the courts could say "since after coming of age you have not returned the property, we will hold you have affirmed your voidable contract and that you are liable for the price."

⁴ Pollock and Maitland's History of English Law, Vol. I, pp. 310-326; Vol. II, pp. 18, 25, 306.

THE FIELD OF STUDY NOT SO EXTENSIVE AS IT
APPEARS

From all that has been said the lay reader must not draw the conclusion that in every case, or indeed in most of the cases, that arise, the judge or counsel is compelled to examine all this mass of law. Certain well-recognized general principles, and their exceptions, constitute rules, not in excess of a reasonable number, and serve to decide the majority of cases. Special study is only required where some new combination of facts presents the novel question, as to which of two or more old rules should be applied, or whether a new rule must be asserted in order to do justice. Some acquaintance with all this mass of material is, however, requisite before a man can understand the law of today, or be competent to give an opinion on any question. The method in which the lawyer is trained through his two or three years of preliminary study, is not much different from the way in which laymen learn history. The detailed facts of history, the battles, the reigns, the discoveries, are generally set down, in Reports of officers to the Departments of Government, in newspaper or magazine reports, in documents on file in Government offices, in Diplomatic and other Correspondence, and in Scientific papers published by Societies, etc., etc. These are collected and read by some historian. He then writes his summary of the events. We read this summary and derive some notion of past events. We know, for instance, without consulting the writings that the Reformation came in in the time of Henry VIII., that Bonaparte lived, and was Emperor of the French, and that he was crushed at Waterloo. But if asked when glass was first used in window panes, or who was the inventor of the cotton gin, we might have to consult the histories before giving an answer.

The Results of Battles, ending in the Courts in the decision of some controversy, in the Legislature in the passage

of some Bill, are the detailed facts of the lawyer. These are taken and read by the Text-book writer; and principles, rules and exceptions are deduced from them. The result is set down in what are known as Text-books as the history and state of the law. The lawyer reads these. On special matters he also goes to the authorities at first hand, and reads the cases or the statutes, and thus fits himself for the duties of counsel and judge.

But the lawyer would have to be guaranteed the long life of a Rustem, or a Methuselah, before he might undertake the Herculean task of consulting all the precedents. He consults enough to get a clear idea of the whole. The result is, that the ordinary professional man is well grounded in general principles, and able from them to solve ordinary questions. When points of greater intricacy arise, he knows where to look, in the myriads of cases, for those likely to contain light on the principles involved. Thus, what the detailed events are to history, or the detailed record of them are to the historian, the cases and statutes are to the lawyers, — authorities to be specially investigated when the necessity arises. Another factor which reduces the apparent mass of labor is the following.

Sometimes great numbers of cases amounting to volumes of reports become obsolete by a simple change made by statute. Under the old law a person who was interested in the event of the suit could not be a witness. Under this rule thousands of pages of Reports of cases were taken up with refinements of distinction and reasoning, as to what kind or amount of interest disqualified a witness from testifying, and how he might be made competent in some instances. In nearly all jurisdictions a statute has been passed substantially saying: "No witness shall be disqualified by reason of interest in the litigation." The rule is thus reversed. The result is that all this learning has become obsolete. Pages on pages of reports containing the cases embodying it are dead and buried as completely, as when, by some convulsion of nature, the Herculaneum

or Pompeii of ancient times is converted into a mere cinder heap of this age. Again, changes in the law of real estate since 1826, and in the law of pleading since 1846, occurring in New York State, have so altered the law that the decisions since then are the only safe guides. The former cases are only valuable as argument or illustration, "to point a moral or adorn a tale."

Thus, in the changes of time, much of the ancient law has vanished from the field as completely as the glacial ice cap once covering Britain and France; and has left behind, in place of moraines, dusty black-letter tomes as evidence of its former presence.

It follows that in determining the present law, provided the judge is acquainted with the broad outlines of the rise and growth of its principles, the quickest route to the end is to study the recent law; and to follow it backward for light on the question. In practical life the result generally is, in New York State, that the answer to the question can be built up from the materials of the last twenty or thirty years. And so it is that while familiarity and acquaintance with the whole body of our past and present law is necessary to the proper equipment of the lawyer and the judge, the amount of special knowledge of special parts of it required is dependent upon the nature and quality of the materials constituting that portion. So much for the period of time over which the practising lawyer must search for precedents to guide him under the common law system.

THE BOOKS OF STATUTES AND THE BOOKS OF REPORTED CASES

But we have not yet clearly stated where the judge, in the particular case of *Brown vs. Smith* mentioned above, found the special rules he laid down; and in what form he found them. We have said that he would search first for a constitutional or statutory provision governing the case. Should he do so, he would find none in New York

State covering the case. If, however, the same suit were in England, he would find a statute declaring the note of an infant given under these circumstances void.¹ The statutes and constitutions he would have to consult on the subject he would find in books printed under the authority of the State. These books purport to be true copies of the engrossed acts in writing passed by the Legislature and placed on file in a State departmental office. The originals so filed bear the signatures and seals of the heads of each House of the Legislature, and sometimes of the Governor of the State, as well as the file mark of the Secretary of State.

Finding no guiding deliverance in these volumes, he would then turn to the reported decisions of the courts in like cases. These reported decisions he would find printed in certain other books. On examination of these books he would find that they were the detailed history of a number of litigations that had actually occurred between John Smiths and Thomas Browns. He would also note that the manner of setting forth the history is peculiar. First come the names of the parties to the case, the court in which it arose, and under what conditions, and at what stage of the proceedings in the case, the matter presented for judgment came up. Next will follow a detailed statement of all the facts in the case thought necessary or material to its fair understanding, by either of the opposing lawyers, by the judge, or by the author who writes the report. Then follows a summary of all the reasons and arguments given by one lawyer why his client should win the case, and a like argument from the opposing counsel. Then follows the written opinion of the judge. This, as a rule, states all the facts of the special case thought to be material, applies to them, and to the decision necessary on them, some principle; and gives the reasons why the principle exists; and for the application of it to the special facts of the case in hand,

and, generally, cites former rulings on similar facts in support of the conclusion arrived at.

THE LAWYER'S OTHER TOOLS OF TRADE

The lawyer has also as his tools of trade, besides the books of statutes and of reports, the treatises of eminent writers called Text-books, and the compilations of cases called Digests. These last two are essentially the product of private, and not State effort. They do not prescribe the law, they state it, and sometimes discuss it. The Digest is an abstract of the Reports. The Text-book is what its author makes it: a book of principles, their reasons, and applications, with citations of cases sustaining them; or a laborious conglomeration of improperly digested rules and cases. The lawyer uses the Text-books and Digests as aids to the better finding out of what has been said in the statutes and reported cases. A text-book may be defined as follows: it is a treatise on the law, or some branch of it, written by a private author. It has no greater force or value than the ability and research the author has displayed in finding the cases in the reports, and in classifying and arranging them, so as to extract a clear statement of the rules and principles, with their exceptions and qualifications, established by such decisions. A digest, in like manner, is a collection made by some private author of the summarized facts and the decisions on them, contained in full in the reports. It is arranged under some principle of classification, usually an alphabetical one. A digest also depends for its value solely on the ability displayed by its author. The main distinction between a Text-book, or Treatise, and a Digest is as follows. In a Text-book the cases are usually arranged with reference to the orderly statement of the principles enunciated by the author, and as authority for such statements, the special facts of each case being only incidentally referred to. In a Digest the facts of each case are carefully summarized with the decision made;

and the order of arrangement is generally alphabetical and based on the presence of some leading fact (as a corporation, a deed, a will involved) rather than on the principles established by the decisions.

THE DISTINCTION AND LIKENESS BETWEEN A CODE AND A STATUTE

A Code is a particular kind of statute. As will be seen from the concrete examples of statutes hereinafter set out, statutes generally apply to and cover certain general classes of facts that are in that way set off as classes by themselves. A Code is a statute, but is distinguished from ordinary statutes by the fact that it professes to, and is intended to, state all the rules that may be applicable to that province of the law of which it is a Code.

Thus a Code is defined to be: "A body of law established by the legislative authority of the State, and designed to regulate completely, so far as a statute may, the subjects to which it relates." So a Criminal code is a statute which, by numerous divisions and subdivisions, chapters and sections, covers all the law of crimes. The term "Civil Code" has various meanings. As used in this essay, it is intended to mean a statute which, in like manner, prescribes all the law of social activities within the State, exclusive of Crimes, Procedure and Political Organization and Powers. It must be borne in mind, therefore, that all that is hereafter said in regard to the intrinsic nature of legislative law as embodied in statutes, the rules of interpretation, decision, application, and manner of promulgation, is equally true of Codes.

THE PRESENT RELATIONS OF STATUTES AND CASES

Statutes as they exist imply the existence of the Common Law. Large classes of disputes are left without any legislative declaration of the principles which should be applied in their solution. A Code is an attempt to cover

by a statute the entire field of the law, so that a statement of all the rules that might or could be needed as guides to the solution of all disputes shall be embodied in the statute.

Statutes, therefore, as they exist are practically fences run by the Legislature around certain provinces of social activities, part of the domain of Municipal law. In the classes of combinations of facts therein enumerated, the Legislature has commanded that the decision of a case arising thereunder shall be according to the rule prescribed. The remaining outlying social facts and relations, and the rules of conduct to be prescribed in relation to them, are left to the arbitrament of the judges. The decisions of the judges in writing on these cases constitute the *lex non scripta*.

As the provinces of the legislative and judge-made law now exist, it may be said that no Code question is presented. The legislative law is, as a rule, confined to such social relations, relatively simple in their nature, or relatively settled and fixed by long custom, as to which certainty in the rule applicable is of more importance than the nature of the rule itself.

HOW THE CODE QUESTION ARISES

The code question, pure and simple, arises only out of the effort to invade, with legislative enactment of rules, classes of facts and social relations hitherto left exclusively to the arbitrament of the judges — cases in which the decision involves an appeal to our ideas of justice, of right and of wrong, and where equity or inequity is the result.

EXPLANATION OF THE TWO SUCCEEDING CHAPTERS

But actual observation is better than any description. We therefore present to the reader in the following two chapters samples of the things we have been talking about; namely, Statutes, Reports, Digests, Text-books

and Codes. To each sample we add a short note explanatory of its nature and of the subject-matter involved.

But before actually examining the objects themselves, a few words of further preliminary explanation are in order. The English law exists to-day as a law of Cases. It is proposed to codify it. It is proper, therefore, that we should first study it in concrete examples as it is, then as it is proposed to have it. The next chapter will therefore set out concrete examples of statute and case law, and of digest and text-book. All that can be done is to give extracts with some few words of explanation to make their bearing on the general issue more clear. In selecting the extracts from the reported cases, digest and text-book, we have selected a portion of the law of contracts in restraint of trade. This has been chosen because it has come down to us through centuries practically unmodified by statute. Again, it is a law of comparatively recent growth and development, arising out of the changed conditions of modern trade,—the telegraph and the steam engine,—and its principles are even now developing in unforeseen directions in the Trusts and Trade Combinations of the present day. These vexed questions we do not touch upon. To adequately discuss even this branch of the law would require a volume as large as this book. We therefore confine ourselves to a very small part of a small bed in this portion of the garden. The succeeding chapter will give examples of Code Law. As it is impossible to cover the whole field, we select that special portion selected for development in the Common Law. We therefore give extracts from three Codes, covering the law of contracts in restraint of trade. We then compare the certainty and the justice of the law so declared with the common law on the same subject. While on this subject, one word more.

GENERAL REMARKS ON THE QUESTION PRESENTED

No amount of theory is equivalent to actual practice; and in generalizing on a subject without actual contact with the things themselves, we are apt to lose sight of facts, and be misled by false analogies. In reading the theoretical jurists, a practical lawyer receives the impression that had Bentham, Austin, and some others, ever taken an active part in the actual practice of the law, had they been compelled to pass upon the complicated questions arising in real life, and, at the risk to the client of life, liberty or property, been compelled to advise and predict, they would have preferred as a practical guide the incoherent mass of material preserved in our common law reports to the most scientific code that the human mind could possibly produce.

The philosopher in his closet, viewing all things by the dry light of generalization, naturally loses sight of the individual cases, and the difficulties inherent in their true solution. His only problem is to generalize these cases into some order and coherence. His questions are not the issues arising in each case, but the classification of the cases among themselves. His task is to state in terse and elegant diction the general principles, not to decide which principles shall be the true guide to apply to the solution of a special problem.

The practitioner, on the other hand, looks only at the problem of the special case presented. His difficulty is to find light to guide him to a correct decision of the case in hand. The general principles may be stated in concise and abstract English, beautiful in its expression, but the attempt to solve, by the aid of such statement, the particular combination of facts presented may, and generally does, constitute a problem of surpassing difficulty and uncertainty.

A Code must necessarily deal with generalities. The case law deals with the special combinations of fact as

they exist. Each reasons to conclusions from its own peculiar data. Because the case law argues from a foundation of facts, instead of from a foundation of abstractions from them, the case law system is the more practical, and the more equitable system. The proof of this conclusion is presented in subsequent chapters.

CHAPTER V

THE ENGLISH LAW AS IT IS¹

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¹ It will conduce to a clearer conception of the succeeding argument if the professional reader will refresh his recollection of concrete facts by a perusal of the extracts in this chapter.

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TITLE I

CONCRETE EXAMPLES OF STATUTES

Exhibit A.—The Statute of Frauds

Here are extracts from the celebrated statute passed in the time of Charles II., and known as the Statute of Frauds. This act has been substantially reënacted in all of the United States.

“An act for prevention of Frauds and Perjuries.

“For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury; be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled and by the authority of the same, that . . .

“III. And moreover, that no leases, estates, or interests either of freehold or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June, be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

“IV. And be it enacted by the authority aforesaid, That from and after the said four and twentieth day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer

damages out of his own estate ; 2. Or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person ; 3. Or to charge any person upon any agreement made upon consideration of marriage ; 4. Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them ; 5. Or upon any agreement that is not performed within the space of one year from the making thereof ; 6. Unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

* * * * *

“XVII. And be it further enacted by the authority aforesaid, That, from and after the said four and twentieth day of June, no contract for the sale of any goods, wares, and merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

Note to Exhibit A. — The Statute of Frauds

This is probably the most famous of all the English Statutes. At the time of its enactment, and for some time prior thereto, the English law had finally reached the stage that oral evidence of the making of a contract was sufficient proof of its existence for a Court of Justice to adjudge damages for its breach. This rule was a comparatively recent innovation upon, or rather relaxation of, an older rule. This older rule had been a Statute of Frauds for its age.

The act did not pretend to change the old law as to all

contracts. The Courts, therefore, had to determine what contracts were within the act, and had to be in writing, and what contracts were without the act, and might be enforced, although oral. Each clause, and we might almost say each word, of the act has been the subject of judicial decision. Some words and phrases as : "Not to be performed within a year" ; and "debt, default, and miscarriage," have been the occasion of repeated and numerous decisions.

Although at another point in this Essay (Chapter VII) certain cardinal distinctions between statutes and cases are specifically pointed out and dwelt upon, clearness requires that, at the risk of repetition, attention should be here directed to the same facts while the concrete examples are before the reader.

Distinctions between Statutes and Cases.

First. A Statute does not decide a special case then up for decision. A decision of a Court does. A statute does not say, the promise made by John Smith to Thomas Brown to pay the debt of William Winter is invalid, because it is not in writing. A statute on that subject would say, as this statute does, "no action shall be brought whereby to charge any person upon any special promise to answer for the debt of another." Thus a statute sets off a class of such promises, and applies to all of them a new rule. And the rule is to apply to future controversies not yet in existence, future cases in which John Smiths promise Thomas Browns to pay William Winters' debts. A case decides that the promise of John Smith made to Thomas Brown is, under all the circumstances, a promise to pay his own debt ; or to pay that of another ; and hence, good or bad, under the statute. The rule of law enunciated in the case, so far as it applies to future controversies, is a rule applicable only to cases involving like combinations of fact — as the lawyers say, cases "on all fours" with the former decision.

Second. Again, statutes do not, as a general rule, give

a reason for the rule of law they adopt. Sometimes a statute has a preamble as this one has. The words "for prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury" constitute this preamble, and so state a general reason for the enactment of the statute. Even so, the reason given is stated without argument; and applying not to a past individual case, but to all future cases as well, is as likely, when the new case arises, to be wrongly as rightly applied. It has been often remarked of this very statute passed to prevent perjury, that it is still an open question, judging from the reported cases, as to whether more frauds have not been perpetrated under its protection, than would have been possible in its absence. Cases, on the contrary, are of little value as precedents unless the opinion of the judge not only states the rule, but the reason for it. By this we include either the reason for its application, if the validity of the rule is admitted; or the reason for its existence and application, if the rule itself is a novel one. Hence the essence of a case is its expression of the reason, and of the arguments for the rule.

This absence of a statement of the reason for the rule, and for its application, constitutes one fundamental difference between a rule of law prescribed in a written statute, and a rule of law laid down in a reported case. The rule of law established by a case rests first and last upon the reason, the validity of the argument contained in it. Stripped of the wealth of illustration and argument with which, in connection with the facts, a judge supports the rule of law enunciated in his decision, the decision might be put in general words similar to those used in a statute. For further proof of this, see Chapters VII and X, *infra*.

Again, note that the statute in prescribing that certain contracts must be in writing to be valid, uses language that gives, as earmarks of the distinction between the

classes of contracts, certain facts in no way connected with the combination of circumstances which would arise in any special case. Thus the earmarks are in one instance "a special promise" to "answer for another." In actual life we never find, in any case arising for decision, these test facts existing alone. The fact or facts, so specially mentioned, always exist mingled or implicated with other special facts, not enumerated in the statute. When controversies arise in real life out of combinations of fact embodying such test facts and others, the Courts are first compelled to determine what these facts are, in themselves; and when they may be said to exist in the case in hand. Thus, what is a "special promise"? What is a contract "not to be performed within a year"? What is a promise "to answer for another"? What is a contract "for the sale of goods, wares and merchandise"? These expressions seem to be entirely plain until we apply them to the facts of special controversies. Then not only these specially mentioned facts, but many others having an important bearing on the "fairness" of the statutory rule, are implicated; and produce obscurity and uncertainty.

How powerful the influence of these unforeseen and unprovided for combinations of other facts may be, is illustrated by the doctrine of Part Performance in Equity. The statute declared (see paragraphs I and III) that an agreement to sell land, unless in writing and signed by the party to be charged, was invalid. We have seen that, by the law of the land, the rule declared by the Legislature is Supreme. Yet at an early date, the Court of Equity overruled the statute by declaring, that where there had been part performance of an oral agreement to sell land, *i. e.* where, for instance, the purchaser had gone into possession and spent money in repairs or improvements, the statute did not apply.

And, in this respect, the enumeration of a few particulars only on which the application of the rule depends,

this statute resembles all others.¹ This is an intrinsic defect of Statutes and Codes. It is further illustrated in Chapter VII. The defect is a defect of language as a vehicle for conveying commands — not a fault of the authors of these writings.

A command is necessarily prospective in its operation. As no one can foresee all the complications of facts that may occur in any given dispute in the future, the special circumstances cannot be embodied in a command. The command must be expressed in general terms. As all the existing facts and surrounding circumstances cannot possibly be expressed in a command, only a few leading and supposed to be distinguishing facts are referred to. The form of law expressed in a statute is, therefore, the expression of a rule of law in connection with an abstraction of certain facts in the presence of which it applies.

The reported case is different. The facts involved in it are known. Not only the general facts, but all of the facts down to the minutest detail. It is true that all are not set down in the report. But the counsel, judge and reporter have opportunity to select from them all such facts as any one of them may deem to have a bearing on the result. These facts are what we call the "material facts" of the case. Now the judge, having the special facts of the special case before him, decides that case; determines that justice or equity requires that the plaintiff, or the defendant, must have judgment. If the judge merely decides the case, no law is enunciated. If, in deciding the case, he gives a reason why he decides it in the way he does, then he has stated some principle of law, of which he says the facts in that case are an example. The consequence is that the judge has stated his rule of law, not in the abstract, not as applying to all future cases, *but in*

¹ For the proof of these intrinsic differences between Code and Case law see Chap. VII. Here the argument is merely gone into in sufficient detail to enable the reader to better understand the special examples of Statute and Case Law set out as Exhibits.

view of certain detailed facts contained in a special case calling for its enunciation and application. The form of law expressed in a case is, therefore, the expression of a rule of law in connection with the detailed facts out of which it arises, and to which it applies. That the judge, in prescribing the law, has present in his mind the detailed facts of a special case in view of which he prescribes the law to govern that case and future analogous cases; while the legislator, in prescribing the law, has in his mind only a few supposed leading facts, serving as earmarks of classification for many cases (without their complications as they will arise in the actual special instances of the disputes the law must decide); is the most important fact distinguishing Case law from Statute law. This distinction in the circumstances under which the law is prescribed in each instance, has far-reaching results; results that have been largely overlooked in regard to their bearing on the question of the Code *versus* the Case law.

There springs from this divergence of origin and surrounding circumstances under which the rule is prescribed, a most important distinction as to the manner in which subsequent judges in reading the statute, or the reported case, extract from it the rule of law prescribed.

In the case of a statute the rule of construction adopted is a rule of *grammatical* construction of the writings. We proceed to ascertain the meaning of each word used, and then the construction to be placed upon them, arising out of their grammatical relations to each other in the sentence. As will be shown later (see Chapter VII) to assist in obtaining the meaning of writings of this description, the Courts have evolved an elaborate system of rules of interpretation and construction. These rules are followed as the only guides to the ascertainment of the meaning of the authors.

In the instance of a rule of law stated in a case, the rule of construction adopted is a rule of *scientific* and

logical construction. We attend, not to the strict meaning of the words, or to the grammatical construction of the sentences, but to the facts and circumstances under which the rule was stated as a ground of decision, and to the reasons given for the existence of the rule itself, and for its special application to that case. This difference in the principles of construction is fundamental. For the full discussion of its existence, and effects, we refer the reader to Chapter VII, *infra*.

So far we have contented ourselves with the statement of generalities regarding the differences between statute and case law. To promote clearness of conception, it is now proper to discuss the proper construction of some clause of this statute. Later, after giving a Reported case, we will discuss the proper construction to be placed upon it. Thus the reader will be given an object lesson of the way such construction is effected in actual practice, and may thus test for himself the validity of the general statements above made.

In the course of our discussion some of the difficulties and hardships of statutory construction will appear. Space and time prevent a discussion of the entire statute. We must content ourselves with a clause. But the principles applicable to this part apply equally to all of the statute.

Let us take up the clause reading "no action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another" unless the agreement is in writing and signed by the party to be charged therewith. When a special case arises under this, the investigation is into the meaning of the exact words used in the statute, and whether the facts of the case fit into the words. The statute appears to the ordinary mind to be clearly expressed. As soon as we begin to apply the words to the facts of special cases, unforeseen ambiguities arise.

What is a special promise? What is answering for

another? What is a debt? a default? a miscarriage? If there was a debt of another person, must he still continue to be liable? Each of these questions has puzzled the hardest-headed lawyers of two Continents; and each of them, at some time or another, has been decided both ways; sometimes by different courts; and sometimes by the same court.

Here are some of the questions which have been disputed under this celebrated clause: John Smith sells to Richard White a promissory note made by Thomas Brown, and orally agrees to pay the note if Thomas Brown does not. Query. Is this a promise to answer for another, and invalid because not in writing? The New York Court of Appeals says, No.¹ Again, the owner of land which is mortgaged, but who is not personally liable on the bond which the mortgage secures, agrees, that if the mortgagee whose interest is due will forbear foreclosure, he will pay the interest due. Is this a promise to answer for another? The New York Court of Appeals says, No.² Query. If the promise had been to pay the principal itself, would this have been a promise for another, and invalid if not in writing? The answer, for reasons too elaborate to be here outlined, would be, Yes.³ In another case an offer of compromise had been made. The plaintiff's lawyer expected his fees would be larger if the case went on, than if the settlement was effected. He, therefore, promised his client that, if the client would refuse the offer of compromise, he, the lawyer, would not charge for his services in the case unless a judgment was obtained and collected. The client thereupon refused to settle, and the judgment that was afterwards obtained proved to be uncollectible. The lawyer then sued the client for his fees, and the client set up this oral agreement. Query. Was this

¹ *Cardell vs. McNeil*, 21 N. Y. 336.

² *Prime vs. Koehler*, 77 N. Y. 91.

³ *Belknap vs. Bender*, 75 N. Y. 446.

a promise to answer for the debt of another? The New York Court of Appeals said, No.¹

In all of these cases the inquiry was as to the meaning of the words "debt of another" in the statute. In each case a "debt of another" was affected or discharged by the promise made. Hence the ground for the litigation. The courts held these particular promises not to be promises "to answer for the debt of another" chiefly on the ground that where the promise is founded on a consideration of benefit to the promisor, the promise is really original; and the fact that the liability of another is in some way affected by it, does not make it a promise invalid under the statute. This, on the ground that promises of this description are not in the class as to which the mischief, which the statute was designed to prevent, existed at common law.

Again, one of the most mooted questions under the statute has been this: The defendant, Thomas Brown, is imprisoned for debt. His friend, Richard White, says to John Smith, the creditor: "If you will discharge Brown from custody, I will pay his debt." Smith does this; the legal effect being to release all liability of Brown on the debt. Smith then sues White on this promise. White says: "My promise was to pay Brown's debt, and is not in writing; therefore it is invalid, and your action must fail." Query. Is this a promise to answer for another? The English Courts have held it was not.² The reason given for this decision is, that Brown being discharged, the debt he owed was extinguished, hence there remained only one debt in existence,—the promise of the defendant; and hence there was no promise to answer for another's debt. On the other hand, it has been forcibly argued as follows: As to an existing liability becoming extinct by the performance

¹ *Fitch vs. Gardener*, 2 Keyes, 516.

² *Goodman vs. Chase*, 1 Barn. & Ald. 297; *Butcher vs. Stewart*, 11 M. & W. 873.

of the condition on which another person's promise to pay it depends, the language of the statute does not necessarily require that it should continue to exist concurrently with the defendant's promise, but that, if one undertakes "to satisfy the debt of a person already indebted, in consideration of his instant release, there seems to be no good reason for saying that this is not a promise *to answer for the debt of another* within the reason and contemplation of the Act of Parliament."¹ The Alabama court, for one, so holds.²

It is to be noted that, if, in the example given above, Brown had remained liable on the debt, there is no question but that White's promise would have been invalid under the statute. The Courts disagreeing with the English Courts in the instance where Brown is released, do so on the ground that the promise, although not within the strict construction of the words of the statute, is within the mischief of the statute; and so ought to be within the remedy.

The foregoing examples have been given with the intention of drawing the attention of the reader to the point that in applying a statute to the facts of particular controversies arising and affected by it, the meaning of the rule in the statute is obtained from the definition of the words, and the grammatical construction of the sentence. The only rule of construction in any way modifying the results so arrived at is the rule of construction that in construing a statute we must look to the old law, the mischief, and the remedy. In other words, what was the law before the statute was passed? Wherein was it defective? Is the particular case presented one wherein the evil of the old law was present or not? If it is a case exemplifying the evil of the old law, the statute should be applied; and if not, it should not be applied. It is the duty of the Court to repress the evil and advance the remedy.

¹ Roberts on Frauds, 224, 225. ² *Tomkins vs. Smith*, 3 Stew. & P. (Ala.) 54.

But even this principle of more extended and liberal construction can never be applied to affect the meaning of the statute where the words themselves are clear, and their application definite. This is the theory. It is often violated in practice. See the murder cases cited in Chapter VII. The maxim "Hard cases make bad law" expresses the recognition of the practical operation of the theory.

The rule of law in a reported case is stated in writing; and, to this extent, it is, in form, exactly like a rule of law as stated in a statute. But when a judge subsequently goes to that case to ascertain the rule of law established by it and to apply it to the decision of a subsequent litigation, he does not extract the rule of law by parsing the sentences and defining and construing the words in which it is expressed. It is true that he obtains the general meaning of the former decision by the usual method of grammatical construction. The point insisted upon here is this. When a judge searches for a rule of law declared in deciding a special case, whatever may be the general or restricted form of the expressions used by the writer of the opinion, the rule is not held to be embodied within the four corners of the writing used to express it; but is extended or limited, beyond or within the grammatical construction of the words, according to the special facts existing with a view to which it is enunciated and to the reasons given for the rule and its application.

The result is, that a rule of law determined by adjudged cases may be stated in as many different forms of expression as the varying literary styles of the different judges may dictate; and yet, no one of these forms will, in itself, be the complete and accurate statement of the rule. The rule is to be deduced from the following data; namely, a comparison of all these forms of statement with each other, and a comparison of the special facts of each case, with reference to which each particular form of

statement may have been made, with the special facts of each of the other cases where the rule has been passed upon. The result arrived at by a process of induction and deduction will be the rule of law. On this point Chief Justice Marshall says: "It is a general rule expressly recognized by the court in *Sturges vs. Crowninshield* that the positive authority of a decision is coextensive only with the facts on which it is made."¹ Chief Justice Parker, speaking of one of Lord Mansfield's comprehensive propositions, said: "It is unsafe to take these general propositions of judges, however eminent, as rules of decision; for it often happens that they are limited in their application although not in their expression."² Further proof of this truth is given in Chapter VII, *infra*.

For the present it will be sufficient merely to call attention to the distinction. Thus, in the reported cases on contracts in restraint of trade hereinafter set out as Exhibits (see Exhibits C and D, *infra*), we find the judges laying down the common law rule in regard to them substantially as follows:—

First. Freedom of contract is the general rule.

Second. An exception exists in regard to contracts which are in restraint of trade.

Third. The general rules under this exception are as follows:—

(a) Contracts in general restraint of trade are void.

(b) Contracts in partial restraint of trade are valid.

Finding the propositions in the opinions in this form, the judge, in deciding a subsequent case upon their authority, does not now proceed to ascertain the meaning of the word "trade," and the meaning of the word "restraint," and the meaning of the words "particular restraint" and "general restraint," and then to determine his case from a consideration of these definitions, and the grammatical construction of the rule as so expressed. On

¹ 12 Wheat. 332.

² *Blanchard vs. Russell*, 13 Mass. 7.

the contrary, he goes to the facts of the special cases in which these general propositions have been stated in this form. From them he discovers what particular collocations of facts have been held to be a "general restraint," and what particular collocations of facts have been held to be a "partial restraint." In the course of his investigation he finds certain reasons given for the existence of the rule, and for its limitations and exceptions, and for its application, or non-application, to the facts of each particular case. Then, reasoning from the reasons for the rules as stated in these other cases, and the reasons therein given for the application of these rules, he decides whether the principle involved applies in the special case before him, or whether some new principle or exception must be established, and what on true principle his decision should be.

The result is that the fundamental distinction between written law in statutes, and written law in cases, is, that altogether different rules of construction are adopted to ascertain the meaning of the writings. As will be shown later on, this difference in the rules of construction is not accidental, but arises from an intrinsic difference in the nature of the writings themselves, and the occasion of their publication.¹

Exhibit B.—The Statute of Limitations

The following is a section from the old act passed in the reign of James I., and known as the Statute of Limitations. This act has been substantially reenacted in all the American States; but, of course, in modern English.

"An Acte for lymytacion of accions and for avoyding of Suits in Lawe.² . . .

"§ 3. And be it further enacted, that all accions of trespass, quare clausum fregit, all accions of trespass, detinue, accion surtrover and replevyn for taking away

¹ See Chap. VII, *infra*.

² 21 James I. Chap. 10.

of goods and cattell, all accions of account and uppon the case, other than such accompts as concerns the trade, of merchandise between marchant and marchant; their factors or servants; all accions of debt grounded upon any lending or contract without specialte, all actions for arrerages of rents, and all accions of assault and menace battery wounding and imprisonment, or any of them which shall be sued or brought at any tyme after the end of this present session of parliament shall be commenced and sued within the tyme and lymytacion hereafter expressed, and not after (that is to saie) the said accions upon the case (other than for slander) and the said accions for accompt, and the said accions for trespas, debt, detinue and replevin for goods or cattell, and the said accion of trespas quare clausum fregit, within three years next after the end of this present session of parliament, or within sixe yeares next after the cause of such accions or suite, and not after; and the said accions of trespass of assault and battery wounding imprisonment or any of them, within one yeare next after the end of this present session of parliament, or within foure years next after the cause of such accions or suite, and not after; and the said accions upon the case for words, within one year after the end of this present session of parliament or within two yeares next after the words spoken and not after."

Note to Exhibit B.— The Statute of Limitations

A word as to the circumstances under which this statute was enacted, and the reasons for its passage, will go far to explain the nature of Common and Statute Law. The law of contracts forms so large a part of our present law, that, to say that it once had no existence, would seem almost contrary to the fact. Yet this is true. Maine has shown how the progress of man in Society has been a progress from *status* to contract,¹ and Herbert

¹ Maine's Ancient Law, Chap. IX.

Spencer enforces the same truth.¹ Within historic time, contract has slowly and painfully developed with the growth of confidence among men.² Contracts evidenced by the seal of the party charged, were among the first to be recognized, and enforced. Again, the executed contract of sale, where the property was delivered and the money paid, seems to be the first contract that the law of Rome and of England took upon itself to protect.³ Then the courts began to enforce a half-executed sale; so that when a vendor proved a delivery, and a promise, the burden was on the vendee to show payment. And from the time of Henry IV. (1399 A.D.) to that of Henry VII. (1509 A.D.) a great conflict rages between the authorities as to whether the courts will enforce mutual oral promises, the "Consensual" contracts of the Civil Law, where witnesses alleging the contract were unsupported by proof of an *act of party charged* in itself corroborating circumstantial evidence. The first case (2 Henry IV. 3b) was a nonsuit because no covenant was produced [using covenant in the sense of a written promise under the party's seal]. Yet, Bryan J. admits the action would lie if the defendant begins to act. In 2 Hen. IV. 33a, a suit for damages for not building a house, Thirning Ch. J. says: "But when a man makes a covenant" [using covenant in the sense of an oral promise] "and will not perform any part of such covenant, how shall you have your action against him without specialty?" [meaning a written instrument under his seal]. And in Keilway, 78, pl. 5, S.C. 21 Hen. VII. 41; Frowicke Ch. J. says: "If I covenant" [using covenant in the sense of an oral promise] "with a carpenter to build a house and pay him £20 to build the house by a certain day and he does

¹ Principles of Sociology — Political Institutions.

² Maine's Ancient Law. Pollock and Maitland, History of Early English Law. Holmes' Lectures on the Common Law.

³ Maine's Ancient Law, p. 310.

not do it, I have a good action upon the case by reason of the payment of the money; and *without payment* of the money in this case *no* remedy. And yet if he make the house in a bad manner, an action upon the case lies, and so for nonfeasance if the *money be paid* action upon the case lies." So also "Si un farrier assume fur luv a curer mon chival que est gravelled en ses paes . . . action sur le case gist fur cest matter sans alleger ascun consideration, etc." 1 Rolle Abr. 10; S.P. 2 Hen. VII. 11. See further 7 Hen. IV. 14; Martin J. in 3 Hen. VI. 36 b, 37 a; 14 Hen. VI. 18 b, pl. 58; 19 Hen. VI. 49 a, pl. 5; 20 Hen. VI. 34 a, pl. 1. The result was that the English Courts of that day did not enforce a contract evidenced only by mutual promises; the "consensual contract" of the Civil law. It will be noticed that the earlier authorities and those sustaining the rule, "No action lies for a nonfeasance," pay no attention to the presence or absence of a consideration, *i.e.* the existence of the reciprocal promises. And the distinction drawn between *assumpsit*¹ and *case* does not affect our argument; for the point insisted upon is, that the old rule was: "No action shall be brought upon any special promise unless the testimony of witnesses is corroborated by proof of one of three overt acts of the party charged." These were, his seal, his acting in accordance with the promise, or his acceptance of the consideration.² The protection this rule afforded against perjury was, that manufactured evidence of an overt act of the party himself can be met by direct disproof. This is so unless the alleged act is laid as having been done so long before

¹ These were technical forms of action. *Assumpsit* would lie for a breach of contract. *Case* would lie for a breach of duty arising out of tort, *i.e.* actionable wrong. The dispute was over which was the proper remedy to adopt in border line cases.

² Holmes, in his lectures on the Common Law, says (p. 264): "The rule was laid down; by parol the party is not obliged . . . from Edw. I. to Henry VII. we find no case where a debt was recovered, unless a consideration had in fact been received."

that witnesses are dead, receipts lost, or a false interpretation can be put upon it without fear of a direct rebuttal. It is this exception which led to the Statute of Limitations.

The ancient rule was found so safe, that a relaxation of its strictness was thought just, and finally prevailed in the time of Henry VII. This change consisted in allowing the mere proof of the existence of a consideration to be sufficient to corroborate witnesses; namely, in allowing proof of the existence of one oral promise, to be a consideration for the enforcement of the other oral promise.

Thus had the courts painfully and slowly worked out the result, that where a contract was alleged and proof of performance made on the part of the plaintiff, or proof of the existence of his agreement to perform with offer to do so, the burden was thrown on defendant to prove his discharge. At the time of the passage of the Statute of Limitations this much had been established by a long line of decisions wherein the length of time between the making or breach of the contract in question, and the bringing of the suit, had varied over years of time. Engrossed in the more important question of whether any recovery could be had, under any circumstances, the element of the time within which the suit must be brought in order to well lie had been passed over in these decisions as of no consequence. In consequence a serious defect in the law now began to be felt. The evil that resulted from this condition of the law was one arising from perjury. Years after some transaction, when receipts were lost, or witnesses to prove performance, or discharge, were dead, the old contract would be proved, and judgment asked for its breach. Thus a number of unjust recoveries were had.

A similar evil which had existed as to certain oral promises mentioned in the Statute of Frauds had been cured, as we have seen, by that statute passed in the

time of Charles II. But later experience proved that the reform had not gone far enough, and that, in the interest of justice, all contracts ought to be barred from suit after a certain length of time.

By the time this defect in the rule came to be noticed, *i.e.* that the plaintiff could recover by bringing suit years after the event, so many cases had been ruled in this way without adverting to the question of the time within which the suit should be brought as in any wise material, that it was practically beyond the power of the Courts to change the rule, and establish an exception. This, because of a great principle which has ruled in the development of our judge-made law, the principle of "*stare decisis*," *i.e.* stand by the decisions, follow precedent. Without this rule case law is not law but chaos.

The evil became so acute that a remedy was sought. The remedy consisted in limiting the time in which certain actions could be brought. The statute specified certain classes of actions, and certain limits within which suit should be brought in each. In subsequent cases, therefore, the Courts have been compelled to interpret and construe this language. Thus the Courts have had to determine whether in any particular case the action was "of accopt and uppon the case," and must be brought in six years; or whether it was an action on "such an accopt as concerns the trade of merchandise between marchant and marchant," and hence within the exception and still governed by the common law rule. Thus the Legislature established in general terms certain exceptions to the working of the former common law rule of no limitation on actions; but, as must always be the case so long as the Legislature decides future cases and not past transactions, they, at the same time, left it to the Courts to ascertain the exact limits of these exceptions, and whether any particular instance was within or without the rule.

TITLE II

CONCRETE EXAMPLES OF REPORTED CASES

The following are examples of cases as actually reported in the books of Reports. In each case some portion of the report is omitted for brevity. The cases selected are decisions in disputes involving the question of whether the Contracts presented were contracts in restraint of trade. They are selected for the purpose of comparing the rules of Case Law regarding such contracts with the rules of Code Law applying to the same subject. The following is the great leading case on the Common Law doctrines in regard to Contracts in Restraint of Trade.

Exhibit C.—*Mitchell vs. Reynolds*, 1 P. Wms. 181
(1711 A.D.)

“A bond or promise to restrain one’s self from trading in a particular place, if made upon a reasonable consideration, is good. *Secus*,¹ if it be on no reasonable consideration, or to restrain a man from trading at all.

“Debt upon a bond.² The defendant prayed oyer³ of the condition,⁴ which recited, that whereas the defendant had assigned to the plaintiff, a lease of a messuage and bakehouse in Liquepond Street, in the parish of St. Andrew’s Holborn, for the term of five years; now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis et auditis*⁵ he pleaded, that

¹ “otherwise.”

² That is, the plaintiff sued on a bond made by the defendant to recover the money agreed to be paid.

³ That is, “to see,” look at the bond.

⁴ Here follow the terms of the condition upon which defendant had agreed to pay plaintiff the money sued for.

⁵ “which being read and heard.”

he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus*¹ the said bond was void in law, *per quod* he² did trade *prout ei bene licuit*.³ Whereupon the plaintiff demurred⁴ in law.

“And now, after this matter had been several times argued at the bar, *Parker C. J.* delivered the resolution of the court.

“The general question upon this record is, whether this bond, being made in restraint of trade, be good ?

“And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contract with and without consideration; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

“The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head and to reconcile the jarring opinions; in order whereunto I shall proceed in the following method :

“*First.* Give a general view of the cases relating to the restraint of trade.

“*Secondly.* Make some observations from them.

“*Thirdly.* Show the reasons of the differences which are to be found in these cases; and,

“*Fourthly.* Apply the whole to the case at bar.

¹ “by reason of which.”

² For that (reason).

³ “as he had a right to do.”

⁴ Said to the Court, “admitting these facts, I am entitled to judgment on the bond.”

“As to the cases, they are either, first of involuntary restraints against, or without a man’s own consent ; or secondly, of voluntary restraints by agreement of the parties.

* * * * *

“Voluntary restraints by agreement of the parties are either —

“*First.* General, or

“*Secondly.* Particular, as to places or persons.

“General restraints are all void, whether by bond, covenant or promise, etc., with or without consideration, and whether it be of the party’s own trade or not. Cro. Jac. 596 ; 2 Bulst. 136 ; Allen, 67.¹

“Particular restraints are either, *First*, without consideration, all which are void by what sort of contract soever created. 2 H. V, 5 ; Moore, 115, 242 ; 2 Leon. 210 ; Cro. Eliz. 872 ; Noy. 98 ; Owen, 143 ; 2 Keb. 377 ; March, 191 ; Show. 2 (not well reported) ; 2 Saund. 155.¹

“Or *Secondly*, particular restraints are with consideration.

“Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136 ; *Rogers vs. Parry*. Though that case is wrongly reported, as appears by the roll which I have caused to be searched ; it is B. R. Trin. 11 Jac. 1 Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book they do not seem material. Noy. 98 ; W. Jones, 13 ; Cro. Jac. 586.¹ In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general and restraints particular and with or without

¹ These are citations to the books containing reports of other cases sustaining the proposition stated.

consideration, which stands upon very good foundation ; *Volenti non fit injuria* ; a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade ; and part with it to another in a particular place.

* * * * *

“II. Affirmatively ; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, *First*, the mischief which may arise from them, first to the party, by the loss of his livelihood and the subsistence of his family ; *Secondly*, to the public, by depriving it of a useful member.

“Another reason is, the great abuses these voluntary restraints are liable to ; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible ; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them lest they should prejudice them in their custom when they come to set up for themselves.

“*Thirdly*. Because, in a great many instances, they can be of no use to the obligee ; which holds in all cases of general restraint throughout England ; for what does it signify to a tradesman in London what another does at Newcastle ? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action. See Puff. lib. 5, c. 2, sec. 3 ; 21 H. VII, 20.

“*Fourthly*. The fourth reason is in favor of these contracts, and is that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade ; or in case of an old man, who finding himself under such circumstances, either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration,

that by selling his custom he may procure to himself a livelihood, which he might probably have lost by trading longer.

* * * * *

“‘*Thirdly*. It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime.

* * * * *

“‘The application of this to the case at the bar is very plain. Here the particular circumstances and consideration are set forth, upon which the court is to judge whether it be a reasonable and useful contract.

“‘The plaintiff took a baker’s house, and the question is whether he or the defendant shall have the trade of this neighborhood? The concern of the public is equal on both sides.

“‘What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, viz. the term of five years.

“‘To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

“‘For these reasons we are of the opinion that the plaintiff ought to have judgment.’”

Note to Exhibit C. — Mitchell vs. Reynolds

The selection of this case is not arbitrary. The case involves the principles of the same branch of the Common Law covered by the sections of the three Codes hereafter quoted and commented on in Chapter VI.

Let us first call attention to the formal parts of the report.

We have first a statement of the court in which the case arose and was decided. This is stated on the title-page of the volume. In this case it was the Court of "*Bancus Regis*," King's Bench, in the year 1711 A.D. Next we have the names of the parties, or title of the case, *Mitchell vs. Reynolds*. Next we have a short statement of what the case holds to be the law, beginning with the words, "a bond or promise to restrain," and ending with the words, a few lines below, "to restrain a man from trading at all." This is what is known as the Head Note. This is a summary of the decision written by the reporter. In the head note the reporter expresses, in as short phrase as he thinks proper, the rule of law established by the case; or rather what he thinks is so ruled. It is not a part of the report itself proper. It is an induction of the reporter as to what the effect of the facts and the opinion on the facts amount to. It is his declaration of the law established by the case.

The statement in the head note of the rule of law established by the case is not fettered within the limits of the grammatical construction of the language employed. This expression of the law contained in the report, when used to ascertain the law for other cases, is always considered to be amplified or limited, as the case may be, by reference to the particular facts of the particular case from which it is abstracted. Its full meaning is not clear, nor considered to be established, until it is read in connection with, and verified by, the facts of the case and the opinion of the court. If, after reading the report, you or I think that the head note does not clearly express the law of the case, we are at liberty to recast it in any way we choose to express the substantial result.

Now come the words "debt upon a bond." From

this point on is a statement of the facts of the case. In this phrase the reporter informs us that the action was brought upon a bond. He then says the defendant prayed *oyer* of the condition. Leaving, from this point, the technical language employed in the report of this case, we may restate it in more popular form thus:—

Reynolds, the baker on Liquorpond Street, St. Andrew's Parish, London, had sold his bakery and business for five years to Mitchell. As a part of the trade, Reynolds agreed not to carry on a bakery business in that parish of London during that time; and executed to Mitchell a bond, whereby he agreed to pay fifty (50) pounds to Mitchell, if he did so. Reynolds did carry on there a baking business within the five years, and so broke the agreement. Mitchell sued Reynolds on this breach. The question was, whether Mitchell could recover; or whether an agreement of a London baker not to carry on a bakery business in London was void in law.

It will be seen from the foregoing that we have in this report a complete statement of all the detailed facts involved in the controversy. We have persons, occupations, places and times, all stated in detail, and the terms of the particular contract involved stated in detail. We have before us, for investigation and study, all the facts of the special case on which the judges acted when they declared the law of that case.

In most reports now comes a statement of the argument of the plaintiff's counsel with the cases he cites, and then the argument of the defendant's counsel with the cases he cites. These are omitted. The reporter goes on to inform us that, after the matter had been several times argued, Parker, Chief Justice, delivered the resolution of the court. From this point to the end is the opinion given by the court containing their reasons for deciding the case in the way they do. On account of the extreme length of this opinion, only

portions of it are given, but they are sufficiently characteristic of the whole.

It will be noted that the opinion deals with various questions raised by counsel in the case, which the court first disposes of; as where the court says "the distinction is not between promises and bonds, but between contracts with and without a consideration." Then the court goes on to lay down the rule which the case establishes, and immediately proceeds to state why this is the rule.

It will be noted that in discussing the question, the court goes back to the decisions made in former cases. The court discusses these, and the rule laid down in them, in connection with the special facts of each case. It is enabled to do this because these prior cases are reported with a like full statement of the details of the facts involved in the respective controversies.

Again, the court argues out the fundamental reason of the rule as applied to social life where they say: "to affirm the true reasons of the distinction." As a clear example of how the construction of any particular rule of law laid down in an opinion deciding a case depends upon a scientific, instead of a grammatical, construction of the language used by the judge,—namely, upon a construction based upon a grammatical interpretation of the words, blended with a just consideration of their application to the facts of the particular case, and to the reasons given therein for their application and existence,—we may take the following part of the foregoing decision. "*Thirdly. It shows why a contract not to trade in any part of England though with consideration is void, for there is something more than a presumption against it because it can never be useful to any man to restrain another from trading at all places though it may be to restrain him from trading in some.*"

Now it happens that later cases have declared that, although the restraint is unlimited in space, namely, over the whole of England, or the whole of the United States, and hence within the prohibition of the above language,

the contract is not for that reason void. And the courts so deciding properly declare that their ruling is not contrary to the above case. The reasons for this paradox are as follows.

When the judge in *Mitchell vs. Reynolds* used those words, he had before him the facts of a case involving a restraint of trade as affecting a single parish in the City of London, and the exceedingly local trade of a baker. The judge stated the reason of the rule to be the reasonable protection of the purchaser in the enjoyment of the business. The reason of the rule is not dependent on fixed space limits. If, therefore, the business is one of national, or international, extent, the reason of the rule should govern; and the true principle involved should not be limited or overridden because a judge, in describing the limits of the rule in an earlier case when the particular facts of the subsequent case were not before his mind, used language not consistent with the new ruling.

Following these principles, the courts in later cases involving contracts in restraint of trade have extended the rule; and, under the circumstances mentioned, have held contracts restraining trade throughout all England to be valid.¹ And so of a contract restraining trade substantially throughout the United States. See the *Diamond Match Company vs. Roeber*,² *infra*.

This brings us to the peculiarity of the rule of construction of written case law, before adverted to in the note to Exhibits A and B. When the judge, in searching the precedents for light to guide him in deciding a subsequent case, thus finds the wording of some rule of law established by a former decision producing by a grammatical construction of the language a rule of law diametrically opposed to the one that should be laid down in his case, he is entitled to proceed as follows. He is at liberty to

¹ *Rousillon vs. Rousillon*, 14 Chan. Div. 351.

² 106 N. Y. 473.

take the expression of the rule of law as set forth in the former case, and apply it to the particular facts of the former case, and to the reasons given for its application, and he is then entitled to prove, if the fact is so, that by reason of dissimilarity between the facts of the case then involved and the facts of the case he has in hand, and by reason of the different reasons which should be applied arising out of the differences in these separate combinations of detailed facts, the expression of the rule of law contained in the other opinion and necessarily containing in connection with it a statement of only one or two general facts, should not be construed as applying the same rule to the new detailed facts of the case in hand.

The argument proceeds thus. Judge Parker, in laying down the rule as he did, had in mind a bakery business in a parish in London; and did not have in mind the special facts of this case; which involve, for instance, the immense Brewery business of Alsopp & Company extending over the entire England and the Continent, or the immense match trade of the Diamond Match Company extending throughout the United States of America. If the special facts of either of these cases had been present as a case to be decided by Judge Parker when he made that decision, he would at once have seen, that the same reasons that made the restraint good throughout a parish in London, so far as concerned a bakery business, make the restraint good throughout England or America, so far as concerns the more extensive business involved in these other cases. On the one hand, when a bakery business is sold, the trade being necessarily local because hot breads can only be successfully delivered within local limits, a restraint extending over a parish is all that the purchaser needs for his proper protection; and a restraint extending over all England is of no advantage to the purchaser, and burdensome to the seller. On the other hand, when the great Maxim Gun business, or the great Diamond Match business, is sold, the protection of the pur-

chaser requires a restraint over the whole world, or over the whole United States of America; just as much as, in the bakery case, a like protection requires a restraint over a parish. Hence in the later cases we distinguish and limit the broad language of the earlier ruling. The former and later cases are not in truth opposed to each other, the later being the logical outcome of the true principles involved in the former.

In drawing attention to this method of case law, we have drawn attention to one of the leading principles of its growth. *The two principles of the growth of the common law from case law decisions have been: First, The rule of "stand by the decisions"; Secondly, The rule that the law ceases when the reason ceases.* As construed by the judges in their different decisions, these rules come down to this. When the detailed facts of one case, and the reason given for the decision on them, are found to be duplicated in the detailed facts of another; or the missing or additional facts involved are not of sufficient importance to change the reason for the rule, — then the judge must decide the second case according to the rule adopted in the first. In doing so, he applies the maxim "stand by the decisions." If under such circumstances this principle were not applied, the case law would have no certainty. It would become a mere chaos of discretionary individual *dicta* without rhyme or reason. As is hereafter shown in Chapter VI, by reason of the absence of this principle from some Code systems, — the French law for example, — the decisions of judges on the diverse special disputes lying within the arc of a code section, result in such a chaos of contradictory rulings that the practitioner is practically bereft of all power of prediction. The other rule, requiring a careful sifting of the facts of the two cases and a consideration of the rule and of the reason given for the application of the rule to each case, is the rule that enables the common law to grow from one decision to another. Thus by gradual accumu-

lation the rules and exceptions of this great system of law have been developed.

Exhibit D.—The Diamond Match Co., Respondent, vs. William Roeber, Appellant, 106 N. Y. 473

The following is a very important case referred to in the foregoing note, decided by the New York Court of Appeals:—

“. . . Appeal from judgment of the General Term of the Supreme Court in the first judicial department . . . which . . . affirmed as modified a judgment in favor of the plaintiff entered upon a decision of the Court on trial at Special Term.

“This action was brought to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of a covenant in a bill of sale executed by defendant, which is set forth in the opinion, wherein also the material facts are stated.”

Here follow the arguments of Counsel for Appellant and of Counsel for Respondent.

Then comes the decision or opinion of the court.

“Andrews J. Two questions are presented: *First*, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, ‘That he shall and will not, at any time or times within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of said The Swift & Courtney & Beecher Company) within any of the several States of the United States of America, or in the territories thereof or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the territory of Montana,’ is void as being a covenant in restraint of trade; and, *Second*, as to the right of the plaintiff, under the special circumstances, to the equitable

remedy by injunction to enforce the performance of the covenant. There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth Street in the City of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks and good will of the business for the aggregate sum (excluding a mortgage of \$5000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate."

Then follows a detailed statement of the facts of the case, which may be summarized as follows : —

The plaintiff company had become the assignee of the Swift & Courtney & Beecher Company, and of defendant's covenant. The Swift & Courtney & Beecher Company, at the time when the agreement above recited was made, carried on the business of manufacturing matches in the States of Connecticut, Delaware and Illinois, and of selling them in the several States and Territories of the United States, and in the District of Columbia, and defendant was at the same time engaged in manufacturing matches in the City of New York, and selling them throughout the same territory. Defendant some time after the contract became Superintendent of a rival match manufacturing company in New Jersey, and opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The court goes on to say : "The defendant for his main defence relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of *Mitchell vs. Reynolds* (1 P. Williams, 181) and which has been repeated many times by judges in Eng-

land and America, that a bond in general restraint of trade is void."

Then follows a discussion of the earlier cases before *Mitchell vs. Reynolds* and a few later American cases.

The court then proceeds: "In *Mitchell vs. Reynolds* the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says 'for the former of these must be void, being of no benefit to either party and only oppressive;' and later on 'because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other.' He refers to other reasons, viz.: The mischief which may arise (1) to the party, by the loss by the obligor, of his livelihood and the subsistence of his family; and (2) to the public, by depriving it of a useful member and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchell vs. Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent, business corporations are practically partnerships and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character.

The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. (*Rousillon vs. Rousillon*, 14 L. R. Ch. Div. 351.) The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in *Horner vs. Graves* (7 Bing. 735) Chief Justice Tindal considered a true test to be 'whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor

the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. 'If,' said Sir George Jessell, in *Printing Company vs. Sampson* (19 Eq. Cas. L. R. 462), 'there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by Courts of Justice.' . . . We cite some of the cases showing the tendency of recent judicial opinion on the general subject. (*Whittaker vs. Howe*, 3 Beav. 383; *Jones vs. Lees*, 1 Hurl. & N. 189; *Rousillon vs. Rousillon*, *supra*; *Leather Co. vs. Lorsont*, 9 Eq. Cas. L. R. 345; *Collins vs. Locke*, 4 App. Cas. L. R. 674; *Oregon Steam Co. vs. Winsor*, 20 Wall. 64; *Morse vs. Morse*, 103 Mass. 73.) In *Whittaker vs. Howe*, a contract made by a solicitor not to practise 'in any part of Great Britain,' was held valid. In *Rousillon vs. Rousillon*, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In *Jones vs. Lees*, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. Bramwell J. said: 'It is objected that the restraint extends to all England, but so does the privilege.' In *Oregon Steam Co. vs. Winsor*, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

"In the present state of the authorities we think it cannot be said that the early doctrines that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest

that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least by the change of circumstances, been removed.

“The covenant in the present case is partial and not general. It is practically unlimited as to time, but this, under the authorities, is not an objection, if the contract is otherwise good. *Ward vs. Bryne*, 5 M. & W. 548 ; *Mumford vs. Gething*, 7 C. B. (N. S.) 305, 317. It is limited as to space, since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York, constitutes a general restraint within the authorities. In *Chappel vs. Brockway* (*supra*) Bronson J., in stating the general doctrine as to contracts in restraint of trade, remarked that ‘contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void.’ The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the Court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true, as a general rule, that a business established here

cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Oregon Steam Co. vs. Winsor* (*supra*) supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

* * * * *

“There is no error disclosed by the record and the judgment should therefore be affirmed.

“All concur except Peckham J. dissenting. Judgment affirmed.”

Note to Exhibit D. — The Diamond Match Company Case

This case has been selected because it is a recent leading case on the law of contracts in restraint of trade. It exemplifies the growth of that branch of the law since the decision in *Mitchell vs. Reynolds* above cited. The decision is all the more remarkable, in that up to that time, various

dicta in the cases had laid down the rule, that a contract restraining trade and extending over the whole State was void. The word "*dicta*" means casual or incidental comments made by the court, sayings by the way, rulings that the judge has laid down as rules of law applying to states of facts not presented in the actual case he was deciding, nor necessarily involved in its decision. Thus in *Mitchell vs. Reynolds* the judge said that a restraint of trade extending over all England would be void, but one extending over a parish of London was good. Now it happened that the case before him was one involving a contract restraining trade over only a parish in London. What he said, then, about what would happen, if the contract had been one restraining trade over all of England, was a *dictum*.

These *dicta* are not within the meaning of the maxim "stand by the decisions." Later judges need not follow them. They follow them or not according to the strength of the reasons upon which they are founded; and according to the analogy between the facts of the case in hand, and the facts of the case in which they happen to have been laid down.

The opinion of Andrews, Judge, in this case is an admirable example of judicial reasoning. The rule finally adopted to decide the case is searched for and obtained by the exercise of a sound logic founded on a due appreciation of the effect and tendency of the former law. The decision made is undoubtedly correct. It is in line with true principle and the evolution of the law on this subject. It is an object lesson of the way in which the common law grows—along lines of logical consistency and expediency—to meet the varying conditions of an advancing civilization.

The case is also an example of the manner in which a judge, in arriving at his conclusion as to what rule of law should be applied to the special case before him, sifts the facts involved in former cases, and the reasons

given for the decision of these cases, to discover the underlying principle involved, and to strip it as much as possible from its environment of special circumstances. The inquiry always is, What was the essential element that made the reason applicable? The consequence is that the judge ransacks the learning and history of the past to arrive at the reason for the expediency of the present.

TITLE III

CONCRETE EXAMPLE OF A TEXT-BOOK

Exhibit E.—Extract from Pollock on Contracts

“Agreements in Restraint of Trade. It would be impossible to give an adequate account of this subject on the plan and within the limits of this book; and it is satisfactory to feel that any attempt to do so is rendered needless by the place already given to it in a work of no small authority. (See notes to *Mitchell vs. Reynolds* in 1 Sm. L. C.) We shall here only give the principles and the short results of the authorities, with some mention of recent decisions.

“The general rule is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way. Partial restrictions, however, are admitted to the extent and for the reason to be presently stated. Thus an agreement between several master manufacturers to regulate their wages and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishments by the decision of a majority of their number is in general restraint of trade as depriving each one of them of the control of his own business, and is therefore not enforceable (*Hilton vs. Eckersley*, 6 E. & B. 47) in Exch. Ch. ib. 66, 24 L. J. Q. B. 353, 25 ib. 199. The *dicta* there leave it doubtful if the agreement would be a criminal offence at

common law. By the Trade Union Act, 1871, 34 & 35 Vict. c. 31, §§ 2-5, agreements of this kind between workmen are protected against the criminal law, though not enforceable. It would be difficult to maintain that the like agreements between masters, though not named, are not within the meaning of the Act. It makes no difference . . . that the object of the combination is alleged to be mutual defence against a similar combination of workmen. The case decides, on the whole, that neither an agreement for a strike nor an agreement for a lock-out is enforceable by law. The Court of Exchequer Chamber thus expressed the general principle in the course of their judgment: '*Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it (his trade) on according to his own discretion and choice. If the law has in any matter (qu. manner?) regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion.' (6 E. & B. at pp. 74-75.) It is not an unlawful restraint of trade for several persons carrying on the same business in the same place to agree to divide the business among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid because they may operate in partial restraint of the parties' freedom to exercise their trade. But a provision that if other persons, strangers to the contract, do not employ in particular cases that one of the contracting parties to whom as between themselves the business is assigned by the agreement then none of the others will accept the employment, is bad. (*Collins vs. Locke* (J. C.), 4 App. Ca. 674, 688; *Jones vs. North*, 19 Eq. 426, a case not free from difficulties on other grounds.)

“The reasons against allowing agreements in unlimited restraint of trade are set forth at large in the leading case of *Mitchell vs. Reynolds* (1 P. Wms. 181, and in

1 Sm. L. C.) and at a more recent date (1837), were put somewhat more concisely by the Supreme Court of Massachusetts, who held a bond void which was conditioned that the obligor should never carry on or be concerned in iron founding : —

“1. Such contracts injure the parties making them, because they . . . diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

“2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

“3. They discourage industry and enterprise and diminish the products of ingenuity and skill.

“4. They prevent competition and enhance prices.

“5. They expose the public to all the evils of monopoly.’ (*Alger vs. Thacher*, 19 Pick. 51, 54.)

“The second and fifth of these reasons appear to be the really efficient ones both in themselves and as a matter of history.

“The admission of limited restraints is commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labor, skill or talent; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons. (*James V. C., Leather Cloth Co. vs. Lorsont*, 9 Eq. 345, 353.)

“It has been suggested by a learned American writer that in its origin the doctrine was founded on a much more obvious and immediate inconvenience than can be now assigned as the consequence of allowing these contracts. It dates from the time when a man could not lawfully exercise any trade to which he had not been duly apprenticed and admitted; so that if he covenanted not to exercise his own trade he practically covenanted to . . . exercise none—in other words, not to earn his living at all. (Parsons on Contracts, II, 255.) One might even go a step farther; for by the statute 5 Eliz. c. 4 (now wholly repealed by the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86), which consolidated earlier Acts of the same kind, not only the common laborer, but the artificer in any one of various trades, was compellable to serve in his trade if unmarried or under the age of thirty years, and not a forty-shilling freeholder, or copyholder, or ‘worth of his own goods the clear value of ten pounds.’ An agreement by a person within the statute not to exercise his own trade might therefore be deemed, at any rate if unlimited, to amount to an agreement to omit a legal duty—which of course is positively illegal. But it must not be forgotten that absolute freedom of trade is positively asserted as the normal state of things always assumed and upheld by the common law; wherefore it may be doubted if any artificial explanation is wanted. It was resolved in the Ipswich Tailors’ cases (11 Co. Rep. 53 a, 54 b) that at the common law no man could be prohibited from working in any lawful trade; and it was said that

“‘The statute of 5 Eliz. c. 4, which prohibits every person from using or exercising any craft mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and

educated in lawful sciences and trades; and thereby it appears, that without an act of Parliament (so again in the case of Monopolies, *ib.* 87 b) none can be prohibited from working in any lawful trade.'

'And certain ordinances by which the tailors of Ipswich forbade any one to exercise the trade of a tailor there until he had presented himself to the master and wardens and satisfied them of his qualification, were held void inasmuch as 'Ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery.' (Cp. the case of the Clothworkers' Co. mentioned *ib.* 86 b.)

". . . It seems certain that partial restraints were recognized as valid at an early time. This appears from the Dyer's case in 2 H. V (Pasch. fo. 5, pl. 26), which has been sometimes misunderstood. The action was debt on a bond conditioned that the defendant should not use his craft of a dyer in the same town with the plaintiff for half a year; a contract which would now be clearly good if made upon valuable consideration. The defence was that the condition had been performed. To this Hull J. said: 'To my mind you might have demurred to him that the obligation is void, because the condition is against the common law, and *per Dieu*' [this expletive is not unique in the Year Books; nor is it at the date altogether conclusive (as modern writers assume) to show that the speaker had lost his temper] 'if the plaintiff was here he should go to prison till he had made fine to the King.' But it does not appear that this *dictum* met with assent at the time, and the parties proceeded to issue on the question whether the condition had in fact been performed or not. Hull's opinion, however, was approved by all the Justices of the C. P. in a blacksmith's case in 29 Eliz. of which we have two reports. (Moore, 242, pl. 379; 2 Leon. 210.) It does not appear in either case what was the real occasion or consideration of the contract. For aught the reports show

it may well have been, and not improbably was, the ordinary transaction of a sale of good will, or the like, in both the dyer's and the blacksmith's case.

"The contracts in partial restraint of trade which occur in modern books are chiefly of the following kinds: —

"Agreements by the seller of a business not to compete with the buyer.

"Agreements by a partner or retiring partner not to compete with the firm.

"Agreements by a servant or agent not to compete with his master or employer after his time of service or employment . . . is over. It by no means follows, however, that an agreement in partial restraint of trade must fall within one of these descriptions in order to be valid. The rule established by the modern decisions is in effect as follows: —

"An agreement not to carry on a particular trade or business is a valid contract if it satisfies the following conditions: (i) It must be founded on a valuable consideration. (ii) The restriction must not go, as to its extent in space or otherwise, beyond what in the judgment of the Court is reasonably necessary for the protection of the other party, regard being had to the nature of the trade or business. (See per Seluga L. J., *Catt vs. Tourle*, 4 Ch. 659; and *Leather Cloth Co. vs. Lhorsont*, 9 Eq. 349; *Allsopp vs. Wheatcroft*, 15 Eq. 61 (arg.).)

"It was at one time thought that the consideration must be not only valuable but adequate; but it is now clearly settled that this class of contracts forms no exception to the general rule. Here as elsewhere the Court will not inquire into the adequacy of the consideration. It is enough if a legal consideration of any value, however small, may be shown. (*Hitchcock vs. Coker*, 6 Ad. & E. 438 (Ex. Ch.), which also settles that a limit in time is not indispensable; *Gravelly vs. Barnard*, 18 Eq. 518. But it is a point to be considered in every case whether the provisions as to the time are such as to make the agreement one that is not to

be performed within a year, so that it must satisfy the requirements of § 4 of the Statute of Frauds. (See *Davey vs. Shannon*, 4 Ex. D. 81.) On the other hand, the necessity of showing some consideration is not dispensed with, or the burden shifted, by the contract being under seal.

“Until lately it was supposed to be an universal, or at least a general rule, that the restraint must not be unlimited as to space. But the doctrine of recent decisions is, or at least tends to be, that the real question is in every case whether the restriction imposed is commensurate with the benefit conferred. It has never been doubted that a partner may bind himself absolutely not to compete with the firm during the partnership; so may a servant in a trade bind himself absolutely not to compete with the master during . . . his time of service. (*Wallis vs. Day*, 2 M. & W. 273.) A contract not to divulge a trade secret need not be qualified, and a man who enters into such a contract may to the same extent bind himself not to carry on a manufacture which would involve disclosure of the process intended to be kept secret. (*Leather Cloth Co. vs. Lorrison*, 9 Eq. 345, 353.) And it has now been denied that the alleged rule as to limits of space exists, as a positive rule of law, in any class of cases. (*Rousillon vs. Rousillon*, 14 Ch. D. 351, 366 (Fry J.) dissenting from *Allsopp vs. Wheatcroft*, 15 Eq. 59 (Wickens V. C.).)

“It seems, therefore, that the only rule which can be laid down in general terms is that the restriction must in the particular case be reasonable. Whether it be so is a question not of fact, but of law. What amounts of restriction have been held reasonable or not for the circumstances of different kinds of business is best seen in the tabular statement of cases (down to 1854) subjoined to the report of *Avery vs. Langford* (Kay, 667).

“It is now settled, after some little uncertainty, that distances specified in contracts of this kind are to be measured as the crow flies, *i.e.* in a straight line on the map, neglecting curvature and inequalities of surface. This is

. . . only a rule of construction, and the parties may prescribe another measurement if they think fit, such as the nearest mode of access. (*Mouflet vs. Cole*, L. R. 7 Ex. 70, in Ex. Ch. & Ex. 32.)

“It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy. (*Wallis vs. Day*, 2 M. & W. 273, 1 Sm. L. C. 377-8. The law of Scotland is apparently the same according to the modern authorities.) It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction or over the servant’s property. (See Hargrave’s argument in *Sommersett’s ca.* 20 St. T. 49, 66.) By the French Law indefinite contracts of service are not allowed. (Cod. Civ. § 1780.) ‘On ne Peut engager ses services qu’s temps, ou pour une enterprise determinee.’ (So the Italian Code, § 1628.) It is undisputed that an agreement by A to work for nobody but B in A’s particular trade, even for a limited time, would be void in the absence of a reciprocal obligation upon B to employ A. (See next note and cp. the similar doctrine as to promise of marriage, *supra*.) But a promise by B to employ A may be collected from the whole tenor of the agreement between them, and so make the agreement good, without any express words to that effect. (*Pilkington vs. Scott*, 15 M. & W. 637; cp. *Hartley vs. Cummings*, 5 C. B. 247.)”

(Pollock on Contracts (Text-book Series), pp. 362-370 inc., star page 310-319 inc.)

Note to Exhibit E. — Pollock on Contracts

The foregoing is an extract from one of the best text-books in the English Common Law. It illustrates the wealth of material on this subject in the common law. Only one text-book on the English law is given because the attempt to include others, or a text-book on the American law, would increase the bulk of this essay to an

enormous degree. The kinship between the foregoing extract from a noted text-book, and the opinion of a judge in a common law case, is apparent. The distinction is as follows. The judge writes his opinion expressing his general rules and exceptions and reasons with a view to the decision of a special case in hand. The text-book writer classifies his subject-matter, according to the principles established, and the material facts; and cites cases, and opinions, as illustrations of the rules and exceptions he lays down.

TITLE IV

CONCRETE EXAMPLES OF DIGESTS

Exhibit F. — Sample of an Old Digest, including Digest of *Mitchell vs. Reynolds*

(2 BRIDGMAN'S INDEX (LOND. 1805), p. 201)

“TRADE XI

‘Restrains on the exercise of particular trades.

“122. Clauses in a charter to restrain trade under a forfeiture, are void, *E. India Company vs. Evans*, H. 1684, 1 Vern. 307; but to regulate trade they are good, S.C.

“123. A bond or promise to restrain the obligor from trading in a particular place, if made upon a reasonable consideration, is good.

“*Secus*, if it be on no reasonable consideration, or to restrain a man from trading at all. *Mitchell vs. Reynolds*, H. 1711, 1 P. W. 181, 10 Mod. 27, 85, 130; Fortesc. 296. See the numerous authorities referred to in this case.”

Note to Exhibit F. — An Old Digest

The foregoing paragraph numbered 123 is given for the reason that it digests the case of *Mitchell vs. Reynolds*, an extract from the report of which is given in full above as Exhibit C. Note the comparative volume between the two methods of expressing the law. Also note how,

in abstracting the rule and circumstances of the particular case, there is an increase in generality, and a decrease in definiteness, of conception of the actual case decided.

**Exhibit G.—Sample of a New York Digest, including
Digest of Diamond Match Co. vs. Roeber**

(ABBOTT'S DIGEST)

“CONTRACTS

“*B. Restraint of Trade*

“*General Rules.* The presumption is that an agreement in restraint of trade is void, and the presumption can be removed only by showing both that there is adequate consideration, and that the restraint is reasonable. It is reasonable, only when to its full extent it is beneficial to the other party. Supreme Ct. 1839, *Chappel vs. Brockway*, 21 Wend. 157; *Ross vs. Sagdbeer*, 21 id. 166.

“The law tolerates no contract which, on its face, goes to prevent a person for any time, however short, from serving the public in any employment he may choose; nor one which deprives any section of the country, however small, of the chances, that the obligor may furnish to it the accommodation arising from the prosecution of a particular trade; unless it appear that the other party himself intends to and can supply such accommodation. Supreme Ct. Sp. T. 1851, *Lawrence vs. Kidder*, 10 Barb. 641.

“A contract not to exercise a trade or carry on business in a particular place made upon good consideration may be upheld, where sufficient reasons are shown for entering into it, and it appears reasonable and useful, and the restraint on the covenantor is not larger than necessary for the protection of the covenantee in the enjoyment of his trade or business. Ct. of App. 1851, *Dunlop vs. Gregory*, 10 N. Y. (6 Seld.) 241; Supreme Ct. 1839, *Chappel vs. Brockway*, 21 Wend. 157.

“The inquiries to be made to determine the validity of a contract in restraint of a trade or profession are 1. Whether the restraint is partial; 2. Whether it is upon an adequate consideration; 3. Whether it is reasonable; Supreme Ct. Sp. T. 1854, *Holbrook vs. Waters*, Supreme Ct. 9 How. Pr. 335.

“*Extent of Restraint.* An agreement, between two partners on dissolution, restraining one from carrying on the same business within twenty miles, is reasonable, and is valid, if founded on good consideration. Supreme Ct. 1827, *Nobles vs. Bates*, 7 Cow. 307.

“A bond restraining defendant from acting as a carrier of passengers on a public canal for a distance of 100 miles founded on a sale of boats, etc., to the obligee for a large pecuniary consideration, Held, valid. Supreme Ct. 1839, *Chappel vs. Brockway*, 21 Wend. 157; and see below.

“An agreement of a physician with his former partner made on dissolving their partnership, that he would not practise medicine in the town for five years, Held, not illegal, as in restraint of trade. Supreme Ct. Sp. T. 1851, *Mott vs. Mott*, 11 Barb. 127.

“Defendant agreed with plaintiff, in consideration of \$500, not to practise as a physician in the County of O. Held, not void. 1. It was a partial and not a general restraint. It would have been otherwise if the limits had embraced the State. (See 3 Bing. 328.) 2. The consideration was adequate to uphold the contract. 3. The restraint was reasonable, as the Court could not say that it was wider than plaintiff's protection might require.

“Citing 4 East, 190; 5 T. R. 118; 2 Mann. & G. 20; 7 Cow. 307; 8 Mass. 522; 21 Wend. 160; 6 Ad. & E. 438; *Holbrook vs. Waters* (above).

“A contract not to carry on a certain business anywhere in the State of New York west of the City of Albany, would be void for indefiniteness, unless understood to mean west of the meridian of Albany, and so

construed it is void as in restraint of trade in too extensive a territory. *Lawrence vs. Kidder* (above).

“Contracts in restraint of trade, covering the whole State, void. See *Chappel vs. Brockway*, 21 Wend. 157; *Dunlop vs. Gregory*, 10 N. Y. (6 Seld.) 241.”

(The foregoing is taken from 2 Abb. N. Y. Digest, 231, 232.)

“*Not to engage in a Business.* It seems that no contracts are void, as being in general restraint of trade, when they operate simply to prevent a party from engaging or competing in the same business. *Leslie vs. Lorillard*, 110 N. Y. 519; S.C. 18 State Rep. 520.

“The modern doctrine of enjoining contracts because they tend in restraint of trade is restricted, so far as corporations are concerned, to contracts which under the circumstances tend to create monopolies; that is, to confer special or exclusive privileges, the existence of which would be contrary to public policy. *Ib.*

“(Citing *Diamond Match Co. vs. Roeber*, 106 N. Y. 473.)

“An agreement by the seller of the stock and patents of a company engaged in the manufacture and sale of a patented article not to engage in business in opposition to the Company while the buyers continue as trustees, is not void as in restraint of trade. A violation of such agreement, although under cover of another corporation of which the promisor is principal owner and only acting officer, will be restrained by injunction. 1882, *McKinnon Pen Co. vs. Fountain Ink Co.*, 48 Super. Ct. 442.

“The case of *Diamond Match Company vs. Roeber*, 106 N. Y. 473, followed, sustaining a provision in a contract selling certain business rights, to the effect that the seller will not engage in such business at any place within the United States within the period of ten years, the Court holding that a restriction which is no greater than the interest of the vendee requires, and by giving which the vendor has obtained an increased price for what he sold,

is valid though it extended through the whole kingdom or country. 1889, *Watertown Thermometer Company vs. Pool*, 51 Hun, 157; S.C. 20 State Rep. 592; 4 N. Y. Supp. 861.

“(Citing *Hodge vs. Sloan*, 107 N. Y. 248; *Leslie vs. Lorillard*, 110 N. Y. 533.)

“A covenant by a manufacturer of matches engaged in business throughout the States and territories, contained in a bill of sale of his factory, stock, trade-mark, good-will, etc., not to engage in the same business within 99 years in any of the states or territories except Nevada and Montana, Held not to be void as in restraint of trade, being supported by a good consideration and constituting a partial and not a general restraint, and being in the circumstances reasonable. 1887, *Diamond Match Co. vs. Roeber*, 106 N. Y. 473; aff'g 35 Hun, 421.

“(Citing *Nobles vs. Bates*, 7 Cow. 307; *Chappel vs. Brockway*, 21 Wend. 157; *Dunlop vs. Gregory*, 10 N. Y. 241.)

“The Court below cited also *Lawrence vs. Kidder*, 10 Barb. 641.

“(*Lawrence vs. Kidder*, 10 Barb. 641, is said to be ‘A leading case’ on contracts in restraint of trade, in 24 Am. L. Reg. N. S. 226.)

“*Not to purchase Goods*. An agreement between a corporation and its stockholders that the latter should not purchase goods of a certain class during a certain period of any others than the members of an association with which that corporation had entered into a contract resulting in benefits to itself and members, Held not to be in restraint of trade. 1886, *Live Stock Asso. of N. Y. (Limited) vs. Levy*, 54 Super. Ct. 32; S.C. 4 State Rep. 514.

“(Citing *Van Marter vs. Babcock*, 23 Barb. 633; *Curtis vs. Gokey*, 66 N. Y. 304.)

“*To buy Merchandise*. An agreement by the proprietor of a public garden, in consideration of a loan, to buy all

his beer of the lender, so long as he should be willing to supply the same at the fair current market price thereof, Held, not in restraint of trade. Supm. Ct. 1883, *Ebling vs. Bauer*, 17 Weekly Dig. 497.

“(Dist’g *Dunlop vs. Gregory*, 10 N. Y. 241.)”

(The foregoing is taken from 9 Abb. N. Y. Digest, 366, etc.)

Note to Exhibit G. — A New York Digest

The foregoing extracts are given as examples of a standard New York Digest of New York State Law. They illustrate the wealth of material in the law of the State of New York on this subject. They do not embrace all the law of the State of New York on the subject. They are selected from one volume of the digest and one supplement, and the cases digested extend from the earliest period to January, 1890, omitting one supplement volume of the digest. The extract is made so that the reader can compare the wealth of material in the common law with the poverty of the material under the code system. (See Chapter VI, *infra*.)

Exhibit H. — Sample of an Annual Digest — The General Digest, 1895

(U. S. A.)

“583. An agreement between a subscriber and a corporation to the effect that the Board of Directors shall appraise the value of his shares and have the option to take them at that value in case of any transfer thereof is not against public policy. *New England Trust Co. vs. Abbott*, 27 L. R. A. 271, 162 Mass. 148, 38 N. E. 432, 10 Am. R. & Corp. Rep. 625.

“584. An agreement between stockholders of a corporation not to sell or transfer their stock without the unanimous consent of all is void as against public policy as a restraint upon alienation. *White vs. Ryan* (Pa. C. P.), 15 Pa. Co. Ct. 170.

"585. A covenant in a contract of sale of a business, that the seller will not conduct business of the same character within a specified part of a city, is valid. *Patterson vs. Glassmire*, 166 Pa. 230, 31 Atl. 40.

"586. A contract providing that the seller of the property and good will of a business will not engage in such business for a period of ten years is not void as against public policy, where by its language, taken in connection with the subject-matter and understanding of the parties at the time, its effect is limited to the vicinity in which the business has been carried on. *Western District Warehouse Co. vs. Hobson*, 16 Ky. L. Rep. 869, 29 S. W. 308.

"587. A contract of sale of the personal property used by a searcher of records in his business, and the good will of the business, whereby the seller covenants not to carry on the business of searcher of records within the county; so long as the buyer shall carry on like business, is within Cal. Civ. Code, 1674, providing that one who sells the good will of a 'business' may agree with the buyer to refrain from carrying on a similar business. *Ragsdale vs. Nagle* (Cal.), 39 Pac. 628.

"588. A contract that a physician shall refrain from practising within a given locality is not invalid as against public policy. *Cole vs. Edwards* (Iowa), 61 N. W. 940.

"589. An agreement by the vendor of a dentist's business, not to reënter the practice of dentistry for four years within a designated part of a city, is valid and enforceable by a court of equity. *Niles v. Fenn* (N. Y. Super. Ct.), 12 Misc. 470, 33 N. Y. Supp. 857, 67 N. Y. S. R. 609.

"590. A contract by which one person agrees not to enter into the business of photographing in a designated place for five years is not void as being in violation of public policy. *Boyce vs. Watson*, 52 Ill. App. 361.

"591. A contract by the vendor of stock and his interest as owner and manager in a laundry company, not to engage or be associated with the management of any laun-

dry business in the District of Columbia, is valid where the restraint is not larger or more extensive than is required for the necessary protection of the Company the stock of which was sold. *Godfrey vs. Roessle* (D. C. App.), 23 Wash. L. Rep. 129.

"592. A contract by a vendor of the business of manufacturing bone tartar, forming but a single feature of its manufacturing plant, which was largely devoted to the manufacture of rock tartar, the finished product of which is not discernible from the former, to one wholly engaged in manufacturing bone tartar, not to manufacture or sell any bone tartar during a definite period — is not void as against public policy. *United States Chemical Co. vs. Provident Chemical Co.* (C. C. E. D. Mo.), 64 Fed. Rep. 946.

"593. An agreement by one who sells a butcher business, not to engage in the same business in the same place or nearer thereto than another town 11 miles distant, so long as the purchaser carries on the business in the former place, is not illegal as being in restraint of trade. *Eisel vs. Hayes* (Ind.), 40 N. E. 119.

"594. An agreement by a patentee and manufacturer of guns and ammunition, with a company to which his patents and business have been transferred, that he will not for twenty-five years engage, except for it, directly or indirectly in the same business, though unrestricted as to the space, is not wider than necessary for protection of the company, or void as against public policy. *Nordenfelt vs. Maxim Nordenfelt Guns & A. Co.* (H. L. E) (1894), A. C. 535.

"595. An agreement with the promoter of a corporation to construct village water-works, not to organize another corporation for that purpose or to ask or receive a franchise from the town authorities for that purpose, is not against public policy. *Oakes vs. Cattaraugus Water Co.*, 26 L. R. A. 544, 143 N. Y. 430, 62 N. Y. S. R. 445, 39 Cent. L. J. 510, 38 N. E. 461, 47 Am. & Eng. Cor. Cas. 251, 10 Am. R. & Corp. Rep. 611.

"596. An agreement by a brewing Company to sell their keg or bulk beer to a wholesale firm, and to no one else in a designated city for one year is not in restraint of trade. *Anheuser-Busch Brew. Asso. vs. Houck* (Tex. Civ. App.), 27 S. W. 692.

"597. The knowledge of one who furnishes beer to wholesale dealers, of an illegal combination between them and other wholesale dealers in the place in restraint of trade, therein, does not prevent him from enforcing payment therefor. *Anheuser-Busch Brew. Asso. vs. Houck* (Tex. Civ. App.), 37 S. W. 692."

Note to Exhibit H. — An Annual Digest

The foregoing is taken from the General Digest for the year 1895. This is an annual publication in which the attempt is made to digest all the decisions of the year rendered in all the Courts, State and Federal, of the United States of America and in the Courts of England. This summary of the decisions of a single year in this province of the law is another instance of the abundance of material in Case Law. And while there are some discrepancies between the principles involved in the decisions cited from different Courts, the general trend of authority and precedent is shown to be harmonious, although the laws of many distinct jurisdictions are involved.

Exhibit I. — Definitions

The words "Judgment," "Opinion," "Decision," "Dicta," and "Holding" need elucidation.

A judgment in the strict sense is defined to be: "The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." It is the expression by the Court of the actual disposition made of the case before it and in form reads substantially as follows: "It is adjudged and declared that the plaintiff recover of the defendant the sum of one hundred dollars with costs to be taxed and have execution therefor," or "it is ad-

judged and decreed that the defendant execute, acknowledge and deliver to the plaintiff a good and valid deed in writing in a form to be approved by the Court of the premises described in the Bill of Complaint therein, viz.:" (description of property in full). Sometimes, however, the word is used in a loose sense as meaning the same thing as the opinion.

An opinion is defined to be "The statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case." In the cases where reports are quoted from above, the opinion is all that part of the quotation coming after the name of the judge writing it.

A decision is defined to be "A judgment given by a competent tribunal." In this definition the word "judgment" is used in the loose sense so as to mean either the formal judgment, or the opinion rendered upon which the former is based. The context generally explains the sense in which the words are intended. Throughout this essay it is generally used as an equivalent for the word "opinion" plus the result of the reasoning, viz. the disposition made of the case.

Dicta is the plural of *dictum*, called also *obiter dictum*, or "remark by the way." It is a remark more or less casual dropped by the judge with respect to law on matters not actually included in the facts of the case under discussion. As Folger J. says: "*Dicta* are opinions of the judge which do not embody the resolution or determination of the Court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself."¹

A *dictum* is contrasted with a holding. The latter is the expression of a rule of law necessarily involved in the decision of the case. Thus Bowie C. J. says: "A decision cannot be said to be *obiter dicta* where the question was directly involved, in the issues of law raised by the

¹ *Rohrbach vs. Germania Fire Ins. Co.*, 62 N. Y. 47, 58.

demurrer to the bill, and the mind of the Court was directly drawn to and distinctly expressed upon the subject.”¹

TITLE V

SUMMARY STATEMENT OF THE PRINCIPLES OF THE COMMON LAW OF CONTRACTS IN RESTRAINT OF TRADE

From the foregoing extracts and discussion it will be seen that the case law of contracts in Restraint of Trade is illustrated by many cases involving a great number of individual complications and combinations of fact. The attempt to educe a rule for guidance is difficult, and yet not impossible.

In the first place, it may be noted that there are certain combinations of fact in which the restrictive covenant is clearly good, or clearly bad. Thus a covenant restraining trade in a locality, a smaller division of the body politic, as a Town, or City, or County, or even several counties within the usual range of customers of such a business, is unquestionably valid. Under such a state of facts, it would not be worth while for a litigant to raise the question. Again, a covenant restraining trade throughout the State for the protection of a business of restricted locality or sphere of influence, a barber shop for instance, would be unquestionably void. Between these extremes stretches the debatable ground. Yet the principles applicable furnish a sufficiently clear guide in nearly all instances. The temptation to seize upon a salient fact like a certain limit of space, as the test of the rule, so as to attain certainty, has been steadily, and successfully, resisted by the judges. And they have been right in so doing, for the equity of the situation is not met by a test of local limits. The equity of the decision of the special

¹ *Michael vs. Mosey*, 26 Md. 239, 261.

case requires consideration to be given, not only to the limit in space of the covenant, but to the limit in space, actual or potential, of the business involved, and to the amount of limitation on the freedom of action of the party who makes the restrictive covenant, needed to protect the covenantee.

We may therefore express the rule thus:—

First. A covenant restraining trade in a limited space is valid, provided the restriction is beneficial to the trade of the covenantee. Under this head two questions arise. 1. Any restraint to be valid requires that the covenantee, or his assignee, or beneficiary (a son set up in the same business for instance), shall need the covenant for his protection. 2. If the restriction applies to a comparatively small locality as a town, or ten miles from such a place, no inquiry is made into the question of whether the trade protected needs protection to that extent. As long as some protection is needed, the law takes the agreement of the parties as the measure of the protection. The trifle of an unnecessary protection in space of a few miles is dismissed as unworthy of examination. The public interest is not affected by such a trifle. "*De Minimis non Curat Lex*" (The law does not regard trifles).

Second. A covenant restricting trade over a wide area of space is valid, provided the restriction is needed for the benefit of the trade carried on by the covenantee; and, if not needed for that protection, it is void.

Under this head arise the questions of real difficulty over which the Courts have disagreed. And yet, however difficult it is to express in language a principle which will correctly decide the cases, no real difficulty arises in applying the principle when the facts of the special case are known. The question is simply a matter of evidence. What is the extent of the business restricted? What is the extent of the restriction in space needed to protect the purchaser? It is evident that such a rule cannot be expressed except in general phrase suitable to the expres-

sion, not to the application, of a general principle. The expression of it in general form in a statute would not lead to greater certainty. This is so, because, being a general principle, it should be continually tested anew by application to the facts, and not made the arbiter of the facts. In other words, it should be a Guide, not a Ruler.

The fact is that much of the difficulty and uncertainty now existing in this branch of the case law, has been brought about by some unfortunate *dicta* let fall by the eminent judge who decided the case of *Mitchell vs. Reynolds*. Had he not spoken of "general" and "partial restraint" — the space of all England, and the space of all London — as the test of validity, much of our subsequent difficulties would have been avoided. He did not see all the possible complications that might arise, and so choose his language as not to forestall such possibilities. The slavish adherence of some judges to precedent, and in this sense we mean the grammatical not scientific construction of the precedent, viz. the taking as gospel the language of the opinion instead of the careful sifting and explaining of the language by reference to the reasons and the facts, has led us into what there is of contradiction and uncertainty in this branch of the law.

As the better law now stands under this head, it is simply a question as to whether the extent of the restriction is needed for the protection of the covenantee, or not. And, here, as showing the capacity of growth along lines of true principle of case law, we may cite an instance. A question would necessarily arise of this kind. Assuming that a business sold has a certain extent in space, and assuming that a covenant by the seller not to trade within that space is valid, what would be the effect of the following complication? Assume that the business sold is comparatively local in extent, but, at the time the covenant is entered into, the intention of all parties is to extend the trade into further fields, and the restrictive covenant is so drawn as to cover not only the old, but the proposed

field. Is this last covenant valid? or invalid? The exact question was presented in *Oakdale Manufacturing Co. vs. Garst* (Sup. Ct. of R. I. 1894), 1 Am. & Eng. Dec. in Eq. 296. In that case certain persons forming a corporation agreed that they would unite their business of manufacturing oleomargarine, and that no one should separately engage in such business for five years. There was no limitation as to territory. The business of the original concerns was comparatively local, but, at the time the agreement was entered into, all parties had in contemplation an extension of the business under the new régime which would include building up an extensive foreign trade. It was held that the covenant was not an unreasonable restraint of trade, and was valid. See *Tode vs. Gross*, 127 N. Y. 480. Here, then, we see the Court taking one more step in the true direction.

At the same time it must be admitted, that the fundamental public policy involved in sustaining, or declaring void, these contracts, is still substantially disputed. It is mixed up sometimes with the question of Trusts and Monopolies. Our civilization is still painfully groping in the dark as to what is the better legal rule to apply to these problems. Thus in the case last cited, the claim was made that the covenant was invalid because the object was to create a monopoly in the oleomargarine business. This claim, however, was not successful. This, not on the ground that such fact could not have affected the validity of the covenant, but on the ground that, in fact, there was no monopoly created. The Courts have consistently ruled against Trusts and Trade Combinations. It is still a question in some intelligent minds, however, whether it would not be better to leave them alone subject to the natural law of competition of rivals.¹ The ques-

¹ The writer looks upon Trusts as a further evolution of the natural laws of Trade which produced corporations—aggregations of wealth under the guidance of one hand and head without which our present civilization could never have reached its present Industrial Development.

tion is one which must be worked out by results. Some future age will know what we ought to have ruled in regard to it. Meantime we have ruled against them. If we are right, it is well. And if we are not right, it is not so well. Yet well enough; because, if their existence is an economic good, they will survive hostile legislation until their observed good results produce a change in the rulings.

In all that has been said we have discussed the question from the point of view of space. There is also an element of time which constitutes a test of validity. As to this it seems sufficient to say, that the time during which the covenant shall run is, in principle, subject to the same limitation as in space; namely, the protection necessary to the covenantee. Again, in this connection, since the covenant is generally appurtenant to property sold, and its full enjoyment necessitates the right of sale with the property if subsequently sold by the covenantee, true principle requires the extension of the time limit in favor of subsequent assignees of the covenant and business. Hence the time may be said to be practically unlimited, passing with the property. But this statement should be subject to one qualification. The duration of the restriction should not be allowed to extend beyond the time during which the party benefited by the covenant needs its protection, *i.e.* while he or his assignee carries on the business.

We may expect to see these principles, stated or implicated in the cases as they now exist, developed along these lines in future cases.

TITLE VI

THE RELATIVE PROVINCES OF STATUTE AND CASE LAW, AS THEY EXIST IN THE COMMON LAW

It is impossible to exhibit here a complete view of this within suitable limits. An adequate idea of the subject-

matter involved could only be gained by reading, say, the Revised Statutes of New York for the Statutory part; and then reading Kent's Commentaries, and supplementing these with a treatise on Equity law, and treatises on Common Law and Equity pleading and practice, for the case law part. The best that can be done is to simply give the table of contents of each. Of course this gives a vague and entirely inadequate conception. But if the reader will take up some history he has read, and look over the table of contents, and then compare the impression thus obtained of the contents of the book with his knowledge of its substance, he will obtain a relatively true conception of how far vague or definite are his ideas of the substance of the common law derived from these tables of contents.

Again, no subject can be fairly grasped as to any detail unless there be first given some idea of the whole field. And even a vague and indefinite conception as to this is better than none. For the same reason, in hereafter citing as exhibits the French and Field Civil Codes the entire table of contents of each is given.

This caution is necessary. If the table of contents of the Statute and the Text-book cover the same subjects as Corporations, Husband and Wife, Wills, etc., it must be premised that the volume of matter on the subject in the Statute is a small percentage of the amount of matter in the Reports. The proportion is about the same as the proportion between the matter contained in the Code sections regarding contracts in restraint of Trade hereinafter quoted in Chapter VI, and the case law on the same subject cited in this chapter. We omit for brevity the table of contents of any book on Common Law or Equity Pleading and Practice. Good examples are Stephen on Common Law Pleading and Mitford on Equity Pleading.

Exhibit K.—The Statute Law

**TABLE OF CONTENTS OF NEW YORK REVISED STATUTES
(7TH ED. BANKS)**

PART I

An act concerning the territorial limits and divisions, the civil polity, and the internal administration of this State.

1 R.S. CHAPTER I

61. Of the boundaries of the State and its territorial jurisdiction.

CHAPTER II

83. Of the civil divisions of the State.

CHAPTER III

87. Of the census or enumeration of the inhabitants of the State.

CHAPTER IV

92. Of the rights of the citizens and inhabitants of this State.

CHAPTER V

95. Of the public officers of this State, other than militia and town officers; their election or appointment; their qualification, and the tenure of their offices.

CHAPTER VI

126. Of elections, other than for militia and town officers.

CHAPTER VII

150. Of the legislature.

CHAPTER VIII

162. Of the duties of the executive officers of the State, and of various matters connected with their respective departments.

CHAPTER IX

188. Of the funds, revenue, expenditures, and property of the State; and the administration thereof.

1 R.S.

CHAPTER X

285. Of the militia, and the public defence.

CHAPTER XI

336. Of the powers, duties and privileges of towns.

CHAPTER XII

364. Of the powers, duties and privileges of counties, and of certain county officers.

CHAPTER XIII

387. Of the assessment and collection of taxes.

CHAPTER XIV

422. Of the public health.

CHAPTER XV

456. Of public instruction.

CHAPTER XVI

510. Of highways, bridges and ferries.

CHAPTER XVII

528. Of the regulation of trade in certain cases.

CHAPTER XVIII

577. Of incorporations.

CHAPTER XIX

605. Of the computation of time; of weights and measures; and the money of account.

CHAPTER XX

612. Of the internal police of this State.

The different titles of this Chapter relate to beggars, vagrants, lunatics, blind men, deaf mutes, idiots, habitual drunkards, disorderly persons, bastards, immorality, excise, taverns, navigation of Rivers, fisheries, wrecks, law of the road, firing of woods, floating timber, preservation of deer and game, dogs, destruction of wolves, brokerage, stock jobbing, unauthorized banking, insurance, police regulations.

PART II¹

An act concerning the acquisition, the enjoyment and the transmission of property, real and personal; the domestic relations; and other matters connected with private rights.

1 R.S.

CHAPTER I

717. Of real property, and of the nature, qualities and alienation of estates therein.
718. Title 1. Of the tenure of real property, and the persons capable of holding and conveying estates therein.
718. Article 1. Of the tenure of real property.
719. Article 2. Of the persons capable of holding and conveying lands.
721. Title 2. Of the nature and qualities of estates in real property, and the alienation thereof.
721. Article 1. Of the creation and division of estates.
727. Article 2. Of uses and trusts.
Article 2 a. Acts relating to trusts of real and personal property.
731. Article 3. Of powers.
738. Article 4. Of alienation by deed.
740. Title 3. Of estates in dower.
743. Title 4. Of estates for years, and at will; and the rights and duties of landlords and tenants.
748. Title 5. Miscellaneous provisions of a general nature.

CHAPTER II

750. Of title to real property by descent.

CHAPTER III

755. Of the proof and recording of conveyance of real estates, and cancelling of mortgages.

CHAPTER IV

763. Of title to personal property, in certain cases.
763. Title 1. Of limited partnerships.
Title 1 a. Partnership and other business names.

¹ A large portion of this Part II includes a codification of the law of Real Property and Trusts, which should never have been codified, nor has any real advantage been derived. On the contrary, our Law of Trusts and Powers is the most artificial and complicated of any in existence.

767. Title 2. Of promissory notes and bills of exchange.
 Title 2 a. Of miscellaneous instruments for the payment of money.
 Title 2 b. Of chattel mortgages, including liens on canal boats.
771. Title 3. Of the interest of money.
773. Title 4. Of accumulations of personal property, and of expectant estates in such property.
 Title 4 a. Other provisions relating to personal property.
 Article 1. Certain property declared to be personal.
 Article 2. Factors, agents and other custodians of personal property.
 Article 3. Unclaimed baggage and other goods.
 Article 4. Conditional sales of personal property.

CHAPTER V

2 n.s.

1. Of title to property, real and personal, transmitted or acquired by special provision of law.
1. Title 1. Of the assignments of the estates of non-resident, absconding, insolvent, or imprisoned debtors.
51. Title 2. Of the custody and disposition of the estates of idiots, lunatics, persons of unsound mind, and drunkards.

CHAPTER VI

56. Of wills and testaments; of the distribution of the estates of intestates; and of the rights, powers and duties of executors and administrators.

CHAPTER VII

133. Of fraudulent conveyances and contracts relative to real and personal property.

CHAPTER VIII

136. Of the domestic relations.
138. Title 1. Of husband and wife.
 Article 1. Of marriage and of the solemnization and proof thereof.
142. Article 2. Of divorces, on the ground of the nullity of the marriage contract.
144. Article 3. Of divorces, dissolving the marriage contract.

2 R.S.

146. Article 4. Of separations, or limited divorces.
147. Article 5. General provisions applicable to the two last articles.
 Title 1 a. Married women's rights and liabilities.
148. Title 2. Of parents and children.
 Title 2 a. Adoption.
 Title 2 b. Registry of births, marriages and deaths.
150. Title 3. Of guardians and wards.
153. Title 4. Of masters, apprentices and servants.
154. Article 1. Of apprentices and servants bound by indentures.
156. Article 2. Of persons held in service.
158. Article 3. General provisions.
 Article 3 a. General regulations affecting employers and employees; the factory inspector; and his powers and duties.
 Article 3 b. Provisions relating to disputes between employers and employees; the State Board of arbitration and mediation; and its powers and duties.

PART III¹

An act concerning courts and ministers of justice, and proceedings in civil cases.

CHAPTER I

163. Of the courts of general or limited jurisdiction.

CHAPTER II

220. Of courts of peculiar and special jurisdiction.

CHAPTER III

274. General provisions concerning courts of justice, and the powers and duties of certain judicial officers.

CHAPTER IV

291. Of actions and the times of commencing them.

CHAPTER V

302. Of suits relating to real property.

¹ This part substantially amounted to a partial code of Civil Procedure.

CHAPTER VI

346. Of proceedings in personal actions brought for the recovery of any debt, or for damages only.

CHAPTER VII

386. Miscellaneous provisions of a general nature, applicable to proceedings in civil cases.

CHAPTER VIII

444. Of proceedings in special cases.

CHAPTER IX

557. Of the writ of habeas corpus; of writs of error; appeals, informations, and proceedings commenced by any special writ.

CHAPTER X

612. Of costs, and fees of officers.

PART IV¹

An act concerning crimes and punishments; proceedings in criminal cases; and prison discipline.

CHAPTER I

655. Of crimes and their punishment.

CHAPTER II

703. Of proceedings in criminal cases.

CHAPTER III

753. Of the government and discipline of County and State Prisons, and of the conduct and treatment of prisoners therein.

Exhibit L.—The Case Law

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PART I

Of the Law of Nations

- Lecture 1. Of the Foundation and History of the Law of Nations.

¹ This part amounts to a partial criminal code and Code of Criminal Procedure.

- Lecture 2. Of the Rights and Duties of Nations in a State of Peace.
- Lecture 3. Of the Declaration and other Early Measures of War.
- Lecture 4. Of the Various Kinds of Property liable to Capture.
- Lecture 5. Of the Rights of Belligerents.
- Lecture 6. Of the Rights and Duties of Neutrals.
- Lecture 7. Of Restrictions upon Neutral Trade.
- Lecture 8. Of Truces, Passports, and Treaties of Peace.
- Lecture 9. Of Offences against the Law of Nations.

PART II

Of the Government and Constitutional Jurisprudence of the United States

- Lecture 10. Of the History of the American Union.
- Lecture 11. Of Congress.
- Lecture 12. Of Judicial Constructions of the Powers of Congress.
- Lecture 13. Of the President.
- Lecture 14. Of the Judiciary Department.
- Lecture 15. Of the Original and Appellate Jurisdiction of the Supreme Court.
- Lecture 16. Of the Jurisdiction of the Federal Courts, in Respect to the Common Law, and in Respect to Parties.
- Lecture 17. Of the District and Territorial Courts of the United States.
- Lecture 18. Of the Concurrent Jurisdiction of the State Governments.
- Lecture 19. Of Constitutional Restrictions on the Powers of the Several States.

PART III

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Of the Law concerning the Rights of Persons

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- Lecture 25. Of Aliens and Natives.
- Lecture 26. Of the Law concerning Marriage.
- Lecture 27. Of the Law concerning Divorce.
- Lecture 28. Of Husband and Wife.
- Lecture 29. Of Parent and Child.
- Lecture 30. Of Guardian and Ward.
- Lecture 31. Of Infants.
- Lecture 32. Of Master and Servant.
- Lecture 33. Of Corporations.

PART V

Of the Law concerning Personal Property

- Lecture 34. Of the History, Progress, and Absolute Rights of Property.
- Lecture 35. Of the Nature and Various Kinds of Personal Property.
- Lecture 36. Of Title to Personal Property by Original Acquisition.
- Lecture 37. Of Title to Personal Property by Transfer by Act of Law.
- Lecture 38. Of Title to Personal Property by Gift.
- Lecture 39. Of Contracts.
- Lecture 40. Of Bailment.
- Lecture 41. Of Principal and Agent.
- Lecture 42. Of the History of Maritime Law.
- Lecture 43. Of the Law of Partnership.
- Lecture 44. Of Negotiable Paper.
- Lecture 45. Of the Title to Merchant Vessels.
- Lecture 46. Of the Persons employed in the Navigation of Merchant Ships.
- Lecture 47. Of the Contract of Affreightment.
- Lecture 48. Of the Law of Marine Insurance.
- Lecture 49. Of Maritime Loans.
- Lecture 50. Of Insurance of Lives, and against Fire.

PART VI

Of the Law concerning Real Property

- Lecture 51. Of the Foundation of Title to Land.
- Lecture 52. Of Incorporeal Hereditaments.
- Lecture 53. Of the History of the Law of Tenure.
- Lecture 54. Of Estates in Fee.
- Lecture 55. Of Estates for Life.
- Lecture 56. Of Estates for Years, at Will, and at Sufferance.
- Lecture 57. Of Estates upon Condition.
- Lecture 58. Of the Law of Mortgage.
- Lecture 59. Of Estates in Remainder.
- Lecture 60. Of Executory Devises.
- Lecture 61. Of Uses and Trusts.
- Lecture 62. Of Powers.
- Lecture 63. Of Estates in Reversion.
- Lecture 64. Of a Joint Interest in Estates.
- Lecture 65. Of Title by Descent.
- Lecture 66. Of Title by Escheat, by Forfeiture, and by Execution.
- Lecture 67. Of Title by Deed.
- Lecture 68. Of Title by Will or Devise.

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CHAPTER II

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CHAPTER III

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CHAPTER IV

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CHAPTER V

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CHAPTER VI

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The following are samples of Codification. For this purpose we select the French Civil Code, the proposed New York Civil Code, known as the Field Civil Code, and that portion of the East Indian Codes known as The Indian Contract Act. As it is impossible to cover the whole field, we give the general outline or table of contents of the book, and then quote the particular sections which we intend to bring into the discussion. In order that the reader may obtain a clear insight into the com-

parative practical workings of the two systems, — case and code law, — we select for this purpose the sections in each Code covering the same branch of the law — contracts in restraint of trade — as is covered by the cases cited in the last chapter.

We would add that the Louisiana Civil Code and the California Civil Code are not brought into the discussion for the following reasons. An examination of the provisions of those Codes will show that the sections of the Louisiana Code covering the subject-matter investigated are substantially the same as the similar sections in the French Code; and likewise the sections of the California Civil Code covering the same branch of the law are substantially identical with the similar sections in the Field Civil Code.

Thus sections 1131, 1132 and 1133 of the French Civil Code are substantially the same as articles 1893, 1894 and 1895 of the Louisiana Civil Code, the only difference between the Codes being that the Louisiana Civil Code, articles 1890 to 1894 inclusive, go on to explain the meaning of "cause" and when some contracts with certain causes are valid and when invalid, more in detail than the French Civil Code.¹ In fact, the Louisiana Civil Code is, as a whole, based on the French Civil Code; and the California Civil Code is, as a whole, based on the Field Civil Code. In consequence a discussion of the likenesses and differences between the French and the Field Civil Codes substantially covers the same points as could be raised in regard to the likenesses and differences between the other two Codes. It is also well to remark that there is an additional section in the Indian Contract Act besides the section 27 hereinafter set forth in full and discussed, which covers the ground of illegal Contracts. This section is section 23. It is substantially the same as sections 1108 and 1131 of the French Civil Code and article 827 of the Field Civil Code. The quotation of

¹ Voorhees' Rev. Civil Code La. (1889), pp. 355, 356.

this section 23 of the Indian Contract Act is omitted as being substantially a repetition in no way tending to help elucidate the problem.

Exhibit M.—The French Civil Code¹

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¹ We use the French Civil Code (Cachard's translation, New York, 1895).

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Title 17.	Of Pledge	462
Title 18.	Of Privileges and Mortgages	467
Title 19.	Of Compulsory Ejectment and of rank among Creditors	501
Title 20.	Of Prescription	505

Besides this Code there are in France, the Code de Commerce, Penal Code, Code of Criminal Procedure, Code of Civil Procedure, etc., etc., making 21 Codes in all.

The provisions of the French Code, relating to contracts in Restraint of Trade, are contained in the sections relating to Illegal Contracts. They are as follows:—

THE PROVISIONS OF THE FRENCH CIVIL CODE RELATING TO CONTRACTS IN RESTRAINT OF TRADE

“Laws relating to public order and morals cannot be derogated from by private agreement.”

(Civil Code of France, Preliminary Title, Article 6.)

• • • • •

"BOOK III

"Title 3. Of Contracts or Conventional Obligations in general. . . .

"Section 4 of the Cause.

"Section 1131. An obligation without cause, or with a wrong cause, or with an illicit cause, cannot produce any effect.

"Section 1132. An agreement is not less valid although the cause has not been expressed.

"Section 1133. A cause is illicit when it is prohibited by law, when it is contrary to good morals or to public order."

(Civil Code of France, Book 3, Title 3, Chap. 11, Sec. 4, Secs. 1131, 1132, 1133. Cachard's translation, p. 260.)

Note to Exhibit M. — The French Civil Code

The French Codes have received from some quarters the highest praise. Mr. John Rodman, who translated them, says: "The Code Napoleon is unquestionably a work of the highest merit, whether we consider the pure morality, the sound legal principles and enlightened reason which pervade every part of it, or the lucid order, precision and method with which the matter is arranged and exhibited."¹ Such also was Mr. Edward Everett's verdict.²

Let us test these sections of the Code by the actual test of cases that have, or might have, arisen under them. Not being familiar with the French Law, we will assume that this French code had been passed in Great Britain, say in 1810. The particular subject we have chosen for comparison between a Code and the Case law system, namely, the Law of Contracts in restraint of trade, is not

¹ Rodman's Commercial Code of France.

² 20 North American Rev. 393. See also Codification in the State of New York, Robert Ludlow Fowler (pamphlet), p. 33.

merely of local interest. In the nature of things, the rules that should be prescribed are general scientific principles. They are principles of public policy, affecting trade and commerce, founded upon fundamental rules of political economy; and limited, not by the frontiers of a particular country, but by the stage of civilization reached.¹ Assume, therefore, that the English judge called upon to decide a particular case has only these sections of the code to consult.

Assume that the case presented is the case of the *Diamond Match Company vs. Roeber*, 106 N. Y. 473. (See the full report of this case as Exhibit D in Chapter V, *supra*.) Let the reader refer to the facts of that case. Then without prejudgment of the issue, let him search for light in the above sections of the French Code as to what the decision should be. Such reference being had, is he now prepared to render a decision based on the code? Let us examine how much light is shed upon the subject.

Referring to the code, he finds that, "laws relating to public order and morals cannot be derogated from by private agreement." He therefore knows that if the contract involved in this Match Company case, that the seller should not for 99 years engage in the match business in America, is "a private agreement derogating from morals," it is invalid. But does this section of the code tell him anything as to whether this particular agreement derogates from public morals, or not? Again, still further examining his authority, he finds that "an obligation without cause, or with a wrong cause, or with an illicit cause, cannot produce any effect." This is interesting. It is now apparent that if this contract not to trade in matches in the United States for 99 years is "without cause, or with a wrong cause, or with an illicit cause," it is invalid. Examining the facts of the case,

¹ See Bagehot's *Economic Studies*, *Postulates of English Political Economy*, p. 20.

he finds that the contract certainly is with cause;¹ namely, it is made upon a consideration, the purchaser having paid \$46,724.05 for the benefits of the contract. Hence the only question left open is whether it is "with a wrong cause," or "with an illicit cause." So far he has not succeeded in finding any statement in the code that will enable him to determine whether a contract not to sell matches in the United States for 99 years, for which a party has paid some \$40,000, is one "with a wrong cause," or "with an illicit cause."

Seeking for further light, he finds that the phrase "illicit" is expressly defined in section 1133. Here, then, is that for which he seeks. He finds it thus explained; namely, "An illicit cause is a cause prohibited by law, or contrary to good morals or to public order."

This definition lands him where he began; namely, with the statement that "a private agreement that derogates from public order and morals" is prohibited. He has, therefore, gone around the circle, and has not yet discovered whether the particular contract brought up for judgment in the Diamond Match Company's case is a private agreement derogating from public morals, or strictly in accordance with law.

In like manner we might take up each one of the special cases heretofore decided in the Common Law Reports under this head of the law, some of which are mentioned and described in the opinion in the Match Company case, and in the Exhibits in Chapter V, *supra*. So doing, instance by instance, we would find that the French code gives absolutely no light to the judge, or to the advising counsel, as to whether any one or more of these special cases — cases which have actually arisen in the English law — should be decided one way, or the

¹ The word "cause" in this instance in the French Code is used in the same sense as the word "consideration" in the English Common Law.

other. Yet the principles of justice, and of political economy, involved, apply alike to the French and English civilizations.

The truth insisted upon and proved by these specific instances is, that the English system of case law and precedent follows a course of logical development. Under this system, from the facts and rulings on past cases, a comparatively certain prediction can be made as to what decision will be made by the Courts upon any combination of facts arising in the future. On the other hand, the Code rules in France, with meshes so broad that they do not touch the equities of the special cases, afford, when such cases arise, no guide whatever, either for the decision of the judge, or for the prediction of the advocate. And when to this is added the rule that no former case shall be cited as a precedent, everything is left at large, subject to the arbitrary discretion of the particular judge — a discretion untrammelled by anything save his own sweet will or crotchety habit of mind.

Thus the Code Napoleon, extravagantly lauded by some writers for its merit of brevity, certainty, and distinctness, breaks down at the first practical application of it to the complicated facts of life. It would seem that the Englishmen who have praised it have not been practical lawyers.

To the professor and to the student it is pleasing and convenient to find the general principles of law laid down in one cover. Seeing them thus, they praise the author because they do not have occasion to submit the text to the severe test of its actual operation on men and affairs. Some plays are called "closet plays," for the reason that they make fine reading, but do not act well. By this test it would seem that, as compared with the English Case Law system, the French Code system makes fine reading, but does not practise well.

Sir J. P. Wilde, in an address made in 1864,¹ said:

¹ 38 Law Times, 518, 519.

“The English system frames no rule in advance, looks backwards instead of forwards, and substitutes the actual experience of the past for the possibilities of the future. True, the future is not provided for in the latter (the English system), except so far as principles are gradually evolved which make solution not difficult or unexpected when the case arises, whereas the former (the code system) professes to make such provision. But is this provision ever made with success? Does any Code really offer a text which when applied to the circumstances of an individual case at once and without doubt decides it?”

“Let the innumerable decisions of some of the most celebrated codes answer the question.

“Take the Ordonnance de la Marine of Louis XIV.

“How simple and brief and apparently plain the text, and yet who ever read the commentaries of *Valin* or *Boulay Patty* on any and every article of it without owning that the text was only plain because the difficulties of particular cases were not present to view, and only simple because their complications were excluded.

“The same thing is true of the codes of the French Empire and of all others which the world ever saw.

“The truth is, that the intricacies and complexity of possible combinations of facts are beyond the range of human conception, and any attempt to foresee and provide for them all beforehand and dispense ready-made justice with success will give little reward to the labor it wastes.”

Von Savigny, in his *Vocation of Our Age for Legislation* (p. 90), speaking of this defect, wherein all the codes are found wanting, says: “The French have not deceived themselves as to the extent and importance of this; they were aware that, strictly speaking, a comparatively small number of cases could be decided directly by a text of the code; that, consequently, in almost all cases, this unrecognized something must virtually decide. But they do not agree as to what it is; they call it ‘(1) *Equité*

naturelle, loi naturelle; (2) Roman Law; (3) old coutumes; (4) usages, examples, decisions, jurisprudence; (5) droit Common; (6) principes généraux, maximes, doctrine, sciences.' ”

Thus under the French Civil Code the law of contracts in restraint of trade is treated along with the law of illegal contracts in general. The whole subject occupies, as we have seen, three short sections. The sum and substance of the information conveyed by these sections is, that an agreement derogating from public order and morals is void, that an agreement with a wrong or illicit cause is void, and that a cause is illicit when it is contrary to morals or public order.

Compare these scant truisms with the wealth of principles and exceptions established under this head in the English Common Law system.¹ Turn from these three general rules of this Code to the numerous decisions forming authorities in the English law, covering nearly every possible combination of facts, and set forth in Chapter V. The result is, that, at least in this branch of the law, so far as concerns certainty, and every other merit which law should possess, the English common law is superior to the French Code.

For, under the French law, the following results: The Code affords no light to guide the decision of special cases arising under this head. When the special cases arise, they must have some decision by courts or by practitioners. Decisions of the special cases are made. These decisions are not authority, and furnish no guide for the future. The advocate, when a new case, or a case involving the same facts, arises, cannot argue from the former decisions as binding in principle or effect upon the judge, and the judge cannot rest his judgment upon them. The necessary result is that you have all the uncertainty occasionally produced by the divergence of

¹ For a very incomplete and partial Exhibit of this abundance of material, see Exhibits C, D, E, F, G, H, Chap. V, and Title 5, Chap. V, *supra*.

decision and opinion under the case law system, plus the added uncertainty that nothing is binding upon the judge sitting to decide the question then in hand.

Let us take the testimony of an adherent of codification. Mr. Sheldon Amos says: "It is well known, for instance, that the set of French Codes which in time became the most comprehensive and self-dependent of all, have been completely overridden by the interpretation of successive and voluminous commentators as well as by the constantly accruing decisions of the Court of Cassation.

"In France, as was intimated before, in treating of another subject, there can be no reliance in any given case, as to whether a judge will defer to the authority of his predecessors, or will rather recognize the current weight attached to an eminent commentator, or will extemporize an entirely novel view of the law.

"The greatest possible uncertainty and vacillation that have ever been charged against English law are little more than insignificant aberrations, when compared with what a French Advocate has to prepare himself for when called to advise a client."¹

Exhibit N.—The Proposed Civil Code of New York

This Code, says Amos, is partly borrowed from Justinian's Institutes and the Code Napoleon, and is a codification of the text-books on the English Common Law.²

Its general plan is best outlined by its main subdivisions, which are as follows:—

DIVISION FIRST

Persons

Part I. Persons.

Part II. Personal Rights.

Part III. Personal Relations.

¹ Amos' *An English Code*, p. 125.

² *Ibid.*, p. 99.

DIVISION SECOND

Property

- Part I. Property in General.
- Part II. Real or Immovable Property.
- Part III. Personal or Movable Property.
- Part IV. Acquisition of Property.

DIVISION THIRD

Obligations

- Part I. Obligations in General.
- Part II. Contracts.
- Part III. Obligations imposed by law.
- Part IV. Obligations arising from particular transactions.

DIVISION FOURTH

General Provisions

Applicable to persons, property, and obligations, or to two of those Subjects.

- Part I. Relief.
- Part II. Special relations of Debtor and Creditor.
- Part III. Nuisance.
- Part IV. Maxims of Jurisprudence.
- Part V. Definitions and General Provisions.

The portion of the Field Code which deals with illegal contracts is found in Division Third, Obligations, Part II, Contracts, Title 4.

Unlawful contracts and contracts in Restraint of Trade are covered by sections 833, 834 and 835.

Instead, however, of quoting only these three sections involving the special subject-matter we have chosen for a basis of comparison, it will conduce to a more comprehensive idea of the nature of a code system, if, in this instance, we quote the sections relating to unlawful contracts entire, and embark on a discussion of some of the differences in detail between this Code and the Common Law on which it is professed to be founded. Requesting

the reader to forgive an apparent digression from the line of argument, we now set out a copy of the entire title, and, in the note, enter into a general discussion of the whole field of law covered by it.

PROVISIONS OF THE FIELD CIVIL CODE AS TO UNLAWFUL CONTRACTS, INCLUDING CONTRACTS IN RESTRAINT OF TRADE

“TITLE IV

“UNLAWFUL CONTRACTS

“Section 827. What is unlawful.

“Section 828. Certain contracts unlawful.

“Section 829. Penalties void.

“Section 830. Contract fixing damages, void.

“Section 831. Exception.

“Section 832. Restraints upon legal proceedings.

“Section 833. Contract in restraint of trade, void.

“Section 834. Exception in favor of sale of good will.

“Section 835. Exception in favor of partnership arrangements.

“Section 836. Contract in restraint of marriage, void.

“Section 827. That is not lawful which is: 1. Contrary to an express provision of law. 2. Contrary to the policy of express law, though not expressly prohibited; or 3. Otherwise contrary to good morals.

“Section 828. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law.

“Section 829. Penalties imposed by contract for any non-performance thereof are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses.

“Section 830. Every contract, by which the amount of

damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section.

“Section 831. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

“Section 832. Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

“Section 833. Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind otherwise than as provided by the next two sections is to that extent void.

“Section 834. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, so long as the buyer or any person deriving title to the good will from him, carries on a like business therein.

“Section 835. Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof.

“Section 836. Every contract in restraint of the marriage of any person, other than a minor, is void.”

Note to Exhibit N. — The Field Civil Code

GENERAL DISCUSSION OF THE PROVISIONS OF THE FIELD
CIVIL CODE AS TO UNLAWFUL CONTRACTS

Comparing this Code with the French Civil Code, we note an improvement in certainty and in detail. (See Exhibit M, p. 178.) Section 827 is substantially the

same enactment as the sections of the French Code above quoted. This section conveys the information that a contract which is contrary to public policy is invalid. If the Field Code stopped here, it would be similar to the Code Napoleon in "compendious brevity," and absence of detail, resulting in an entire uncertainty, or in a complete absence of any rule sufficient to decide the numerous individual cases which might arise under it. But the Field Code had the advantage of being prepared some fifty years later than the Code Napoleon, and of having for its materials of construction the wealth of decisions under the English Case Law. Its authors, therefore, were enabled to go beyond the mere statement of a general rule of law; and they were enabled to apply that rule, in the light of experience, to certain classes of facts wherein it applied, and to certain others wherein an exception was required.

Section 828, therefore, prescribes that a contract exempting any one from the consequences of his own fraud, or wilful injury, or violation of the law, is invalid.

Sections 829 to 831 are an attempt to state the common law doctrines of penalty, and of liquidated damages. This is done so badly that the test laid down of "when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage," would introduce an entirely new inquiry as to the meaning of these words, which are not the words generally used in the cases to express the common law doctrine on the same subject. In this way the numerous cases on the subject—cases which have practically settled a working test—will become of no value as guides. The usual way of expressing the distinction established by the cases is as follows: If the damages on the breach can be ascertained, the lump sum provided in the contract is a penalty and void. If the damages are too remote; or cannot be ascertained; the lump sum is liquidated damages; and is valid; *provided it is not unreasonable*

in amount, and bears some proportion to the importance, to the other party, of the performance of the contract. When a particular case arises the Court does not have to construe the above sentences stating the rule, but reads them in connection with the actual facts of decided cases, and reaches a conclusion based on the analogies and the reasons therein contained.

Section 832 specially forbids a class of contracts now fully protected as valid under the Common law. The Common law rule is that a contract which ousts a Court of jurisdiction, as an agreement that in case of dispute there shall be an arbitration and no suit on the contract, is void. But an agreement that no suit shall be brought until an arbitration has been had, is valid.¹ Apart from this, stipulations in a contract that suit shall be brought in one year, or be barred, although the statute of limitations allows such suits to be brought within six years, have been repeatedly upheld. This on the ground that a party may waive a benefit conferred upon him by statute.² Section 832 reverses this rule.

Section 836 is an innovation upon the Common law rule on the same points. The Common law rule is that an agreement in general restraint of marriage, or not to marry at all, is void; but an agreement not to marry a particular person, is good. We consider the new rule of this Code the better public policy.

Finally, sections 833 to 835 inclusive contain the Code provisions of the law of Contracts in Restraint of Trade.

¹ *Scott vs. Avery*, 5 H. L. Cas. 811; *Delaware & Hudson Canal Co. vs. Pennsylvania Coal Co.*, 50 N. Y. 250.

² Thus a common carrier may limit the right of action for loss of property to a reasonable time, and a stipulation in the bill of lading that an action must be brought within three months, is reasonable and valid. *Central Vermont R. R. Co. vs. Soper*, 59 Fed. Rep. 879. See *Jennings vs. Grand Trunk R. Co.*, 127 N. Y. 438; *North British & Mercantile Ins. Co. vs. Central Vt. R. R. Co.*, 9 App. Div. (N. Y.) 4.

PARTICULAR DISCUSSION OF THE PROVISIONS OF THE
FIELD CIVIL CODE AS TO UNLAWFUL CONTRACTS

Comparing these provisions of the Field Code on illegal contracts with the sections of the French Code on the same subject, we note a gain in certainty and in definiteness. The codifier has not been satisfied with the mere statement of the general rules contained in section 827, but has gone further. He has stated a number of special instances embracing special combinations of fact, wherein a contract is legal, or illegal, as stated. Thus, if a case should arise where a contract provided that in case of a breach the party in default shall pay to the other a lump sum as damages, we would no longer have to go to the general rule contained in section 827 for information on the subject; but would be referred to the special rules and exceptions contained in sections 829 to 831 inclusive.

In passing, we may note that section 827, equivalent to the provisions of the three sections of the French Code cited, furnishes no guidance to the decision of such a case.

While, therefore, under the French Code, as we have seen, a case of this kind would not be provided for at all, we do find in the Field Code express provisions on the particular subject. The gain in certainty, however, as compared with the certainty of the common law, is still only partial.

In every case arising under this code having these general characteristics, — namely, a contract, a breach and a provision for the payment of a lump sum as damages on the breach, — the question of “When from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage” remains a test to be applied by the judge without guide other than his own ideas.

Under the common law system (assuming that this statement of the test is a true statement of the general rule) the general rule is laid down in connection with the special facts of special cases decided with reference to it, and these constitute precedents which furnish a compara-

tively certain guide to the decision of subsequent cases. For it must be remembered that the subsequent case may be exactly like some former lawsuit that has arisen and been decided, in which event we have the greatest amount of certainty possible in any system of law; or the new case may embrace facts of a similar nature, not necessitating on the grounds of true principle any change in the rule, in which event a train of sound reasoning leads to a certain conclusion. In all such cases there is no uncertainty in the common law. Under such circumstances the common law is more certain, in that it proceeds by scientific induction from the past decided cases to the establishment of the rule; and then, by deduction, to the classing of the new case in the same category with the old. If now, without the light afforded by the adjudged cases, we should attempt to solve any special dispute as to whether a lump sum agreed to be paid in a contract was a penalty and void, or liquidated damages and valid, we would note a generality in the language of these sections when applied to actual cases resulting in an uncertainty in their practical operation, no less marked than the uncertainty arising from the more generalized statements of the French Code. Thus the Field Code, although providing rules as to the validity and invalidity of contracts containing clauses to pay fixed sums on their breach as damages, is as far from laying down a certain rule as to when such a covenant is a penalty and void, and when such a covenant is liquidated damages and valid, as the French Code itself. One reason of this uncertainty is the absence of any decisions in it of special cases made according to the rule, and its exceptions. This is an example of the value of illustrative cases in connection with a Code rule.

For, if an example of an actual case decided according to the rule is included, the meaning is rendered clearer, in that an opportunity is afforded to reason from the application of the rule in such case, to its application in

other like cases. Those who object to the insertion of illustrative cases do so on the ground that they would be restrictive upon the general language employed in the code. This objection is valid. In the absence of the insertion, as such illustrations, of all the known cases that have arisen and been decided under the rule; and, in the absence of the expression of the reasons for the rule, and for its application to these special cases on the facts of the special cases; there is lack of the proper abundance of material on which to reason out the application of the rule from former decisions to future instances. It is in this characteristic — namely, wealth of illustrative cases — that the excellence of the common law system lies.

Again, looking at section 832 we note that the case there mentioned, if arising under the French Code, would have no rule laid down for its decision. As to whether a contract limiting the time within which a party might enforce his rights under it would be good, or bad, would depend upon the *arbitrium* of the Judge. Under the Field Code, however, the rule established for this special instance of an illegal contract is clear and certain. In passing, we may note, however, that the certainty is arrived at by a defect in the substance. In other words, the rule established, though certain, is in violation of a corollary from a well-established general principle. It is the general practice for insurance companies to provide in their policies that the same shall be void unless a suit is brought on them within one year. And common carriers and telegraph companies generally have a clause requiring suits for damages for their negligence, etc., to be brought within ninety days. As stated above, the common law holds these provisions to be valid. The character of the business involved, in these instances, renders such limitations reasonable and proper; and there may be other branches of business similar in character. On what ground of public policy should such covenants in a contract be declared invalid? It is true that the

existence of these exceptions renders it very difficult to draw a code section which will state the rule and the exception, and not be as completely ambiguous in its application to special cases as the preceding sections which attempt to lay down the rule of the distinction between penalties and liquidated damages. Certainty is a valuable requisite in the law, but it should not be attained at the expense of freedom of contract, and of what is equitable. The common law rule on the subject is entirely certain, and concurs with an enlightened public policy. Why destroy an exception that should exist, and obtain no greater certainty than you have at present?

The differences between the French Code, the Field Code, and the Common Law, in this province of the law, may be summarized as follows:—

The French Code simply lays down a principle in connection with one or two broad general facts. Thus the facts are, a contract contrary to public policy; and the rule is, that it is void. The Field Code states further facts. It gives us certain kinds of contracts relating to certain matters of fact. These matters of fact are extremely limited in number. For instance, in the law relating to illegal contracts the facts stated are—a contract containing a stipulation or condition “which limits the time within which he may thus enforce his rights.” The rule stated is that such a stipulation is void. The contract is, therefore, good or bad, dependent upon the presence or absence in the case of these few special facts. The special facts mentioned are never all of the facts that actually occur in any special case, but an abstraction from them of what are considered to be the material facts. In the actual cases, arising in daily life, these specially mentioned facts may occur in connection with, or without, other special facts; or a portion of them may exist, and others be absent; and every possible combination of presence, or absence, in every possible proportion, of these facts, may exist. So facts not specially mentioned may exist

in connection with these abstracted facts; and, on true principles, require a reversal of the rule. The peculiar conditions of the business of carriers and telegraph companies, above mentioned, are samples of this. But in such cases the general rule laid down without reference to, or prevision of, the existence of these special facts, must control. And this must be so, whatever may be the analogy of reason, that on the special facts involved the exception to the rule should apply and not the rule itself.

We may restate the argument thus. The French Code is indefinite and uncertain, because of the absence of any detailed facts mentioned in connection with the rule laid down. The Field Code is definite and certain, as compared with the French Code, through the inclusion in the Field Code of detailed facts with reference to which the rule is laid down. Lastly, the Field Code is defective in definiteness and certainty, as compared with the Case law system, through the fact that no attempt is made to deal with the actual combinations of fact that arise in special cases. The Codifier is satisfied to lay down a rule in connection with a few abstracted facts. These, in actual practice, may occur in all proportions of presence or absence with many other special facts. In other words, we may conclude: that a code deals with selected facts abstracted from the special instances that arise in daily life; the case law system deals with the actual combinations of facts as they arise in daily life.

Here must be borne in mind a truth sometimes overlooked. The merit of certainty in a system of law is not dependent upon its certainty in the past, but its certainty in the future. The Power of Prediction is the test: Given the facts of a special controversy arising in daily life, with what certainty can the advocate predict that the decision of the Court will be for, or against, his client? The system which allows him to make this prediction with the greatest assurance of ultimate success is the best.

And here we may note an advantage in certainty which

the Case law possesses over a Code. The issue of comparative certainty is generally argued on the basis that every new case arising under the common law system is doubtful and uncertain, in the same way and to the same extent, as under a code system. The fact is otherwise. While the detailed facts of individual cases are always different, the material facts are as apt to be repetitions of former occurrences, as not. Experience affords daily instances of such repetitions. It thus happens that a great number of cases arising in the daily transactions of life are mere repetitions of combinations of facts which have before arisen and been decided, or of the material facts involved in such combinations. The rule, once established, is certain. The future cases involving like facts never get beyond the consulting counsel ; in fact, never get into the courts at all. The consequence is, that under the common law system, so far as cases involving special facts have been decided, there is the acme of certainty arrived at for the decision of subsequent cases containing repetitions of such facts, or of the material part of them. Assume now a change from the case to the code system.

The code, being an abstraction of these selected facts, and an abstraction of the rule applied to them, it follows that all the actually decided cases that have been passed upon under the rule, are left, after the enactment of the code, as though they had never been decided. They are merely so many new cases to which, when they again actually arise, the general language of the code must be applied ; and its interpretation worked out ; the same as if the special cases mentioned were now for the first time arising, and had never been passed upon. Thus a great mass of absolutely certain law under the common law system becomes a Province of new law to be reinvestigated and decided afresh under the code system. For instance, as above shown, all the cases of penalties and liquidated damages, which to a certain extent have rendered the law of that subject certain, would become as

though they had never existed, were the foregoing sections of the Field Code made the law of New York State. This difficulty caused by the enactment of a Code has led in California to the curious result that the Courts presume the Code has not changed the old law.¹ The California lawyer, therefore, first looks into the old law to determine what that was, and then applies it, unless the Code has expressly changed it. By this process of construction whatever was certain under the old law is retained under the Code, *except where* the Code has itself unsettled it. The defect is that the Code has thus not accomplished its purpose. It has not simplified the law, but merely introduced one more disturbing element. Returning from this general discussion, we now take up the special topic of contracts in restraint of trade.

PARTICULAR DISCUSSION OF THE PROVISIONS OF THE FIELD CIVIL CODE AS TO CONTRACTS IN RESTRAINT OF TRADE

Our object is to compare the provisions of the Field Civil Code in this branch of the law with the actual state of the Common Law as shown in Chapter V.

Section 833 lays down the rule that a contract in restraint of trade, unless embraced within one of the two exceptions contained in sections 834 and 835, is void.

Section 834 creates an exception in favor of the person who sells the good will of a business. He may agree with the buyer not to carry on a similar business within the limits mentioned. Section 835 gives to partners on dissolution a right to make a similar contract between themselves.

Both sections limit the extent in space of the restriction. Thus section 834 limits the space of the restriction to a county; and section 835, in regard to contracts

¹ See Pomeroy's Plea for this construction. The Civil Code of California, Vols. III and IV, of West Coast Reporter.

between partners, limits it to a city or town. Section 835 places no express limit on the length of time of the restriction, but section 834 limits the time of the restriction to such time as the buyer of the good will, or his successor, carries on a like business therein.

The peculiarity about these sections of the Field Code is that they do not express the common law rules on the subject as they existed at the time (1862) this Code was written. On the contrary, they embody very important changes in the rules then existing. (See Chapter V, Exhibits C, D, E, F, G, H, I, and Title V.) They thus exhibit another defect in a code system. This consists in the substitution of the ideas of public policy held by the drafters of the code, without the advantage of elaborate argument before them on the questions involved, for the sounder views of public policy elaborated after forensic argument and debate through successive decisions of an appellate court.

This code was drafted by three Commissioners, three lawyers, in the privacy of their study. The Appellate Court of New York is the Court of Appeals, and consists of nine judges. They declare the law only after public discussion before them of advocates striving for the recognition of the rule, or its exception, which will cause the side on which they are retained to win. Note a sample of the class of work respectively turned out under these different conditions of authorship.

The drafters of the New York Civil Code intended to change the common law — the law declared by this bench — on this subject. And their rather remarkable theory of the proper public policy on the question of contracts in restraint of trade is expressed in their notes to these sections. Their note to section 833 is as follows: —

“Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. In *Dunlop vs. Gregory* (10 N. Y. 241), a contract not to run a certain steamboat above Saugerties on the Hudson, although

there was no sale of a good will, nor any circumstances to justify the contract, except that it was made upon a sale of the vessel by an association of persons who had previously used it to run above Saugerties and wished to avoid competition. In *Whittaker vs. Howe* (3 Beav. 387), a contract not to practise law anywhere in England was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the State of the Services of its Citizens.”¹

Let us examine the validity of this *ex Cathedra* reversal of the rule established by the Courts. In the case of *Dunlop vs. Gregory* referred to, the sellers owned boats running between New York and Albany on the Hudson River. They sold one of their boats and received back a covenant from the purchaser that the boat sold should never be run as a passenger boat on a portion of this line. These very Code Commissioners by section 834 grant that a purchaser buying a good will can protect himself through such a covenant from competition from the vendor, and that he ought to be so protected. Why, then, is it against public policy for a vendor, selling a portion of his stock in trade, to protect himself from competition by the vendee as against the remainder? The covenant restraining trade, if valid in the one case, should be valid in the other. The decision in *Dunlop vs. Gregory*, therefore, is founded on sound principle; and the criticism of the codifiers is without merit. Perhaps this criticism was prompted by their views as to the proper space limits of such restraint, as these are explained in their note to section 834. Thus the restraint in *Dunlop vs. Gregory* could not have been limited to a single county, and so accomplish any good to the party benefited by the restraint. The necessities of the case required the restraint to embrace more than one county, and hence the covenant would be invalid under the provisions of section 834.

¹ Note to N. Y. Civil Code, 1865, p. 255, Sec. 833.

The following is the note of the Code Commissioners to section 834:—

“The district within which a party may exclude himself from carrying on business should be accurately defined by law; and no division of the State appears to the Commissioners to be more reasonable or convenient for the purpose than a county. And no one should be allowed to prevent another from carrying on a business, unless he himself provides the public with the same advantages in the same county.”¹

This amounts to laying down the rule that the owner of a corner grocery may sell his shop, and good will, and get the full value for them; but that H. B. Claffin & Co., and other houses whose trade is not limited by county or state lines, cannot sell their business, and get the market value thereof. The purchaser of a business and good will does not get the full benefit of his contract, and the seller of a business cannot get its full value, unless the seller can lawfully contract not to enter into competition with the purchaser. The rule sustaining such a contract acts for the benefit of both parties. Since, under this section of the Code, a contract not to enter into competition must be limited to the county where the business is located, the covenant would have to be so drawn to be valid; and, when so drawn, it would be of no value to the purchaser in the case of the larger houses.

Compare the Code Commissioners' statement of what should be the policy of the law in this respect, with the language of the Court in *Diamond Match Co. vs. Roeber*.¹ Andrews J. says: “The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. . . . There are trades and employments which, from their nature, are localized; but this is not true of manufacturing industries in general. We

¹ N. Y. Civil Code, 1865, p. 256, note to Sec. 834.

² 106 N. Y. 485.

are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines."

Thus, not only did these sections misrepresent the common law of contracts in restraint of trade when they were written; but had they become the law of New York, they would have established a rule of law opposed to the commercial genius of the people. As compared with the actual doctrines on the subject which the courts have worked out, the rules of public policy so prepared by the Code Commissioners are inconsistent, short-sighted and unreasonable.

It happens that contracts of this description have been frequently before the courts since these Code sections were written. In its slow process of evolution by the light of human reason applied to the solution of concrete disputes, the Case law has reached certain conclusions not dreamed of by the authors of this code.

It will be noted that these sections of the code classify all contracts in restraint of trade into three classes, consisting of a general rule, and two exceptions. The general rule is, that all contracts in restraint of trade are void. (*Sec. 833.*) The first exception is, that a contract in restraint of trade between the seller and buyer of a business is valid, if limited in space to a county, and in time to the time in which the purchaser carries on the business. The second exception is, that a contract in restraint of trade made between partners on dissolution, is valid if limited in space to a city or town.

Here, then, we have a statement of a few matters of fact which are the earmarks, or tests, on which to apply the rule, or its exceptions. These earmarks are, respectively, contracts in restraint of trade, and contracts in restraint of trade connected with the sale of a good will, or with a partnership relation. In each of these classes of cases the rule is prescribed. There is no statement of any special facts of a given case that might arise involving any such facts, and numerous others. There

is no statement of the reason for the general rule prescribed. There is no statement of the reason for the exceptions to that rule. There is no statement of the arguments upon which the general rule is founded, and no statement of the arguments upon which its exceptions are founded. There is no statement of the reasons for the application of the rule and for the application of its exceptions to the abstracted facts respectively mentioned.

At the time these sections were written, the result of the common law cases seemed to be as follows: A contract to restrain trade, in order to be valid, must be limited in space and in time. It was thought that a restraint extending over a whole State, or a Country, would be void, as too general. While the only surely valid restraint was a restraint extending over a limited space, like a town, city, or county. In the sale of a stock of mattresses, etc., a contract not to trade in all the territory of the State of New York west of the City of Albany, was held to be void.¹ Yet, in a case decided in 1839, the court had already made the step beyond the ruling in *Mitchell vs. Reynolds*, required to found this branch of the law upon good sense, and business judgment.

In the last-mentioned case the plaintiff and defendant were competitors in running boats on the Erie Canal between Rochester and Buffalo. The defendant sold to plaintiff his boats and property in the business for \$12,500, and executed a bond in the penal sum of \$25,000 "that he would not at any time thereafter run or be interested in any line of packet boats on the Canal within the limits before occupied by him." The defendant broke the covenant. Suit was brought by the plaintiff on the bond. Defendant objected that the restraint was general and not partial, and hence void. The court says on this point:² "But it is said that a restraint from Rochester to Buffalo, a distance of about 100 miles, is

¹ *Lawrence vs. Kidder*, 10 Barbour, 641.

² *Chappel vs. Brockway*, 21 Wend. 158, 162.

too large. That it is not confined to a particular place. The objection seems to take it for granted that a valid restraint cannot extend beyond a particular state or city. This is not the rule. A man cannot for money alone, where he has no other interest in the matter, purchase a valid contract in restraint of trade, however limited may be the circle of its operation. But when a good reason appears for allowing the parties to contract, the restraint may extend far enough to afford a fair protection to the obligee. How far this will be must depend in a great degree upon the nature of the trade or business to which the contract relates."

This phrase that the validity of such a contract depends "in a great degree upon the nature of the trade or business to which the contract relates"; and that a good reason is derived from what is necessary for a fair protection to the obligee; is the essence of an enlightened policy of the law upon this subject.

The difference here noted between the rule under the code system and the case law rule is a fair example of a characteristic distinction between a code and a common law system. The code rule that contracts in restraint of trade are valid or invalid according to whether the restraint is limited to a county or extends over a greater area, is not founded on a reason, but merely on the presence of an abstraction of a few selected facts; viz. a contract restraining trade extending over more or less than a county. The common law rule that a contract in restraint of trade is valid or invalid according to the question of a fair protection to the purchaser and the nature of the trade involved, etc., is a rule founded on reason, and not on any selected special facts, except in so far as these may feed the reason.

The results are as follows: Cases involving the same reason for the application of the rule will be declared valid or invalid by the code, according to whether the restraint is limited to a county or not; and cases involv-

ing the same reasons why the contracts should be invalid, as those in which it is so declared, will be valid under the code section, because limited to a county. Thus, under the code, the sale of a small bakery, for instance on Grand Street, East Side, New York City, having the bulk of its business within five blocks, can be accompanied by a covenant that the vendor shall not open a new store in New York County, thus debarring him from the West Side or Harlem or elsewhere. This, when the vendors opening a dozen such stores in other parts of New York City, would in no manner injure the vendee or come into competition with him. Yet if H. B. Claffin & Co. sell their wholesale dry-goods business,—a business extending throughout the country, — a covenant on their behalf not to open up a ruinous competition with the purchaser, from, say, Brooklyn or Jersey City, is void.

Under the operation of these inconsistencies, the following results. The owner of the small bakery desiring to retire can sell out and, covenanting not to compete, get the full value of his good will. This right is denied to the merchant whose ability and brains have developed a business of national or world-wide extent.

Again, since the code section must be construed, not according to the reason of the rule, but according to the language, there are a number of cases which come under the reason for the general rule or its exception and yet must be erroneously decided by the code section. This because the selected facts are present or absent, and necessitate a decision in accordance with this condition of affairs.

The following are instances: —

(a) Thus we have seen that a contract between a master and a servant, protecting the master from the servant's competition in the same trade within reasonable limits, has been held to be valid at the common law. *Rousillon vs. Rousillon*, 14 Ch. 351-366.

Yet this code section would make such a contract invalid. And, that this was the intention of the section

is still more clearly expressed by section 155 of the same code. This section makes illegal any agreement of a servant not to exercise his vocation after the employment.

(b) Thus, a covenant by the vendee of a boat not to run in competition with the vendor, though founded on the same principle as the covenant of a vendor not to run in competition with the vendee, is valid in the common law and invalid under this code section. *Dunlop vs. Gregory*, 20 N. Y. 241, overruled by section 833 of Field Code.

(c) Thus, in case a patentee sells his patent, it may be of the utmost importance that the buyer should be protected by a covenant on the part of the inventor that he will only exercise his inventive faculties in the same field for the benefit of the purchaser, and will convey all future improvements or inventions affecting the value of the patent sold. To allow such a contract to be valid is beneficial to the inventor, because he can get a larger price for his patent. Such a contract is valid under the common law (*Morse Twist Drill & Machine Co. vs. Morse* (1869), 103 Mass. 73; *Printing and Numerical Registering Co. vs. Sampson* (1875), L. R. 19 Eq. 402), but would be invalid under this code. (See section 155 and sections 827, 833, 834 and 835.)

(d) It would be a serious question under the language of the code whether, if a vendor conveyed his business with a covenant not to compete with the vendee in the same county, and afterwards the vendor became the chief stockholder in a corporation embarking in such a competitive business, this would be a breach of the contract.

It is unquestionably so at common law; where the reason of the rule, and not the language in which it is expressed, is the question involved. (*McKinnon Pen Company vs. Fountain Ink Company*, 48 N. Y. Superior Court Rep. 442; *Kramer vs. Old* (N. C.), 34 Lawy. Rep. An. 389.)

(e) So also the covenant involved in the case of *Live*

Stock Association of N. Y. vs. Levy, 54 N. Y. Superior Ct. 32 (cited above, Chapter V, in Exhibit G; *see p. 153*), held valid under the common law, would be invalid under this code section. It will be remembered that the agreement there involved was an agreement between a corporation and its stockholders that the latter would not purchase certain goods during a limited period from any others than the members of an association with whom the corporation had made a beneficial contract.

(f) So also the covenant involved in the case of *Ebling vs. Bauer*, 17 Weekly Digest, 497 (cited above in Chapter V in Exhibit G), held valid under the Common Law, would be invalid under the Code. This was the case of the saloon-keeper who, in consideration of a loan, agreed to buy all his beer at market rates from the brewer. See also a further example, Chapter V, Exhibit H, section 596.

(g) So also the contract involved in the case of the *New England Trust Co. vs. Abbott*, 162 Mass. 148 (cited above in Chapter V as Exhibit H, section 583), held valid under the common law, would be invalid under this code section. This is the agreement not to sell stock except on giving first option to the other persons in the company. This decision is against the weight of authority on the subject. (See Chapter V, Exhibit H, section 584.) It is, however, founded on true principle, and a correct public policy. It recognizes an exception to the general rule of invalidity of contracts in restraint of alienation, which the peculiar circumstances of ownership of corporate stock require should be recognized; and the exception to that rule established in this case, should become the law of the land.

(h) So also the covenant involved in the case of *Oakes vs. Cattaraugus Water Company*, 143 N. Y. 430 (cited above, Chapter V, in Exhibit H, section 595; *see p. 156*), held valid in the common law, would be invalid under this code.

(i) So the covenants in the *Diamond Match Company case*,

106 N. Y. (cited in Chapter V, Exhibit D; see p. 133), and the *Nordenfelt* case (cited in Chapter V, Exhibit H, section 594; see p. 156), each held valid at the common law, would be invalid under this code. The *Nordenfelt* case was where a patentee assigned his patents to a company and agreed not to engage, anywhere, in the same business during twenty-five years.

And so we might go on indefinitely, taking up each of the decisions at the common law which have been set out in Chapter V, and applying this code to them to ascertain the result. If we did so, we should find that some of the cases would be decided correctly by the code; but the majority of them would receive a decision contrary to that already made at the common law; while, in other instances, the Code would furnish no guidance. We should further find that the way the decision went under the code system would depend, not upon the reason applicable to the case, but upon whether, or not, the language of the code included and covered the facts of the case.

And each and every case so tested by the code would be found to involve a great number of facts, all having a bearing in connection with the one or two abstracted facts mentioned in the code, upon whether the rule, or the exception to the rule, should be applied. The code, however, selects these one or two abstracted facts, and makes their presence or absence the test of the application of the rule, or of its exception.

Unfortunately for the value of a code system as a system of substantive law, the presence or absence of these facts is not always the true test of the equity of the rule. Other unnamed and unforeseen facts, present or absent, or existing in varying combinations with or without the special facts mentioned in the code, produce results that often cry aloud for the application of a just rule, instead of the code rule.

Whether or not, in any special case, the code rule will turn out to be just, is not a necessary, but an accidental

result. Under the case law, on the contrary, the result of the decision of the special case must produce justice; or the fault lies in our reasoning powers, and in our lack of knowledge of what real justice is.

From this it appears that as soon as the Codifier descends from glittering generalities to the enumeration of earmarks of classification to fit special instances, what is gained in definiteness is lost in equity.

The French Code was indefinite; it merely said, an illegal contract is illegal. Under this you could keep guessing *ad infinitum* as to what was legal, and as to what was illegal; but at least you could refer to reason, and to equity, and to public policy, as guides to determine the problem involved in each special case. On such a reference to first principles the French Code lacks the certainty and power of prediction possessed by the English Case law, because it lacks the examples of the decided cases, the precedents illustrating and applying these general principles.

The Field Code becomes more definite. It also says, illegal contracts are illegal; but it goes on to say, among illegal contracts are contracts in restraint of trade. And then in order to meet reasonable objections that might be raised to such a rule in its broadest extent, it goes on to specify two exceptions. These exceptions are made definite. A contract in restraint of trade made by a seller of a business and extending over not more than a county, is, under certain conditions, valid; and so likewise of such a contract made between partners. So far so good; there is a distinct gain in clearness.

But we now find that when these test facts, which are the earmarks on which our certainty depends, arise in actual life, they occur more or less implicated with combinations of other facts; and the inquiry no longer is, what is the proper rule to apply to this case, but, are the earmarks, as mentioned in the code, of this or that rule or exception, present. Reason is no longer the trusted

guide. Interpretation takes her place. Compelled by the Code provisions, combinations of fact demanding upon reason the same solution result in contradictory decisions. You have gained something in certainty — you have lost justice. The final appeal is no longer to reason and *equitas*; but to the rule as it is “nominated in the bond.”

A little analysis will convince of this further truth here insisted upon. That the Field Code, as shown, introduces a system of law which, in becoming more definite, loses in equity, is not a special fault of that particular Code. It is a defect inherent in all codes. And the more minute the classification and subdivision of the law which any code may attempt in order to make its provisions apply with any definiteness to particular cases, the more likely that, for the one or two instances intended to be covered by the language in which the rule prescribed will result in equity, there will be a dozen unexpected and unforeseen combinations of facts to which the rule will apply and produce injustice. The statute books are full of just such unintentional blunders. It is, therefore, a fundamental truth that what a Code gains in the form of expression of the law by a greater definiteness, it loses in excellence of the substance of the law by an absence of equity. It may be certain, but justice is no longer its ruling spirit.

We now pass to the Indian Contract act, and to its provisions on the same subject. The comparison is instructive because to avoid, probably, the very reproach we have cast upon the Field Code — viz. that it has attained some certainty at the expense of equity and sound policy — the Indian Contract Act expresses the earmarks or crucial tests, upon the presence or absence of which its rules depend, in a very different manner. And, in this very difference of form of expression, we will find further warrant for the proposition that a code must either be too general to be a practical guide, or too specific in details to be equitable.

THE ANGLO-INDIAN CODES

The Anglo-Indian Codes consist of the following Codes, viz. : —

The Penal Code, Succession Act, General Clauses Act, Contract Act, Negotiable Instruments Act, Transfer of Property Act, Trusts Act, Easements Act, Specific Relief Act, the Code of Criminal Procedure, the Code of Civil Procedure, Evidence Act, Oaths Act, the Limitation Act.

First. Appendix: Court Fees Act. Suits Valuation Act. Stamp Act. Registration Act.

Second. Appendix: The Debtors Act. The Civil Procedure Code Amendment Act, 1888.

These Codes prescribe the rules of law for the British possessions in East India. The one of these Codes which deals with unlawful contracts is known as the Indian Contract Act, the table of contents of which is as follows:

Exhibit O. — The Indian Contract Act¹

TABLE OF CONTENTS		SECTIONS
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¹ Stokes' Anglo-Indian Codes, Vol. I, p. 535.

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The sections of this act covering contracts in restraint of trade occur under the title or subdivision of Chapter II, regarding "Unlawful Agreements."

THE PROVISIONS OF THE INDIAN CONTRACT ACT IN REGARD TO CONTRACTS IN RESTRAINT OF TRADE

"27. Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void.

"*Exception 1.* One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

"*Exception 2.* Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

“*Exception 3.* Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.”

Note to Exhibit O. — The Indian Code

In passing, it is proper to call attention to a difference between this form of statute (a code) and the ordinary statute. This difference arises from the tacit assumption that a code covers the entire law, and that a statute covers only a part of the law. Thus, in the Statute of Frauds, the Legislator does not say: “All oral contracts are valid except the following.

“*Exception 1.* A contract to answer for the debt of another is void unless in writing.

“*Exception 2.* A contract not to be performed within a year is void unless in writing,” etc., etc.

But having in view the rules of the common law as being well known and understood, a statute simply prescribes a rule as to the particular combination of facts mentioned. Thus, the Statute of Frauds simply enacts that all promises to pay the debt of another, or contracts not to be performed in a year, etc., etc., are invalid, unless in writing. In a code, on the contrary, we always find the legislator first laying down the general rule which covers all cases not otherwise provided for, and then inserting the exceptions. The assumption is, that all matters that have arisen, or that may arise, are covered by the provisions of the code, and that nothing is left to an outside coexisting law. Again, the earmarks which distinguish the combination of facts under which one Code rule applies, from another combination of facts under which an exception or a different Code rule applies, are embodied in the statement of a very few selected facts. And these distinctive facts may exist, with or without a great number of others; or may be partially or wholly absent, in connection with varying combinations of other

facts. Thus, under these Code sections, the first question would be, what is a lawful profession, trade or business? The answer is not found in the act itself. It must be obtained by interpretation, by the study of definitions, by the consideration of the old law, the mischief, and the remedy, and by the application of the words to special combinations of facts as they arise. Again, who is one who sells a good will? Suppose that a corporation sells its business and good will and that the chief stockholder in it makes a collateral contract with the purchaser to refrain from carrying on a similar business, is that a case within the exception? or does it come under the general rule? Again, what is the meaning of the words "specified local limits"? Would these words include all of the State? would they include all of the United States? Would they include Foreign countries? Evidently these words would not include the latter, and probably not the others. Again, supposing all the facts required under exception 1, down to the word "provided," exist, what is the effect of the proviso? Does it not leave the whole matter so that the court may exercise an entirely untrammelled discretion in each case, as to what is reasonable and what is not? Note that while the proviso cannot extend the meaning that would otherwise be given to the words "specified local limits," yet it may raise awkward questions, restricting and limiting what would otherwise be the plain meaning of those words.

Now let us see how far the changed language used to express the law of contracts in restraint of trade in these two Codes—the Field and the Indian Contract Act—has resulted in a change in the substantive law respectively declared by them.

At the outset, we notice a glaring omission made by the Field Code, which the Indian Contract Act covers. This is the case covered by the exception 3 to section 27 of the Indian Contract Act, quoted above. This exception provides that partners may lawfully agree with each

other that any of them will not carry on any other business *during the continuance of the partnership*. A glance at the section will show the reader the absolute necessity for the express mention of this exception; because, otherwise, the general prohibition of the opening sentence invalidates such a contract. Neither of the other two exceptions mentioned can be construed to cover this particular case. If the reader will refer to the quoted sections of the Field Civil Code, he will note that the exception of this partnership case from the general rule inserted in the Indian Code is wholly omitted from the Field Code. (See p. 189.)

Comparing the two codes, he would find that section 833 of the Field Code is substantially the same as the first sentence of section 27 of the Indian Contract Act, viz. each enacts the general rule that all contracts in restraint of trade, except as mentioned below, are void. Section 834 of the Field Code is substantially the same as exception 1 of section 27 of the Indian Contract Act. They both enact that a seller of a good will may contract not to compete with the buyer within limits of space and time. Section 835 of the Field Code is substantially the same as exception 2 to section 27 of the Indian Contract Act. They both enact, that partners, on dissolution, may contract not to carry on the same trade within local limits. Note that there is no limitation under this case as to the length of time such a contract may run. But of this again. Exception 3 to Section 27 of the Indian Contract Act has no counterpart in the Field Civil Code. Here, then, is one glaring oversight of one Code filled up in another.

But who will guarantee any code against the omission of not one, but many more, such cases? Some of the cases set out in Chapter V are proper samples of such omissions; and others are samples of the defective public policy which either of these Codes would have compelled had it been the source of the decision.

It would seem that the public policy of the general rule and of its exceptions, as contained in a Code, should be consistent; that a limitation on free contract existing in one case should not be arbitrarily removed in another, where no reason for such difference exists. For example, both codes declare that all contracts restraining trade are void except those mentioned. Both codes except the case of the seller of a good will, and the case of partners on a dissolution. But, while in the case of the seller of the good will the restraint must be limited to local limits, and last only so long as the purchaser or his successor in title carries on the business, no such limitation is imposed on a partner selling out to his other partner on dissolution. He is restricted, it is true, to a covenant against trade covering only a local limit, but he is not restricted as to the length of time during which he can restrain himself. Yet the reason of the rule and of the exception is as applicable to the one case as to the other.

A careful analysis of these Code sections with the law as it exists, and with each other, would show similar defects and absurdities. We need, however, what further space is at our disposal to point out a more significant difference in terminology between the Field Civil Code and the later Indian Contract Act, resulting in an even greater divergence in the substantive law expressed.

It will be noted that the framers of the Indian Contract Act have retreated from the position of certainty, as to the limits in space, set by the Field Code. We no longer have the plain rule that the restraint in space must be measured by a County or a City. The certain County or City has become the comparatively uncertain "specified local limits." And then comes a proviso, which, in another form, introduces the case law system almost as completely as though there were no code rule on the subject: "provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

Can it be candidly said that this section of this code states the law on the subject in as clear and as certain and as satisfactory a way as the same subject is covered in *Mitchell vs. Reynolds*, and the other Common law cases, set out in Chapter V? The truth is that this abstraction of the common law rules on the subject is not as certain as similar phraseology found in the reports, because it is disassociated from its environment and stands alone.

This proviso introduces even more uncertainty than can possibly be charged against the Case Law System. Under this proviso the discretion of the judge in deciding that a special case falls within the rule, or within its exception, is, practically, unlimited. Unlike the Common Law System, where the judge is bound down by the force of precedent and the rationale of the law compelling his decision to be made along lines of a system of customary legal reasoning established by years of education and habit, the judge, under this Code section, is unfettered by precedent—for the language of the Code is his only guide (at least before precedents are made)—or by reason, because no statement of the reasons is given. Hence, within the arc of the operation of the code section, namely, within the arbitrary boundaries of cases involving the selected and abstracted facts mentioned in the Code section, the discretion of the judge is absolute. He sits and decides the special case before him with all the irresponsible authority and all the unchecked discretion of an Eastern Cadi. Let us examine the provisions more in detail.

The authors of this code, instead of restricting a valid contract to restrain trade to the limits of a county, have attempted to avoid the inequity of the Field Code in this respect by using the words “within specified local limits, . . . provided that such limits appear to the court as reasonable, regard being had to the nature of the business.”

Assuming that the courts have worked out a meaning of the word "local" before the word "limits," so as to extend the space mentioned beyond the bounds of a county to a larger area, it would be almost impossible, under any ordinary rules of construction, to say that the limits of space involved in *The Diamond Match Company* case (Chapter IV, Exhibit D, p. 133), or in the *Nordenfelt Gun Case* (Chapter IV, Exhibit H, Sec. 594, p. 156), could come under this exception. This, for the reason that the word "local" expressly excludes the idea of a world-wide area, or of an area including the entire territory over which the jurisdiction of the Court extends. Hence these and many other cases, in which covenants restraining trade have been held valid, although general in space, on the ground of the reason of the rule that the restraint should be sufficient to protect the purchaser, must be held invalid under this code. Thus the inequity of the Field Code in specifying the exact limits of the County has not been escaped by the use of the more general language of the Indian Code. It still remains true, under this code, as well as under the Field Code, that covenants restraining trade, the validity of which are founded upon the same reasons as other covenants restraining trade, will be valid or invalid, not according to the reason on which the rule of validity or invalidity is founded, but upon the space over which the specified local limits extend.

Again, assume that the words "specified local limits" have been given a meaning by the court, say, to mean within twenty or one hundred miles of the place of business, or within half a State, according to the facts of the case and whether "such limits appear to the court reasonable." It follows that the addition of these last words introduces into the rules established by this code the flexibility, and with it the uncertainty, of the common law. The resulting uncertainty is worse than the uncertainty of the common law, for a patent reason. At the common law the reasons for what constitutes a reasonable

limit are stated over and over again in the different cases in connection with the facts then under observation. The code nowhere contains any authoritative statement of the reason for the rule, or for its exception, or for the application of it to special combinations of fact. It is true that this act contains a few illustrative cases under the different sections, but these are so highly abstracted in their statement as to amount to little more than an index digest, similar in scope to the digest of *Mitchell vs. Reynolds*. See Chapter V, Exhibit F, p. 149.

In consequence the limits which shall "appear to the court reasonable" will depend upon the mere *arbitrium* of the judge; or, if they have any certainty at all, will depend for their certainty upon the courts reintroducing, in their application of this section of the code to the decision of disputes, the common law cases and reasons.

Thus do we arrive at a *reductio ad absurdum*. The code was passed to do away with the common law, and to escape worse evils we reintroduce the common law. This result is not overstated. A writer in the Law Quarterly Review for July, 1894 (13 Law Quarterly Review, 323, 324), commenting on the use by the author of an annotated book of the Indian Codes of English decisions, excuses it on the ground that it is the practice in India to refer to English decisions for illustrations of the meaning of their Codes.

If we now compare the substantive law expressed in this code with the substantive law expressed in Chapter V, by taking up the individual cases decided under the common law, and testing what the decision of the same under this code would be, we would find difficulties in its construction like in kind, and inequities in its application similar in character, to those pointed out in the Field Code.

So, if space allowed, we might take up each case mentioned in the text-books and digests contained in Chapter V, and apply these code sections to it. And we might

note whether, if that case were arising as a new case under this code, we could predict anything as to what the decision would be; and, if so, with how much certainty. And we should find, as a result of such tests, that in using the words "within specified local limits" in this Indian Contract Act, instead of the words "within a county" used in the Field Code, the Indian Contract Act has lost in definiteness and has gained in equity. We should further find that in adding the proviso, "provided that such limits appear to the Court reasonable, regard being had to the nature of the business," this Code has introduced a reference to the reason of the rule without stating what that reason is. We should also note, that even this reference to a reason has improved the substance of the law, as compared with the Field Code, where no such reference is made, and has given the court an opportunity to construe the code rule on the same lines that the past experience of the common law decisions has marked out. We should further find the result to be that the power of predicting the decision of a special case is not any more certain, in fact, is less certain, than under the case system. We should further find that this Indian Code has a similar merit to the case law, in that the reason of the rule is the guide up to a certain point; and it is less perfect than the case law, in that the guidance of reason stops at a fixed point, and from that point the language, instead of the reason of the rule, governs the result. But space fails us for the details of this analysis.

Note to all the Codes

And so the Codifier ends where he began. His object is to do away with the common law. He drafts his Code. He must either make it so indefinite that it amounts to no rule at all, and we are left to the vacillating possibilities of the *arbitrium* of the judges (*French Code*): or, he may lay down his principles in connection with special

facts ; in which case his code has all the uncertainty arising from the construction and interpretation of words as applied to complicated transactions ; and, in the end, we must apply the rule without regard to the equity of the result ; and so produce as much or more injustice than justice (*Field Code*) : or, he must express his code in more studied general phrases, and attach a reference to the reason of the rule, or rather say that the rule should be reasonable (*Indian Contract Act*) ; in which case, we merely reintroduce either the vacillating uncertainty of the *arbitrium* of the judge ; or, to escape that greater evil, the case law again.

And so the codifier travels in a circle which he attempts to square ; and his efforts, in the region of law, are not likely to be crowned with any greater success, than have resulted from similar efforts, in the region of geometry.

The difficulty lies in the attempt to reason from fixed and arbitrary abstractions of phenomena to phenomena ; instead of from phenomena to phenomena.

CHAPTER VII

ALL THE LAW IS WRITTEN—THE LIKENESS
AND UNLIKENESS

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TITLE I

THE TRUE DISTINCTION LIES IN A DIFFERENCE BETWEEN THE RULES OF CONSTRUCTION APPLIED TO STATUTES AND REPORTS

In such manner and form do the Legislature and the Courts, respectively, prescribe in writing the laws of the land. As between the two bodies thus prescribing the law, the Legislature is supreme. If the Legislature prescribes that a certain rule shall apply to, and govern the decision of, any dispute arising out of special facts, the Court must follow the rule so laid down, must render the decision the Legislature has enjoined. Another, and not less important fact is, that in all cases of disputes arising between men where the Legislature has not expressed its will, the Courts must discover, and apply, the rule required to decide the controversy.

While, then, all the law is written, it is divided into two great classes of writings; namely, Acts of the Legislature, and reported decisions of the Courts. With a view to this difference in authorship, and mode of promulgation, the old lawyers stated the distinction by a curious

classification. Blackstone divides the Common Law of England into the "*Lex scripta*," written law, or statute law; and the "*lex non scripta*," unwritten law, or reported decisions of the courts in adjudged cases. This division has been attacked as unscientific, for all the law is written.¹ The real distinction is between laws enacted by the Legislative Body, and laws declared by the decision of Judges; Legislative and Judiciary Law.

As will be noted from the examples given above, statute law states in written language the rule of conduct prescribed for a certain class of cases by the Legislature. Thus, in the Statute of Limitations cited, actions are classified so that, in some cases, suit must be brought in six, in others, four, in others, two years. Again, these limitations do not apply in certain classes of excepted cases—thus the rule applies to "all actions of acco^mpt and upon the case *other than such acco^mpts* as concerns the trade of merchandise between marchant and marchant." What are accounts between *marchant and marchant*? And who is to decide whether any particular account in suit is such an one or not, so as to come under this exception?

Again, in the Statute of Frauds cited, we have the classification of promises coming under the act; as, "any special promise to answer for the debt, default or mis-carriage of another," and "Contracts for the sale of real estate or any interest therein"; and, "any agreement for the sale of goods and chattels of the value of £10 or over"; unless part payment, delivery or earnest occurs,—shall be void unless in writing, etc. As to what agreements, out of the mass of contracts, come under, and what are excluded from, these classes, the Legislature have given us no guidance save the expression in language of their intention. When a special case arises, it is left to the Courts to find out whether the special case is within, or without, the classification made in the statute.

¹ Austin's Province of Jurisprudence, § 897.

This is so because of the difference in the time and occasion on which the two authors of the law respectively act. The Legislature does not pass an act in this way: "Be it enacted that the promissory note made by Thomas Brown to the order of John Smith, and now owned by John Smith, not having been sued upon for over six years since it fell due, is hereby barred from suit hereafter." But it does enact that: "In all cases where Thomas Browns make notes payable to the order of John Smiths, and the John Smiths do not sue on such notes until after six years from the date of maturity of such notes, such suits shall be thereafter barred."

The Legislature, then, does not decide any past disputes between men, nor does it decide any definite particular number, or class, of past controversies between men. It prescribes a general rule that shall govern the decision of future special disputes, including in the facts involved certain specially selected facts. Thus, Legislative Law is essentially prospective, and deductive. The Legislature leaves to the Courts the decision of all special cases as they arise. It could not do otherwise, without itself becoming a Court. But, in some instances, the Legislature states the general rules of public policy which shall be followed by the Courts in deciding certain cases. The Courts, on the other hand, never lay down a general rule applicable to future cases, except in the presence of the special facts of a past dispute then presented for decision, and as a means of arriving at a just decision of that case. The question of whether a subsequent case shall be decided according to the rule so laid down, is a question to be argued and decided when the facts of the subsequent case, claimed to be controlled by the earlier decision, have all happened, and, as a past transaction, come before the court for investigation, and decision. Thus case law is essentially retrospective, and inductive.

Statute Law, then, states in written language the rule

of conduct prescribed for a certain class of cases by the Legislature. It does so by stating that when certain facts exist, the rule of conduct applicable shall be as declared. Being intended to embrace classes of things, or persons, it must necessarily be expressed in general terms. Assuming, as it does, the existing facts of society, much is left to implication that cannot be expressed. The specially selected facts constituting the earmark, or test, of the application of the rule are never the sum and substance of the facts as they actually arise in daily life. On the contrary, these selected special facts exist in all possible combinations with other unmentioned facts. And these unmentioned facts often have most forcible and important bearings, from the point of view of equity, on the rule that should govern the case in which they occur.

Hence arises the necessity of —

First. Interpretation of the words employed.

Second. Construction of the whole as applied to particular controversies embracing particular combinations of fact.

The function of ascertaining the meaning of the rules of conduct so expressed by the Legislature to govern the disputes arising from the transactions of men, and of applying the rules to these disputes, is one of the functions of the Courts. To the extent that any statute may apply to, and govern the facts, the Courts must follow the rule therein laid down.

The task of ascertaining when the facts existing in a special controversy make the rule of conduct prescribed by the statute applicable, is the peculiar province of the Courts.

This task has two subdivisions.

First. The ascertainment of the existence of the facts in the special case presented.

Second. The construction of the words used in the statutes to ascertain whether any statute applies to those facts.

In solving this class of questions, and in determining the meaning of written language in a statute, will or contract, the Courts have been compelled to educe certain general rules of interpretation and construction. These are founded upon common sense, experience and right reason. Without a rigid adherence to these rules, all interpretation of such documents would be chaos, and confusion.

The rules of interpretation are intended as a guide to a true solution of the meaning of the particular words used. The rules of construction are intended as a guide to the meaning of such words, so interpreted, when read in connection with each other. Construction begins where interpretation ends, but may necessitate a reinterpretation of the particular words used in conjunction. The two act and react upon each other, in such a way, that the joint product is the conclusion arrived at by the Court as to what the writing expresses. We say, what the writing expresses, instead of, what was the intention of the authors, advisedly. This because the fundamental principle of statutory construction is, — the intention of the legislators must be found in the language which they have employed; no supposed, or conjectured, intention, or omission, can be supplied by him who construes, but does not make, the document.

The same rule applies to written contracts. Thus, in a case involving a question as to the existence of an implied covenant, an English Judge, in referring to the rule often laid down in the books to the effect that the Court in construing a document strives “to carry out the intention of the parties,” states that the true rule to be applied is as follows: —

“My opinion will be founded upon the words of the deed. I endeavor always, and always will, to construe every instrument, be it deed or will or act of Parliament, by what I conceive *to be the meaning of the words used*. The common phrase ‘Intention of the parties’ is an

expression which is very loose and calculated to mislead." ¹

It happens that the great German writer Thibaut — who, by the way, was an advocate of codification — has explained interpretation in a most masterly manner. We extract and condense the following from his Introduction to Jurisprudence.²

"Sec. 44. By the interpretation of a law is meant an accurate statement of the precept contained in it (the meaning of the law).

"Sec. 45. It is necessary clearly to distinguish from each other —

"1. That which is actually signified by the words as they stand (meaning of the words).

"2. That which was meant to be expressed (the intention of the legislator) and

"3. The result arrived at by a logical deduction from the reason of the law.

"An interpretation if based upon the meaning of the words of a law is termed *grammatical*. If based as it ought to be upon the spirit of the law, *i.e.* upon the intention of the legislator and the reason of the law, the interpretation is termed *logical*.

"Sec. 46. The person on whom the duty of interpretation falls must in the first place look to the words used, and must only resort to a logical interpretation when there is a clear necessity for so doing. . . . If, however, a doctrinal³ interpretation is possible, he must abide by it, even though the result at which he may so arrive be opposed to that which notions of natural justice and morality, or of what is ambiguously called equity (*Æquitas*) may seem to require.

"Sec. 47. Grammatical interpretation is to get a meaning, one or more."

¹ *Great Northern Railroad Company vs. Harrison* (Excheq. Chamber, 1852), 12 Com. Bench, 576.

² Introduction to Jurisprudence, Thibaut (N. Y. ed.), 42, 51.

³ *I.e.* grammatical or restricted.

Sec. 48. An interpretation confined to the exact meaning is literal. An interpretation of ambiguous law based on wider meaning is liberal.

“Sec. 50. The results arrived at by a logical interpretation of a law may or may not be the same as those arrived at by its grammatical interpretation.” The logical interpretation may be the same, or it may be more restrictive or more extensive.

“Sec. 51. Considering the reason of a law one of the fundamental rules applicable to extensive construction is that whenever the *very same reason* for which the law was made to extend to certain specified cases is also applicable to another specified case, the latter must be governed by the same law as the former whether the law be written or unwritten. . . . Extensive interpretation of a law founded on its reason is commonly called interpretation by analogy.

“Sec. 52. The maxim *cessante ratione legis cessat lex ipsa*¹ is *altogether false* when applied to restrictive interpretation. If after a time the reason of a law ceases to exist, the law itself nevertheless continues binding, and it is not to be interpreted restrictively merely because some particular case may not come within its reason. Restrictive interpretation can only be adopted when it can be shown that the lawgiver did not intend the law to extend to the case in question.

“Sec. 53. As for *declaratory* interpretation, one must endeavor to ascertain the reason of a law and the special object of the lawgiver, and to carry out the conclusion thus arrived at in preference to all others.”²

It must not be concluded, from the foregoing, that all the interpretations above mentioned are applicable to statute law. Both Thibaut and Austin distinctly state that the rules of interpretation which should be applied to statutes are different from the rules of interpretation

¹ “When the reason ceases the law ceases.”

² Introduction to Jurisprudence, Thibaut, 42, 51.

which should be applied to judicial decisions.¹ It follows, that statutes are capable of being subjected to a grammatical, and to a logical, construction, but not to a construction dependent upon the *reason of the rule*. This is true unless the statute is ambiguous on its face. A reported case, on the other hand, is construed, as to its meaning and effect, entirely with reference to the reason of the rule. The word *Logical* has already been brought into use. It expresses a wider and more liberal interpretation, applying both to statutes and cases. A new word is therefore necessary to express the idea of this difference, which is fundamental and intrinsic, between the construction of the words used to express a rule of law in a Case, and the same words used to express a rule of law in a Statute. For want of a better word to express this difference, we will call the kind of interpretation whereby we extract the meaning of a common law decision, the *scientific interpretation*. The phrase seems to fit the process. For in educing the rule embodied in a case, we study the phenomenon in all its aspects, and reason to a principle of law which governs it. Our method, in extracting this law of the case, is exactly similar to the method employed by every scientific investigator in other fields in extracting the law of nature embodied in an experiment. And, as in chemistry, or astronomy, the general principle discovered and proclaimed by a Dalton, or a Newton, is not conclusive; but has only that validity which its reasons give it; and is open to reinvestigation, at the first experiment, or observation, apparently leading to a different conclusion; so, in the science of law, a rule of law established by a case is (whenever the rule is important and clearly erroneous) of no more value than the argument on which it is founded.²

The last statement is too sweeping. It is made so to

¹ 2 Austin's *Province of the Law*, § 914.

² Witness the many overruled cases, where the reason of the law has triumphed over the rigidity of the rule of precedent.

bring out forcibly a portion of the truth often overlooked. The force of precedent compels a like decision in all cases, wherein no great public or private interest is involved in a decision either way. Yet, wherever great questions of right, and of wrong, are involved, the force of precedent is not sufficient to silence the "still small voice" of reason. The foregoing statement then, sweeping as it is, is true of all those questions of large importance seriously affecting the common weal. This is proved by the number of instances in which the reason of the law has triumphed over the law of precedent. (See Bigelow's *Overruled Cases*, etc.) And at some future time this principle is likely to be applied to the doctrines of the last *Legal Tender* decision (*Legal Tender Cases*, 12 Wall. 457; see dissenting opinion), and of the warehouse cases establishing the right of the Legislature to fix rates of compensation for any business "affected with a public use." (*Munn vs. State of Illinois*, 94 U. S. 113, and see dissenting opinion in *Budd vs. New York*, 143 U. S. 517.)

RULES OF STATUTORY INTERPRETATION AND CONSTRUCTION.—RULES OF INTERPRETATION

1. Every writing implies numerous facts which it would be useless to express; hence the interpreter may assume all that is necessarily implied.

2. Language must be taken in its ordinary and popular sense, unless the technical nature of the subject-matter, or the circumstances surrounding its use, indicate a technical or professional use of words; in which case the latter interpretation must be adopted.

3. The general spirit or intent of the whole writing should prevail over a too strict construction of the letter of any part.

4. The meaning must be found and obtained within the four corners of the writing. The interpreter must not, by conjecture or otherwise as to the true intent,

read into the writing a clause or meaning not therein expressed.

5. The whole writing must be read together.

RULES OF STATUTORY CONSTRUCTION

The great rule is that the intention must be found in the language used.

1. The language of a statute must be taken in a popular sense unless there is something to indicate the intention to use such language in a different sense. Thus, where a statute concerns a technical subject, the special sense pertaining to that subject must be regarded.

2. The court must not go beyond the statute in search of a supposed sense.

3. The whole statute must be read together. In other words, all statutes relating to the same subject-matter are to be construed together.

4. If the language is equivocal, or ambiguous, as applied to the facts, the true construction to be adopted must be sought in an investigation of the old law, the mischief and the remedy intended by the statute. It is the duty of the judge to repress the mischief and to advance the remedy.

5. When statutes appear to conflict with each other, they must be construed so that, if possible, both may stand.

From the foregoing it will be seen that in construing a statute, and in applying its provisions to the decision of a particular case, the hardship produced by applying the rule to an individual case has, provided the words are clear, nothing to do with the matter. Under such circumstances the court has absolutely no discretion, but must decide the case according to the command of the statute. If the facts found to exist bring the case under the words of the statute, the Judge must follow the rule laid down. And this he must do however much he or any one else might have reason to suspect, or to be mor-

ally certain, that had the legislators foreseen the possibility of the application of such a rule to the actual case in hand, an exception would have been inserted in the act to prevent the glaring injustice. The question as to whether a given state of facts comes within the rule laid down by a statute is then, in the first place, not "Does the rule in this case produce just and equitable results?" but, "What do the words mean?" If the words are clear, and the facts named exist in the special case, there is an end to the matter. The injustice and inequity produced, as a result of the application of the rule to the particular combination of facts presented, is only of weight in so far as they may affect the interpretation to be given to the words used. And this consideration can only apply to affect the result, when there are different senses in which the words might have been employed. The difficulties of construction arising under these rules can best be exhibited by the citation of a few notable cases.

SOME CURIOUS CASES

For instance, the Statute of Descents provided that when a man died, his son, or grandson, as the case might be, should inherit. A son murdered his father, and, under the express language of this statute, was entitled to inherit. Collateral heirs, who would have been entitled to take under the statute, if the son did not take, attacked his title. In deciding this issue the Pennsylvania Court held, that under their law the only penalty for murder was death by hanging; and they go on to say:

"In the case now under consideration it is asked by the Appellant¹ that this court shall decree that in case of the murder of a father by his son the inheritable quality of the son's blood shall be taken from him and that his estate under the statute of distribution shall be forfeited to others.

¹ The collateral heirs.

“We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says, if there is a son, he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relatives shall take, who have no right to take it if there is a son? From what source is it possible to derive such a power in the courts? It is argued that the son who murders his father has forfeited all right to his father’s estate, because it is his own wrongful act that has terminated his father’s life. The logical foundation of this argument is, and must be, that it is a punishment for the son’s wrongful act. But the law must fix punishments; the courts can only enforce them. In this State no such punishment as this is fixed by any law, and therefore the Courts cannot impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father’s estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion, when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children, in the absence of a will, how can any doctrine or principle, or other thing called ‘public policy,’ take away the estate of a child and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory; and the estate cannot be diverted from those persons and given to other persons without violating the statute. There can be no pub-

lic policy which contravenes the positive language of a statute.”¹

So where a wife had been accessory to the murder of her husband, she was still held, under the statute in North Carolina, to be entitled to dower.² So where a son murdered his mother, a mortgage given by him on the real estate he thus inherited was held to be good.³ So where, in Nebraska, a father murdered his daughter in order to inherit her real estate, the Supreme Court of Nebraska at first ruled that the father could not inherit. On reargument, however, the Court reversed its former decision.⁴ In New York a contrary rule has been adopted.⁵ A grandfather had made a will in favor of his grandson. The grandfather afterwards married again, and said he was going to change his will. The grandson, to prevent this, murdered him before the will was changed. The court held, that although the statute so required in words, the grandson could not take under the will. The court so held on the principle that all laws, as well as all contracts, may be controlled in their operation and effect by these general fundamental maxims of the common law; viz., no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own inequity, or to acquire property by his own crime; and a thing which is within the letter of a statute is not within the statute unless it is within the intention of the lawmakers. The first of these principles is a maxim of case not statute law, and on the conceded hypothesis of the supremacy of Statute Law cannot avail to cut down the clear words of a statute giving or withholding a right.⁶ The latter rule mentioned is only

¹ A. M. Carpenter's appeal (Pa. Sup. Ct.), 22 Lawy. Rep. Ann. 145, 148.

² *Owens vs. Owens*, 100 N. C. 242.

³ *Beem vs. Milliken*, 6 Ohio Ct. Rep. 357.

⁴ *Shallenberger vs. Ranson*, 41 Neb. 631, reversing on a reargument the first decision in the same case reported in 31 Neb. 61.

⁵ *Riggs vs. Palmer*, 115 N. Y. 506.

⁶ Austin's *Province of Jurisprudence*, §§ 904, 905; Thibaut, *Introduction to Jurisprudence*, Sec. 46, quoted above.

properly applied to cases of ambiguity. If it is applied to cases where the meaning of the words is clear, it introduces a contradiction in terms.

The Supreme Court of the United States has decided that if the assignee of a policy of life insurance murders the insured, this is sufficient to defeat a recovery by the assignee on the policy against the Insurance Company.¹ The difficulty with this New York rule of construction is exemplified by the facts of another case arising in New York shortly after the *Riggs vs. Palmer* case. The second case illustrates the great uncertainty which must exist when once the fixed principles of statutory construction are departed from. Thus a statute required that a widow should, within one year after the death of her husband, elect in writing whether to take a provision given to her by will, or her dower in the estate. If she did not so elect within that time, she was conclusively presumed to take the provision left her by will, and to waive her dower right. A widow, having neglected to make the election within the time required by the statute, brought suit to be relieved from the bar of the statute on the following grounds. She charged that through the fraud and misstatements of the owner of the land, she had been induced not to make her election to take dower. The fact was that the dower right was much more valuable than the provision made by the will, and she had failed to elect to take dower because of the fraud practised by the devisee of the land. The Court, however, held that the rule of the statute could not thus be changed.²

In the Nebraska case of *Shallenberger vs. Ranson*, reported in 41 Neb. 631, reversing the same case in 31 Neb. 61, the Court says: "The conclusion reached by the reasoning of Judge Earle in *Riggs vs. Palmer* (115 N. Y. 506), as well as that in this case (referring to the first

¹ *Mutual Life Insurance Company vs. Armstrong*, 117 U. S. 591.

² *Aikin vs. Kellogg*, 119 N. Y. 441.

decision reported in 31 Neb. 61, which was in line with the decision in *Riggs vs. Palmer*), was based very largely on that species of judicial legislation above characterized as rational construction.

“If Courts can thus enlarge statutory enactments by construction, it may be that the reference in the majority opinion in *Riggs vs. Palmer* to the provisions of the Civil Law are very apt, as illustrating how, by rational interpretation, our statute should be made to read. It may be proper, it has been said in Kentucky, in giving a construction to a statute to look to the effect and consequences, when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequence, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action.”

The foregoing sufficiently indicates the extreme difficulties of statutory construction. It is not too much to say that the doctrine of *Riggs vs. Palmer* cannot be recognized as valid without introducing into the law an element of uncertainty promotive of more real harm than the inequity of allowing the grandson to take the devise in that particular case. This is true so long as we continue to hold the other fundamental theory of the common law, that the Legislature is supreme, and what it says must be obeyed. Thus, an axiom of the law would be consistently maintained; and the omission in the statute being brought to their attention by such a striking case, the next Legislature would, in all probability, redress the glaring injustice for all future time. As Jervis C. J. says: “Courts of Justice ought not to depart from the plain meaning of words used in Acts of Parliament; when they do so, they make, but do not construe, the law.”¹ Another way out of this difficulty is suggested in Chapter XI, *infra*.

¹ *N. Y., etc. R. R. Co. vs. Queen*, 1 El. & Bl. 858, 864 (Excheq. Ch.).

As showing the difficulties into which such a system of logical interpretation of a statute leads us, may be mentioned the celebrated Fleming Murder Case in New York, occurring shortly afterwards. A Mrs. Fleming was indicted for procuring the death of her mother, Mrs. Bliss, by poison in clam chowder. The alleged motive was the desire to inherit a fund of eighty thousand dollars in which the mother had a life interest, and which, on her death, came to the daughter. Mrs. Fleming, the daughter, being under indictment, needed money for her defence, and applied to the Court, in whose custody the fund was, to have the money paid over to her. Collateral relatives entitled to the fund, in case she was not, objected to the transfer, citing the authority of the *Riggs vs. Palmer* case. The Supreme Court at Special Term¹ refused to turn over the fund to Mrs. Fleming until the indictment had been tried, and the fact of guilt or innocence thus established, and refused to proceed with the issue of guilt in the civil case, so brought by the relatives claiming the fund, on the ground that an acquittal of Mrs. Fleming in that proceeding might prejudice the criminal action of the People against her. This was reversed by the Appellate Division² of the Supreme Court on the ground that Mrs. Fleming was presumed to be innocent until proved guilty, and her civil right to the property could not be defeated or impaired until that time; hence, the temporary refusal to proceed was not warranted.³ The Court pertinently says: "Are the Courts to grant or deny civil rights on a balancing of expediencies?"³ At the subsequent trial of the indictment Mrs. Fleming was acquitted. In consequence, the civil proceeding was never carried further.

The Courts, therefore, are the tribunals which ascertain the existence of certain facts, and thereupon pass

¹ A division of the court held by one judge.

² A division of the court held by four or five judges who sit to hear appeals from the cases tried before one judge.

³ *In re Fleming*, 5 N. Y. App. Div. 190.

upon the question of whether any rule prescribed by the Legislature applies to those facts. If there is a rule so prescribed, which applies, that rule is followed, and the case is decided according to it. If no such rule exists, then the court prescribes the rule.

This is the second chief function of the courts. The first is to construe and apply a rule prescribed by the Legislature. The second is to create a rule, when the Legislature has not provided one, and to apply the rule so enunciated. But how? Under what circumstances does the Court create and prescribe such a rule, and from what source does it obtain the principle which shall govern the case presented? The great distinctive feature of the circumstances under which the courts act in creating a rule of conduct, as distinguished from the circumstances in view of which the Legislature acts, is as follows: The courts never declare a rule except in view of a controversy waged before them, and with reference to a decision of the quarrel moved between the litigants. In the absence of an actual litigation, there is no judgment; in the absence of a judgment, no decision or opinion is rendered, and no rule of conduct is laid down. In contemplating a certain set of facts with reference to the proper decision of a quarrel pending and arising out of them, the courts are compelled to seek for some general principle of justice or equity on which to base a decision. The decision necessarily involves the creation of some new general rule, or the acceptance of some old general rule underlying and involved in the facts of the case. The enunciation of this reason for the decision, postulating as it does the existence and application of such general truth, is in itself a creation and prescription of such rule of conduct. Thus Judge-made Law, leading up as it does from the facts of a special case to a general rule of public policy, is essentially inductive, and not deductive, in its nature.

The remaining point to be considered is this. In those

cases wherein the Legislature has not expressed its views, how does the court obtain the rule which governs the case presented? In determining the rule to be prescribed, the court is governed by the following controlling forces.

First. So far as may be consistent with general principles of public safety, the Court attempts to arrive at a fair and just result in the particular case.

Second. The great mass of existing rules and exceptions established by decided cases, and apparently affecting the decision to be made, are sifted and explained, limited and followed, with a view, upon the principles of logic, equity and political economy applicable, to make those apply which will produce the desired just result in the case in hand.

These former decisions, which are thus consulted, are themselves rules prescribed by former courts in former cases, and were based upon similar considerations. Thus we can trace back the growth of the Common Law of England, and we will find that it is all along based on "The customs of the Realm," using "custom" in the sense of the expression through the courts of the ethical, political and economic ideas held to be properly applicable to control the acts of the members of the social unit, at the times the decisions were rendered. Thus Sir John Nicholl says (3 B. & Ald. 245 N. Ab.) that the first or customary law "is but a reflection or organized reëxpression of the social ethics of a nation." In other words, when the Courts prescribe a law, they do so, in theory at least, by consulting the wisdom of the past, and applying the wisdom of the present; the resultant arrived at, with a due regard to the deliverance of each age, is the decision, the rule of conduct then prescribed.

So far, then, we have ascertained that Statute and Judge-made law are alike in one respect. Both declare and establish in written language rules governing the conduct of men. They differ in the following respects.

The Legislature declares the rule applicable to particu-

lar classes, or combinations of facts to arise in the future, comparatively few in number, and leaves it to the courts to determine when those facts exist, and whether the rule applies. Under this the inquiry is simply: what collocations of facts are included in the language used under the principles of construction. The equity or inequity of the result of applying the rule to the special case is of secondary importance.

The courts declare the rule applicable to classes or combinations of facts, as to which the Legislature has not expressed its will. The inquiry here is, what does the learning of the past, and what does the learning of the present, dictate as the just rule to be applied to these facts.

In the decision of a case, embracing facts included in the purview of a Statute, the order of investigation for the true rule to be applied is —

First. What do the words of the Statute mean, and do they apply. If so, the rule stated applies.

Second. What is the just rule that will produce equity in this case.

This last inquiry is, however, only possible where there is an ambiguity in the wording of the statute, or an uncertainty as to whether some other statute, or some other principle, apparently equally applicable, governs. In such cases the main inquiry is, what has the Legislature said.

In the decision of a case arising under the Common Law, the order of investigation is —

First. What is the general rule which, applied to the facts of this case, would produce equity.

Second. Would the application of such a rule to these facts be opposed in principle to any general rule of public policy framed to bring about the greatest average of just results in the great majority of cases. Unless overruled by the second consideration, the principle of the decision is, "Let justice be done in this case."

In all that has been said there has been implied another difference between Legislative and Judge-made Law. Attention has already been called to it in another connection. It is now proper to deal with it directly. This difference lies in the manner in which the rule of Civil conduct is prescribed by each. Legislative Law establishes principles of public policy *a priori*. Judge-made Law establishes such principles *a posteriori*. The Legislature prescribes a general rule to govern certain classes of facts to arise in future cases; it is essentially prospective and deductive. The Judge, having before him the concrete facts of a particular case, decides the question presented; and, in so doing, evolves as the ground of his decision a principle or rule which he decides should govern that and similar cases. Judge-made Law, though not so in theory, is often in fact retrospective; and, inferring from a particular case to a general rule, is inductive. This distinction is one having far-reaching consequences upon the scientific validity of the principle on which codification rests, and will be referred to again later on.

We have now reached a point at which the intelligent Lay Reader will say, "You have explained that Legislative and Judge-made Law are both written; and you have stated that certain intrinsic differences exist in the application by the Courts of these two classes of writings to the disputes and controversies of men. I can understand the difference in the results stated, but I cannot understand the principles of interpretation which, applied to the same facts, written documents, produce such divergent results." Here lies the clew that leads us safely out of the labyrinth of complexities involved in the discussion of the Code question, to the true conception of the intrinsic difference between the Code and the Case Law, and the scientific impropriety, not to say impossibility, of codifying the whole law.

The crucial point is, that the same principles of inter-

pretation of written language are not applied to the two classes of writings in question. On the contrary, no one ever thinks of conceiving a legal principle, established by a Common Law decision, as being limited to an accurate interpretation or construction of the language used by the Judge in expressing or defining it. All decisions of Judges are construed as limited, qualified, explained and amplified by the particular facts of the particular case under discussion. So much is this the case, that the ordinary rules for the interpretation and construction of written language above set forth in detail do not, in any sense, apply. Slight attention is paid to the vehicle or mode of expression; attention is directed mainly to the facts, and the decision on the facts. The rule of law, evolved by principles of reason and common sense from those two elements of the reported case, overrides all questions of construction, or of interpretation of the judicial language,—the vehicle in which it is conveyed. This rule, so established, or inferred, or abstracted from the written report, may be properly expressed in as many different ways as the infinite diversities of individual minds and styles allow, and yet remain the "Rule in Shelley's case," or otherwise, as the case may be. This truth was mentioned in Chapter I (p. 14), and examples of its operation were given; and attention was again called to it in Chapter V. It is, however, a truth of such importance that it is necessary to again insist upon it in the orderly development of the argument. We are fain to ask the indulgence of the reader while a few authorities are cited on this head.

Thus Chief Justice Marshall says: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question

actually before the Court is investigated with care and considered in its full extent; other principles, which may serve to illustrate, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.”¹ In *Pass vs. McRae*, 36 Miss. 148, the court, by Harris J. said: “Such is the flexibility of language, and even of sentences disconnected from their context, as well as the special state of facts to which they have been applied, that in courts it has become a settled rule that all adjudications are to be considered only in connection with, and as explained by, and limited to, the state of circumstances appearing in the record.” And the writer of the article on “stare decisis,” in 23 Am. & Eng. Encyclopædia of law, says: “The language used in the opinion of the court must be construed in the light of the circumstances connected with each case. Its influence and weight as a precedent is also largely dependent upon them. The language in argument, or findings, may have a restricted or enlarged interpretation by reason of its connection with a specific statement of facts.” (Ibid., p. 23.)

The above citations to authority in support of an elementary, every-day truth are only inserted because the argument of the codifiers to be afterwards dealt with (see Chapter VIII), that since all law is written, what can be expressed in a report can be expressed in a statute, overlooks this truth, and implies its negation.

That the rules of construction of written language are applied to the interpretation of all writings except the written opinions of courts in reported cases, is an unquestioned principle of law. This truth belongs to that class of generic truths implied in more obvious specific facts, which remain, as it were, hid from observation, because always impliedly assumed, yet seldom clearly expressed.

¹ *Cohens vs. Virginia*, 6 Wheat. (U. S.) 399. See also Curtis J. in *Carroll vs. Carroll*, 16 How. (U. S.) 287; and Caruthers J. in *Louisville etc. R. R. Co. vs. Davidson County Court*, 1 Sneed (Tenn.), 695. See also *Lucas vs. Tippecanoe County*, 44 Ind. 541.

By its very universality, the law of gravitation long escaped observation; and this patent truth is writ in characters so large as to escape attention. Lawyers, who, as law students, remember the slow and painful growth of their clear conceptions of how to extract the *holding* and *dicta* from a common law decision, will also recollect that the facility finally attained was reached rather through the study and contemplation of the actual examples of such extraction contained in later cases limiting, qualifying or explaining former decisions, than through any clear enunciation by teacher or text-book of this fundamental doctrine.

For, curiously enough, this fundamental distinction between written decisions and all other writings, though everywhere implied, and in some places expressed, is nowhere, in the ordinary student's text-books, pointed out and demarcated as the broadest distinction and most important difference between legislative and judiciary law. Austin himself saw and enforced the distinction. Thus he says:—

“903. I now proceed to show that the principles of construction or interpretation of rules of these two classes is essentially diverse. The primary index to the intention with which a statute was made, or the primary guide for the interpretation of a statute, is the literal and grammatical sense of the words in which it is expressed. It is true that if the literal meaning is indeterminate or ambiguous, the interpreter may seek in other indicia the intention of the Legislature; for example, in the reason of the statute as indicated by the statute itself, in the reason of the statute as indicated by its history, the mischief to be remedied, or in the clear enactments of other statutes made by the same Legislature *in pari materia*.

“904. But if he be able to discover in the literal meaning of the words any definite and possible purpose, he commonly ought to abide by the literal meaning of the words, though it vary from the other indices to the actual

intention of the Legislature. For, the statute being framed for the very purpose of laying down a rule to guide the tribunals, it must be assumed that the terms in which the law is expressed were carefully measured. If the interpreter might *ad libitum* desert the literal meaning, it would be impossible for the legislator to express his meaning in terms which could certainly attain their end.

“905. But the primary index to a rule created by a judicial decision is not the grammatical sense of the very words or terms in which the judicial decision was pronounced by the legislating judge; still less is it the grammatical sense of the very words or terms in which the legislating judge uttered his general propositions. As taken apart or by themselves, and as taken with their literal meaning, the terms of his entire decision, and *a fortiori*, the terms of his general propositions, are scarcely a clew to the rule which his decision implies. In order to an induction of the rule which his decision implies, their literal meaning should be modified by the other indices to the rule, from the very commencement of the process. From the very beginning of our endeavor to extricate the implicated rule, we should construe or interpret the terms of his entire decision and discourse by the nature of the case which he decided; and we should construe or interpret the terms of his general or abstract propositions by the various specific peculiarities which the decision and case must comprise.

“For it is likely that the terms of his decision were not very scrupulously measured, or were far less carefully measured than those of a statute, in so much that the reasons for his decision, which their literal meaning may indicate, probably tally imperfectly with the reasons upon which it was founded. And his general propositions are impertinent, and ought to have no authority, unless they be imported necessarily, and therefore were provoked naturally by his judicial decision of the very case before

him. It is even unnecessary that the general grounds should be expressed by the judge. In which case, the only index is the specialties of the decision as construed by or receiving light from the nature of the case decided. An inference *ex rei natura*.”¹

Again, Austin, in explaining the differences between statute or code law and judiciary law, himself says that the commonest rule of interpretation, that the law ceases with the reason for it, “applies solely to precedents and does not apply to statutory law.”²

It follows, if this be true, that the decision in *Riggs vs. Palmer*, the New York case above cited, is a decision exactly in contravention of a fundamental principle of statutory construction. That case applies to a statute, a method of construction, which is only valid as applied to a common law decision. On this point Austin says:—

“914. Again, one of their commonest rules of interpretation — *cessante ratione legis cessat lex ipsa* — applies solely to precedents, and does not apply to statute law. For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator, which the judge should not take upon himself to set aside, though he may think it desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law left.

“Professor Thibaut of Heidelberg, in his interpretation of the Roman law, was the first, I believe, who saw distinctly that the rules of interpretation which will apply to the Edictal Constitutions contained in Justinian’s compilations have little or no applicability to those judicial decisions, or to those solutions of cases that are

¹ Austin’s Province of Jurisprudence, §§ 903, 904, 905.

² *Ibid.*, § 910.

analogous to judicial decisions, which the same compilations also embrace.”¹

Yet, although Austin clearly saw this difference in the rules of interpretation, he did not see the important bearing of this difference on the theory of codification. And Professor Holland and Mr. Field, and other Advocates of Codification, have failed to note its bearing on their favorite argument.

In this difference, in the manner in which the meaning of the authors of such compositions is sought for and obtained, consists the fundamental distinction between Code and Case Law. And this distinction is so fundamental, that he who argues that all law is written, and that what is written in the reports may likewise be written in a statute, must either deny the existence of this difference or must convict himself of using, in his argument, the fallacy of the ambiguous middle; must convict himself of using the words “written law” in two senses, and of arguing from an assumed identity of character in the two kinds of writings, an identity which does not exist.

In this distinction, too, lies the formative principle that has rendered possible the phenomenon known as *the growth of the common law*. Advocates of the Common Law, as distinguished from Code Law, are never tired of expatiating on the wonderful power and facility of its growth; on the ability, as it were, of the organism to properly respond to changes occurring in its environment — properties which the Common Law has in all ages exhibited. And the champions of the Code, while giving a grudging assent to these claims, assert that this very capacity for growth but exemplifies the ambiguity and uncertainty in the law declared under such a system, and clearly exhibits the greater benefits of certainty and stability resulting from the promulgation of a Code. Had the early common law judges felt compelled, when cited

¹ Austin's Province of Jurisprudence, § 914.

to a former opinion, to decide the case in hand in obedience to the construction of such opinion obtained by the ordinary rules of interpretation of written language, the interaction of such a principle of construction of the effect of prior decisions together with the principle of "Stare decisis" (to stand by the decisions, to follow decisions already made in like cases), would have rendered the growth of the common law an impossibility. The resulting effect on the merit of substantive law itself would have been even worse than the promulgation of a well-drawn code. For in that event unguarded expressions of legal rules to be applied under certain circumstances, made by a judge with reference to the facts of a particular case before him, would have become rules of conduct to be blindly applied to classes of facts not then in mind, nor intended to be covered. By establishing the rule that in weighing the application and effect of the former decisions on the case in hand, the express language of the decision must not be regarded, but such language must be construed with reference to the detailed facts of the special case then under investigation and discussion, the early Common Lawyers laid the corner stone of that great system of jurisprudence,—a system which some of its more ardent advocates delight to style: "The perfection of human reason."

TITLE II

THE DIFFERENCE IS INTRINSIC, NOT ACCIDENTAL

THE COMMON LAW DEALS WITH THE ACTUAL COMBINATIONS OF FACTS. THE CODE DEALS WITH ABSTRACTIONS FROM THE FACTS

We have seen how this distinction in the Rules of Construction applied to these classes of writings arose, and exists, as a historical fact. It remains to consider whether the difference thus established occurred through fortuitous circumstances, or may be referred to a still

deeper fundamental distinction in nature between the forms of written language we are discussing. On consideration, it will appear that this difference is not due to chance, but rather to a difference in the intrinsic nature of the writings, and to a difference in the occasion and means of their promulgation. The theory and scope of the creation of law, by the case law system, is a process of induction. The first and most important investigation is into the facts of the particular case—facts which have already happened and are now presented for observation and decision. Given the facts, the attempt is to decide the case so that justice shall result. If in a decision so made there is implied a general principle or rule of conduct adapted to control under similar circumstances, such principle is said to be the rule established by the case. And this rule is in fact a principle or general truth, discovered by induction from a number of special cases or combinations of fact. While in theory this rule has always been known, and has always been a part of the law, in practice it may be an entire novelty, and a surprise to the profession at large. This way of looking at the facts is, it is true, opposed to some authorities. Some lawyer has somewhere incisively said that law as presented in its actual operation in the courts is less an inductive search for general truths than a deductive application of old principles to new combinations of fact, the dispute being mainly confined to the minor premise. In other words, law, in actual practice, is less a dispute over the existence of principles than a dispute over the application of them. That this presentation of the facts, though true, does not militate against our contention that the common law is always an inductive science will become evident on disentangling the evidence. Assume a state of facts arising in any particular case in any comparatively ancient branch or province of the law wherein numerous decisions based on almost all possible particular combinations of material

facts have established all the general principles governing such cases. In such a case the inquiry as to what the decision shall be resolves itself more into a question of which of two or more general principles already established, and more or less conflicting on the new facts of the case, would produce equity than into a question of what new principle shall be discovered and applied. And that, in the great majority of cases, this method of arriving at a decision of a particular case by deduction from general principles already known is the usual process among judges and lawyers is not surprising. For the great majority of cases are not new, and do not need the establishment of some new principle or rule of conduct as a necessary corollary from the decision made. Even in these instances, however, the true inductive nature of a common law decision is manifest; for the selection of the general rule which shall be applied to the facts of the given case is not dependent upon a hard and fast interpretation of the language in which such general truth has been expressed, as including or not including the case in question, but rather upon a process of classing the individual case by its facts with cases of like combinations of fact, and so bringing it under a general principle which, when applied to the facts, will produce substantial justice. The process, therefore, is as much inductive in its nature as when a naturalist classes some novel kind of animal as belonging to an already known group or *genus* by reason of certain similar underlying attributes.

And when we pass from familiar combinations of social facts to those new developments of social activities heretofore unknown, with the solution of the grave political and economic questions arising out of which the common law is even now grappling, we see at once the clearly inductive nature of its growth, both past and present. A reference to the new development of the law in regard to Trade combinations, Trusts and Corporations—we refer especially to that class of decisions

which in the interests of justice are beginning to break through the shell of the legal entity of the corporation itself to get at the result of the material existence of the stockholders as individuals beyond¹—is sufficient to establish the truth that the Case Law as it exists is unquestionably an Inductive Science.

The facts of the Case Law System are preëminently the facts of each particular case. These are the attributes, the *data* with which it deals and whereby it classifies the subject-matter investigated under one head or another. From such data the common law, as a science, classifies these organisms, and decides each case according to the principles of right reason established in the community. In other words, the common law is a concrete science of applied ethics, and is a purely inductive science developed from the application of human reason to social facts.

It happens that the reverse is true of a statute, and hence of a code system. The statute does not deal with facts as they occur in daily life, but with abstractions from those facts. The rule of the statute is applied or not, according to the presence or absence of a few generalized facts, which never in themselves constitute the whole of any combination of facts which the rule is called upon to decide in a special case. And what is true of a statute in this case is especially true of a code. The code introduces into a legal system an entirely new and novel factor. As the only excuse for the existence of a code is, on the one hand, its certainty, and, on the other hand, its generality, it is evident that the code proper should neither be a bald statement of general principles already established, as that an infant's contract is voidable, except for necessities; nor yet a detailed statement in connection with any rule or its exception of all its possible or probable applications to special facts, as

¹ Cf. *Anthony vs. Glucose Co.*, 146 N. Y. 407, 413; *Seymour vs. Spring Forest Cemetery*, 144 N. Y. 333, 340.

that cuff buttons worth fifty (£50) pounds would be necessities for a millionaire's son, and not for the son of a book-keeper on a yearly salary of one hundred and twenty-five (£125) pounds a year. In the former case there would be no certainty, and we would have to go back to the principles of the common law in order to render a decision in any special case. This would render the promulgation of such a code useless, or worse than useless — useless so far as respects any actual benefit to be derived from its application to the known facts of the past and present; worse than useless, in so far as it would prevent (by implication) the establishment of new principles and exceptions thereto to govern the unknown possibilities of existence, and the combinations of facts, to arise in the future. In the latter case, we would have arrived at certainty in regard to the decision of the special case mentioned; but that certainty would be obtained at a cost entirely disproportionate to its advantages, and yet not be equal in value to a similar certainty now existing under the common law. A code formed on these lines would be nothing more or less than a Digest having the authority of legislative sanction.

If such a code was made very full so as to contain all the combinations of facts passed upon by the decided cases and the decisions made, it would not be any more certain than the Common Law Reports; and, in omitting the argument and illustrations supporting the decision would omit for the sake of brevity the very life and soul of the product. The resulting abstract statement would be so misleading for all purposes of guidance in deciding like cases, that the gain in brevity would have been obtained at a sacrifice of practically all else. And in so much as such a code approached nearer the form and substance of a modern digest, just so much would its increasing brevity breed increasing uncertainty and possibilities of misconstruction. To fully appreciate this fact, let those who have studied and relied on Digests, even the best of them,

pause for a moment and consider what abundance of mischief would be wrought in our substantive law were any one of them suddenly crystallized into a statute, and the courts compelled to apply its language, under the laws of statutory construction, to the decision of future litigations. And in so far as such a code attempts to solve future possibilities of litigation, it would substitute the learning of one man, or body of men, — the code commissioners, — applied casually to the solution of a problem without assistance from any interested party, for the learning of a full Bench of Judges applied to the special case in hand with the advantage of assistance from lawyers employed to advance all possible arguments affecting the decision to be made.

A Code, then, such as is here referred to, and in fact the only kind of a code which the intelligent advocate of Codification proposes, must be a written expression of the principles of the law with their exceptions so formulated as not, on the one hand, to be so general in statement as to furnish no guidance in the solution of special cases; and, on the other hand, not to be so specific as to become misleading in its application to other like cases, and so lose all advantage of conciseness.

From this it will be seen that the codifier must map out his field deductively. Must first select his broad principles not as principles suspended in mid air — but as expressly or impliedly limited in their application by connection with certain specially abstracted facts. The Field Civil Code is an example of this. Thus we find that Mr. Field maps out his province into four great divisions as follows : —

“ Division First, Persons. Division Second, Property. Division Third, Obligations. Division Fourth, General Provisions applicable to persons, property, and obligations, or as to two of these subjects.”

Again, he maps out Division Third into : —

“ Part I. Obligations in General. Part II. Contracts.

Part III. Obligations imposed by law. Part IV. Obligations arising from particular transactions."

And Part II into : —

"Title I. Nature of Contract. Title II. Manner of creating contracts. Title III. Interpretation of Contracts. Title IV. Unlawful Contracts. Title V. Extinction of Contracts."

And under Title IV we have (Sections 827–836) code sections which have been set out in full above as actual examples of that generality of statement of principles and facts which the author deems sufficient to constitute a good codification of that branch of the law. (See Chapter VI, p. 189.) The merits or demerits of this classification, and mode of statement, are not intended to be here considered. These quotations have been made as fair samples of the mode of expressing law through the medium of a Code, as compared with the mode of expression through the medium of Case Law Reports. It is clear that the whole process is deductive, not inductive. The general rule is stated in connection with earmarks of facts, distinguishing the class of objects, or cases, to which it is to be applied.

After the promulgation of this code, when any combination of facts is presented for decision in any special case, and the general facts above stated exist, with or without other complications, the court cannot proceed to inquire, what does justice dictate under all circumstances in the light of reason and common sense, is there an old rule to fit the case, or must a new one be established ; but must proceed by deduction to a decision substantially as follows : —

"Section 833 of the code says all contracts of class A are illegal and void. Class A includes all contracts in restraint of trade excepting two cases. The contract in this case is a contract in restraint of trade, and is not included in either exception. Therefore judgment must be for the defendant."

Under the Case Law System the rule of law is derived from, and is expressed with relation to, the actual combination of facts in the cases as they arise; the actual phenomena with which the science deals; the facts which the system acts upon, and which react upon it.

Under the Code System the rule prescribed deals with something which is never found in actual life. The Code rule deals with a certain combination of facts which never occurs solely, or alone, in the outside world. The Code rule deals, therefore, with an abstraction of the human mind, and not with the facts as they exist. And, in this respect, the science of applied ethics promulgated in a code differs in its methods from the method of every other science whereby man attempts to attain a knowledge of nature, and to conquer its difficulties.

This difference in fact that the Case Law deals with the actual phenomena, while the Code Law deals with human abstractions from the phenomena as the counters for its reasoning, is the fundamental distinction between the two systems.

A second and not less important distinction in fact is yet to be noted. Referring now to the three codes, extracts from which are contained in Chapter VI, we may note that while the different sections state a rule of law, there is nowhere stated in them a reason for the rule. Thus section 833 of the Field Code states a rule of law and a meagre combination of facts to which it must be applied whenever those facts exist; but it does not state the reason for the rule. It does not state why this rule is promulgated; it does not state why this rule applies to the facts mentioned; and it does not state why the particular classes of facts mentioned in the sections 834 and 835 are excepted from the operation of the rule.

Herein lies a further fundamental distinction in fact between the manner of expressing law in a code and in a case, which constitutes a part of the intrinsic difference on which is founded the possibility of applying different rules of construction to these two classes of writings.

The truths here insisted upon are so important that we restate the argument.

In a statement of law in a statute or a code we have —

First. A rule.

Second. Specially abstracted facts to which such rule is applied.

Under this system the courts, first, ascertain the existence of these special facts; second, apply the rule laid down.

In a statement of the law in a reported case we have —

First. The full statement of all the facts of the special case.

Second. Discussion of the reasons and arguments sustaining the rule that should govern the decision on the facts.

Third. The application of the rule, and the reason for its application.

Fourth. The decision made on the facts and law.

The last may be right, though the second and third be erroneous.

Under this latter system, the courts, first, ascertain the entire combination of facts; second, the reasons for the existence or application of the rule; and, third, apply the rule so ascertained.

The existence in the Common Law Report of this full statement of the facts, and the full statement of the reasons for the rule and for its application, constitute the intrinsic differences in fact between the Case Law System and the Code System. And these differences have been the cause of the distinction between the rules of interpretation of written language formulated and applied to these two classes of writings. It will be noted that the rules of statutory construction are applied in the English Law to other writings besides statutes; namely, to contracts and to wills. And we may here note that there is a kinship between contracts and wills and statutory law, in that the body of these writings

never contains a full statement of all the surrounding facts in view of which they are made, nor a full statement of the reasons and arguments in view of which the parties enter into the covenants. Sometimes a part of this defect in contract writings — the absence of a statement of the surrounding facts — is attempted to be done away with by elaborate recitals. When this is well done, these recitals become a great aid to the proper interpretation of the writings by the court.

The intrinsic difference between law as expressed in writing in a Statute or Code and as expressed in writing in a Common Law Case is, therefore, a difference in the subject-matter contained in the writing.

The fundamental distinction resolves itself into two additional qualities possessed by the Common Law Report, and not contained in a Code Section.

1. *The full expression of the arguments and reasons: (a) for the existence of a rule as a rule; (b) for its application to the special facts presented.*

2. *A full statement of all the facts and circumstances in view of which: (a) the rule is established; (b) the rule is applied.*

It is difficult to say which of these qualities is the more important of the two, as constituting this intrinsic difference; and it is unnecessary to determine their relative importance. For, as shown above, a Code could never make its rules and exceptions depend upon the elaborate detail of combinations of fact which exist in the Case Law System. That the omission of facts from the combination of facts specified in a Code as the test on which the rule depends is a source of weakness, is apparent. Supposing that the code did express the reasons for the rule, and expressed them rather fully, this defect, arising from the mere abstraction and the statement of a few facts as the basis for the rule and the reasons for its existence, would still exist. For, in so far as the detail facts are omitted, the reasons for the rule, or for its appli-

cation, may be erroneous, or may be erroneously applied. A common experience in looking up the law in text-books will exemplify this. Thus we often find that the rule stated in the text-book and the reasons given for it have an altogether different force, proportion and application, when viewed in the light of an actual study of the decisions cited than was at first suspected. And we find that our first interpretation, based only on the text-book, was either too broad, or too narrow, or in error in some other way. Usually this error arises from some misconception of the point of view. And so, in so far as the full statement of the special combinations of facts, in view of which the rule is promulgated, and with which it has to deal, and in view of which the reason for it was elaborated, is curtailed, liability to error in interpreting the rule and in interpreting the reason for it and for its application to special disputes creeps in.

SUMMARY

Finally, we may summarize the foregoing remarks as follows: *The fundamental intrinsic differences between the two modes of expressing substantive law are as follows:—*

A CODE CONTAINS

1. *A statement of the rule.*
2. *A statement of a few selected facts to which it must be applied.*

A COMMON LAW REPORT CONTAINS

1. *A statement of the facts in combination as they occur.*
2. *A statement of a rule.*
3. *A statement of the reasons for the existence of the rule and for its application to that combination of facts.*

These *intrinsic differences* rendered it possible for the early judges to refuse to construe prior decisions in the way they construed all other writings, without at the same time reducing all law to a discretionary confusion. The

rules of statutory construction are absolutely necessary to the proper interpretation of the writings in question. Without them, all would be chaos, and uncertainty. This because such writings have not in their body, as it were, the full expression of the facts, and the reasons based upon the facts, for the conclusions stated in them. The Common Law Report has within itself the corrective principles. The actual case presented for decision is set out with all its attributes; namely, its entire combination of facts, and the arguments based on them. The question then resolves itself into an application of the science of applied ethics to the solution of the particular problem involved in this combination of facts. The actual phenomenon, or experiment in the social field, being given as it exists, science can by right reason solve the problem.

In these crucial distinctions lies the scientific reason why the common law and the statute law early diverged from each other in the rules of interpretation applied to each. And here also lies the scientific warrant for that curious, and apparently anomalous and false, old classification made by Blackstone; and by the old lawyers before him. When this distinction was first established, probably no rule of law was better known than the rule, that the Rules of Interpretation of written language do not apply to the opinions of a court. By degrees it became easier to put opinions of a court in a class by themselves, and to give them a name. No better way to keep alive the fact of the distinction could have been suggested than to give them a class name, contrary to the fact but consistent with the legal theory. And so we may suspect probably arose the classification of law into *Lex Scripta*, and *Lex non Scripta*.

Throughout the whole course of the evolution of the common law the forces of conservatism and liberalism at work in shaping its growth have been sustained, the former by the great principle of, "stand by the decisions," the latter by the great principle of, "the rule

ceases with the reason for it." On the one hand, the conservative spirit has appealed to the letter of former decisions on similar facts, and denied the existence of any necessity for an exception to the rule then established. On the other hand, the liberal tendency has appealed to the reason for the decisions on the facts in former cases, and claimed an exception to the rule was proper in the case in hand, in that the reason no longer existed because of some change in the combination of facts.

And so the fact that the written Reports of adjudged cases or Judge-made Law contained not only the decision but the facts, and also the reason and argument for the decision on the facts, has been of incalculable benefit to the progress of the science. In fact, so thoroughly has the principle that a judgment must be founded on sound reason and common sense become a part of the common law, that many hundreds of cases have been overruled by later decisions for violation of this cardinal principle. And no less a decision than the last authoritative announcement of the Supreme Court of the United States declaring that the government can make anything it chooses to call a dollar "legal tender" for the solution of prior contracts calling for payment in dollars, must under the force of this great overshadowing principle be finally overruled. It would indeed be a reproach to any system of jurisprudence if such a decision as that set out in "The Legal Tender Cases" of 1876 could possibly remain the law for all succeeding ages.¹ In extreme cases of outrageous error, therefore, the Common Law has within itself a corrective force. This force which thus, in some instances, triumphs over all else, is simply the force of reason.² The influence of the

¹ See the able dissenting opinion of Field J. in *Legal Tender cases*, 12 Wall. 457, 649, 655.

² Our English cousins, though at first inclined to overrule cases not founded on sound reason, have lately developed the strict doctrine of absolute adherence to precedent (Pollock's *First Book of Jurisprudence*, 300, 311, 316, 319.) The American doctrine is more liberal. The Supreme

rule of precedent is, however, so strong that in the great majority of instances a court, especially the court of last appeal, feels bound to follow a former decision although if the case were presented anew a different conclusion would be reached. And this fact renders necessary in some instances the interposition of statutory law to effect a reform in the rule.

To attain a true knowledge of men and things, to lay down principles which when applied to our conditions will produce substantial justice, — relative not absolute justice, — is the constant aim of the Common Law. To effect this in each individual case there is an appeal to reason for the rule, and this appeal to reason is the chief merit of the Case Law as a System of Jurisprudence.

Court of the United States, and the highest Courts of the different States, now and then overrule earlier decisions.

CHAPTER VIII

THE IDEAS AND ARGUMENTS OF THE
CODIFIERS

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And now having studied the question at first hand, let us resort to the literature on the subject. Let us sit at the feet of the High Priests and weigh their words. Even as far back as the time of Bacon,¹ and again in that of Hale, there was felt the want of a systematic, logical arrangement in the body of the law.

THE AGITATION FOR AND AGAINST CODIFICATION

But the first writer of prominence to urge the necessity of codification, was Jeremy Bentham.² He was followed by the justly celebrated John Austin, and later by the still living Professor Holland and Professor Amos, Sir James Fitzjames Stephen and Sir Frederick Pollock. Until this century few lawyers engaged in the actual practice of the law were in favor of Codification. Now, among many others, may be named, in England, F. Vaughn Hawkins,³ Sir James Fitzjames Stephen ;⁴ and, in

¹ Dillon's Lectures on Jurisprudence, p. 273.

² The Proposed Codification of the Common Law, James C. Carter (pamphlet), p. 70.

³ Juridical Society Papers, 110.

⁴ 6 Irish Law Times, 572.

this country, Chancellor Walworth, David Dudley Field, and Ex-Judge John F. Dillon.

Opposed to the theory of codification stand the majority of the English and American Bars. Among those who have best expressed the arguments against codification may be named W. M. Best,¹ and Sir J. P. Wilde² in England, United States Attorney General Legaré, and Mr. James C. Carter in this country.³

THE TWO DISTINCT QUESTIONS INVOLVED

The question of codification is said to resolve itself into two distinct propositions.⁴

First. Is the theory of codification sound? Is a good code a better form in which to express the law than a case system?

Second. Is the particular code under discussion a good one? Is it fit to replace the case law?

The latter question is complicated by others. Where, by the accident of conquest, several systems of law are found existing side by side, as was the case in France and Germany, Austria, Italy and India—Codification, however unsound scientifically, may be expedient. Under such circumstances the existing conditions must be destroyed and the resulting uniformity arrived at by calling in the aid of the Supreme Power of the State, namely, the legislating power. Courts, in theory at least, exist to declare, and to apply the law; not to make it. Hence, the reconciling of coequal and coexisting but divergent customs, is beyond their powers.

It is probable that even in such a case of competing systems of law, the necessity of a Code has been erroneously assumed. Assuming that any one of the conflict-

¹ 1 Juridical Society Papers, 209.

² 38 Law Times, 518. He favors, however, a Code Digest.

³ See the two able papers of Mr. Carter, *The Proposed Codification of the Common Law and The Provinces of the Written and Unwritten Law.*

⁴ Austin's *Province of Jurisprudence*, § 948.

ing systems is a good and complete system in itself, that portion of it which should properly be expressed in Statutory Form (see Chapter X), should be so expressed; while the portion properly left to the development of its Case Law, could be so left by enacting a statute, that all decisions should be made according to the principles of the system of law so made paramount. (See Chapter X.)

A notable example in our own jurisprudence of the inherent weakness of courts in this respect is the United States Supreme Court. This court is compelled, whenever the construction of a State statute or a land case, is concerned, to declare the law according to the law as declared by the Supreme Court of the State where the case arises, or the land lies. Hence its decisions on such questions may be, and sometimes are, in direct conflict.¹

If a code established under such conditions turned out to be a thorough success, such result would not conclusively prove that codification of the law of a country, as of England, in which but one system of law exists, is the proper remedy for existing defects.² On the other hand, if the results of codification in countries so circumstanced, have not imparted to the law that certainty and fixity which is the object and the claim of codification; and, if under the law of such countries, the capacity of the advocate to predict the decision that will be made by the Courts on the facts of any particular quarrel, is not superior to, or equal to, a similar power of prediction now existing in the English system; it follows that codification of the English law is thereby proved to be a doubtful and uncertain expedient. Better to bear the ills we have, than to fly to those we know not of. He who advocates a change has the burden of proof upon him.

All admit that there are grave defects of uncertainty

¹ *Burgess vs. Seligman*, 107 U. S. 20, 23. But where a question of common law is involved, — *i.e.* unwritten law, — this Court follows its own views. *Swift vs. Tyson*, 16 Pet. 1, 19.

² *Amos' Science of Law*, pp. 379, 385.

and obscurity in the English Law; and all admit similar defects in the law of all countries having Codes. Whether the amount of certainty in administration — in other words, the power of prediction — is as great under one system, as under the other, is a question on which authorities differ. Of course those opposed to Codification claim greater merits in the English Law, than can be found in that of France or Germany, and *vice versa*.

NO CODE YET WRITTEN SUITS THE SCIENTIFIC CODIFIERS

The more scientific upholders of codification, Austin,¹ Hawkins,² Pollock, Amos³ and Holland,⁴ seem to agree that no code yet written is a true code — is such a code as it ought to be. Thus Austin calls attention to the grave defects of the French Code and of the German Code.⁵ Professor Amos has testified to the comparative uncertainty of the French law as compared with the English,⁶ and has warned us against concluding that the results of the Indian Code shed any light on the question of Codification in England.⁷ Mr. Whitley Stokes, in his compilation of the Indian Codes, criticises some of them very severely, and then apologizes for his criticisms.⁸ Sir Frederick Pollock, Editor of the *Law Quarterly Review*, and an advocate of Codification, says that the Indian Codes “are the best models yet produced; at the same time they are by no means faultless. It is easy to see various points in which they are capable of improvement, though it must be remembered that for the purposes of Indian administration, labor and ingenuity would not im-

¹ 2 *Province of Jurisprudence*, §§ 953, 959.

² 3 *Juridical Society Papers*, 110.

³ *An English Code*, Sheldon Amos.

⁴ *Forms of Law*, Holland.

⁵ 2 *Province of Jurisprudence*, §§ 953, 959.

⁶ *An English Code*, Sheldon Amos, p. 125.

⁷ *Ibid.*, p. 36.

⁸ In *Anglo-Indian Codes*, General Introduction, p. xxviii.

probably be thrown away in working them up to the refined exactness which is an English lawyer's ideal."¹

Mr. Whitley Stokes thus criticises the Indian Contract Act: "Unfortunately it had been sent out to India in a very crude form; it never underwent the patient, penetrating revision by a skilled draftsman necessary in the case of such a measure; and though the Indian Judges have loyally endeavored to give effect to the provisions, these are so incomplete and sometimes so inaccurately worded that the time seems to have come for repealing the act, and reënacting it with the amendments in arrangement, wording and substance, suggested by the cases decided upon it during the last fourteen years."² Sir Frederick Pollock, while commending this very contract act, on which the above drastic criticism is made by a friendly critic, would not substitute it for the English Case Law until after careful criticism, and revision. He says: "I do not say that we could adopt the Contract Act or even most of it as it stands. Careful criticism and revision would be needful, and a good deal of development in some places."³

FIELD'S CALIFORNIA CIVIL CODE

On the other hand, our practical Codifier, Mr. David Dudley Field, wrote a Civil Code which he, and many others, deemed good enough to replace the Common Law System in New York. Substantially this same Code was enacted some years ago (1873) in California. The result has apparently not been as Mr. Field anticipated. The law of California is no more to be found in one book — "the covers of one volume" — than it was before.

CRITICISMS OF CODIFIERS ON FIELD'S CIVIL CODE

Professor Pomeroy of the University of California (certainly a competent critic), and an adherent of the prin-

¹ A Digest of the Law of Partnership, 3d ed., Introduction, p. xi.

² 1 Anglo-Indian Codes, p. 534.

³ Pollock's Essays on Jurisprudence, p. 93.

ciple of codification, discussed in 1884 the effect upon California law of this code. This, after twelve years of its existence. He draws attention to its defects, ambiguities, contradictions and uncertainties ; and to its absolute failure, to make the law plain and certain ; and says, "It seems to me that reasoning and experience alike show that a mere partial civil code, a code which only professes to contain elementary definitions, the most general doctrines and a few special rules, leaving the great mass of practical rules and doctrines still existing as a part of the common law and equity by its side, is only an additional source of uncertainty and confusion introduced into the jurisprudence of a State. As this description applies in the most direct manner to the Civil Code of California, the inquiry remains, how far may this uncertainty and confusion be lessened or removed by its judicial interpretation." ¹ And he further says : "The only mode by which its imperfections may be obviated and the benefits of codification may be partially realized from it, is, I earnestly submit, *by adopting and strictly enforcing this uniform system of interpretation, that all its provisions are to be regarded as simply declaratory of the previous common law and equitable doctrines and rules, except where the intent to depart from these doctrines and rules clearly appears from the unequivocal language of the text.*" ²

Here then, after twelve years of experiment, this Code, which was to do away with all other law books, has merely added one more statute to the list to increase the confusion. And the best way to avoid its most pernicious consequences is urged to be, to treat it as though it were not. And this is the deliberate judgment of a man favorably disposed towards codification. ³

¹ Pomeroy on "Civil Code of California," p. 58. 3 & 4 West Coast Reporter.

² Ibid., p. 69. 3 & 4 West Coast Reporter.

³ Ibid., p. 68. 3 & 4 West Coast Reporter.

Sir Frederick Pollock says of Field's proposed New York Civil Code (substantially the same as the California Civil Code): "I feel bound to add that for my own part, so far as I have been able to form an opinion of the draft Civil Code of New York, it is a decidedly unfavorable one. I am disposed to agree with the Bar Association of New York in thinking the present state of the law better than that code or anything much like it; but I do not agree that this proves codification to be in itself undesirable or impracticable."

Mr. John T. Doyle, a member of the California Bar, writing to Mr. Albert Matthews, Chairman of the Code Committee of the Bar Association of New York, April 22, 1882 (Pamphlet Report of Committee, October 10, 1882, p. 27) says: "You ask if the enactment of the codes (the California Codes) has diminished the labors of the profession. I should say decidedly not. It does not do to refer to a section of the code as determining the case, for every form of words is susceptible of more than one interpretation, and no two cases are exactly alike. The code itself has to be interpreted, 'and there begins new matter.' The old rule must be ascertained before you proceed to consider whether the code designed to change it. Again, how many old rules are repealed by implication, and how many and what are not?" A New York lawyer reading this might easily understand it to refer to the New York Code of Civil Procedure — that wonderful example of a false reform. A word on this code before passing on.

FIELD'S NEW YORK CODE OF CIVIL PROCEDURE

Mr. Field's Code of Civil Procedure was adopted in New York in 1848. It had originally 391 sections. It was to revolutionize and simplify practice. Of course procedure is a branch of the law, which, if the theory of codification be sound, is of all others the portion that should be codified. The certainty of procedure is its chief merit. Yet the champions of Codification in New

York State are unable to "point with pride" to the results of that achievement. Mr. Robert L. Fowler in his pamphlet on Codification, writing in support of the Field Civil Code and in answer to Mr. James C. Carter's attacks upon it in his paper on The proposed Codification of the Common Law, says: "The Code of Civil Procedure enacted in 1848 was, taking all things into consideration, a very wonderful piece of legislation, concise and comprehensive. The revolutions it instituted, the extent of which it is difficult now to understand, were wholly, as every one knows, in the law relating to pleading and procedure. Had crafty, debased and unsystematic legislation refrained from meddling with the primitive practice Code (of 1848), there never would have been valid cause for dissatisfaction with those reforms which Mr. Field originally contemplated. Indeed to-day, if there were the slightest effort in the right direction, the adjective law of New York, with all the light of experience, might be readily made the best instead of almost the worst in the World."¹ To the last part of this judgment, that our law of procedure is the worst in the world, every practising lawyer in New York State will say AMEN!

Assuming the truth of the statement as to the original excellence of the code of 1848, we might well ask the codifier, has experience no lesson? If a splendid, logical, systematic Code of Civil Procedure of 1848 had become by 1880, through the effect of numerous decisions as to its meaning and numerous amendments, an unwieldy and inconsistent mass, so that a new codification was necessary; and, if this new code has again, in sixteen more years, through the operation of the same causes, become so uncertain and obscure that no lawyer can know the practice by reading the code itself, but must consult the congested volumes of the annotated codes and hundreds of volumes of reports of practice cases decided under the code, — what will be the fate of a Civil Code?

¹ Codification, p. 55.

Who will guarantee the absence of "crafty, debased and unsystematic legislation"? What will be the comparative importance of the prize to be gained by "crafty, debased and unsystematic legislation" affecting a Civil Code as compared with that affecting a Code of Procedure?¹ Again, is not the praise of the original reform overestimated?

THE NEW YORK CODE OF CIVIL PROCEDURE REFORMS MORE SPECTACULAR THAN REAL

The main Reforms effected in New York by the Code of Procedure are said to be two.

First. The Union of Law and Equity.

Second. The Simplification of the Pleadings.

¹ For an example of tricky Legislation as affecting a Civil Code, see the attempt made by section 3063 of the proposed New York Civil Code of 1887 to change the rule of *Caro vs. Metropolitan Elevated R. R. Co.*, 46 Super. Ct. (J. & Sp. N. Y.) 138, and of *Story vs. N. Y. Elevated R. R. Co.*, 90 N. Y. 122. This Code section enacted a general rule which would have prevented a landowner from recovering damages against the elevated roads for the nuisances of smoke and noise. See Railway Companies and the Civil Code (pamphlet), pp. 2, 4, by Mr. George L. Rives, of the New York Bar.

For an example of tricky Legislation as to Procedure in effect winning suits, see Leavitt on Negligence, p. 726, referring to Chap. 572 of the New York Laws of 1886. This statute requires claimants for damages for personal injuries against a City to file, within six months after the accident, with the Corporation Counsel, a notice of intention to begin suit, and suit must be begun within one year. As Mr. Leavitt says, this statute was so indexed as to help conceal its existence, and led to a number of non-suits. It is said to have been slipped through the Legislature in order "to make a record" of success in defending negligence suits for the then Corporation Counsel of New York City.

There already existed a section, viz. 1104 of Chap. 410 of the New York Laws of 1882 requiring the filing of the claims in such cases with the Comptroller of the City. In a case afterwards arising where such a notice had been filed with the Comptroller, and had been handed by him to the Corporation Counsel, it was held that this was not a compliance with Chap. 572 of the laws of 1886; and that the notice must be independently served on the Comptroller, and on the Corporation Counsel. *Missano vs. Mayor of N. Y.*, 17 App. Div. 537. This decision, undoubtedly correct, is another instance exemplifying the absurdities of statute law; and its rigid adherence to form instead of reason. Note that a construction clause such as is suggested in Chap. XI. would have prevented the inequity of this ruling.

FIRST. THE ALLEGED UNION OF LAW AND EQUITY

The union has been more apparent than real. In the old practice a separate judge sat for Common Law Cases ; and a separate judge for Equity Cases. One set of cases was tried by a judge and jury ; the other by the judge alone. The New York Law reform did not attempt to do away with this difference in the trial tribunal. In consequence, the courts have had to keep up the distinction between Law and Equity. The codifiers could not do away with the Jury in common law cases because it was protected by the Constitution. The code expressly prescribed that the jury should try common law cases and the judge all others. (N. Y. Code of Civil Procedure (1848), §§ 208, 209.) The consequence was that the continuance of the two tribunals necessitated a continuance of the division line between the systems.

The great reform, therefore, resolves itself into the same judge sitting, now as a chancellor to hear a case of equitable facts, and now as a common law judge with a jury, to hear a case of common law facts. The total amount of the great reform is to occasionally compel an equitable defence, when interposed to a legal cause of action, to be tried before a judge and a jury, instead of before a jury alone. If, however, the equitable defence is also a counterclaim, the counterclaim must be first tried before a judge alone,¹ before the legal issue is brought on before a judge and jury. Thus if a landlord sues for rent on a lease and the tenant sets up a counterclaim to reform the lease for fraud or mistake, the counterclaim must be tried in equity before the rent issue is tried.²

In fact, the continued separation of the two systems is still so complete that the court is divided into the Equity and Common Law Parts (the Special Term and the Cir-

¹ *Story vs. Livingston*, 1 Month. Law Rec. 44, citing § 974 of Code Civ. Proc.

² *Colvill vs. Chubb*, 20 N. Y. Civ. Proc. 352.

cuit); and the question of whether a case shall be tried in one or the other, is a question of Calendar practice, instead of a question of jurisdiction. Under the old practice, if you sued in equity when you ought to have sued at law, or *vice versa*, your suit was dismissed with costs; and you had to start over again. This was the evil the reform was intended to remedy. Under the present practice, provided the facts set out in your pleading are the facts you prove, the Court will decide the jurisdiction question and give you one relief or the other. But, should you bring on the case at Circuit when the judge thinks it ought to be at Special Term, you get your case dismissed and delayed until you get it on the Calendar of the right Part. Again, it is held "if a party brings an equitable action, even though the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial."¹ Of course dismissal under these circumstances generally means delay, the payment of costs for your mistake, and the necessity of beginning over again on the other side of the Court. It takes the vision of a Code Enthusiast to see any difference between the hardship of this case, and what was claimed to be the evil of the old law, alleged to be remedied by this code.

Under the system of procedure initiated by the code, and without other guide than the necessities of a distinction which is essential, and not accidental (so long as the trial tribunals are different), the courts have evolved a working hypothesis. This is that the facts stated in the pleading, and the relief asked, determine whether the case is in equity, or at law. And the results are as distinct under the code system as under the old common law. The law of evidence is applied,

¹ *Enders vs. Sullivan*, 1 N. Y. Month. L. Rec. 46, citing *Dudley vs. The Congregation of St. Francis*, 138 N. Y. 451, and other Court of Appeals cases.

and all incidental relief is granted, or denied, on a like test. Frame your action for money damages for a breach of contract. Now, at the trial, offer to introduce evidence of a contemporaneous oral variation of the contract, omitted from the writing by mistake, or fraud. To the objection of your opponent that such evidence is not admissible, answer by citing many authorities that it is admissible in equity, — an undisputed fact, — and then cite the codifier's claim that the code has made law and equity one. The prompt ruling by the Court sustaining the objections of your adversary, and the ruling out of your proposed evidence, will awaken you to the consciousness of how much of fact, and how much of fiction, there is in this boasted amalgamation of law and equity under the code. As Earl J. tersely says, the distinction between a legal action and an equitable suit cannot be "wiped out by legislative fiat."¹ The consequence is, that in New York, the judge sits at one time as a judge at law, at another time as a judge in equity. In each instance he applies the rules of law according to the capacity in which he sits, a capacity determined by the pleadings in the case. And the result is not different from what would have been the rulings had the same case arisen under the old dual system of courts, and been tried in its appropriate forum.

The benefit of this head of the Reform in New York is practically confined to the mode of Trial, the *viva voce* examination of witnesses in open Court, instead of privately before an Examiner. This is a valuable reform. But it might have been effected by a better means than a Code. A short clause in a statute was all that was required. See the example of New Jersey hereafter cited (see p. 278).

¹ *Gould vs. Cayuga Co. National Bank*, 85 N. Y. 75, 83.

SECOND. THE ALLEGED SIMPLIFICATION OF THE PLEADINGS

We will admit there were abuses, and those grave ones, in the old Common Law system. There were some formal absurdities (the formal pleas at common law), formal allegations that had to be made (the confederacy clause, etc., in the equity bill), and some requirements leading to occasional hardship—as the requirement that all the evidence should be stated in equity pleadings.¹ But these did not need a code for their correction. Both systems of pleading—equity and common law—were logical and precise, and good as a whole, the products of centuries of thought and practice. If either system were to be substituted for the other, the equity system, which searched the conscience, and narrowed the issues to be tried on the evidence, was to be preferred. The codifiers chose neither, but elected a new departure. The result, after nearly half a century, is this:—

A Bill in Equity is not now good as a Code Pleading, because it is a pleading of the evidence of the facts and not the substantive facts.² A common law count, with all its generality of statement whereby a man does not know what is the real matter in dispute, is a good pleading.³ The old Bill of Discovery is abolished. This was evidently done under a vague idea of the Codifiers that their system of verified pleadings rendered its retention unnecessary.⁴ Since you cannot plead the facts in detail, but only the conclusions of fact, or of mixed law and fact,⁵ it is easy enough for the adverse party to deny

¹ See *Graham vs. Oliver*, 3 Beav. 129.

² *Williams vs. Hayes*, 5 How. Pr. 470; *Milliken vs. Cary*, 5 How. Pr. 272; *Wooden vs. Waffle*, 6 How. Pr. 145. And see further, *Schroeder vs. Post*, 3 N. Y. App. Div. 411.

³ *Allen vs. Patterson*, 7 N. Y. 478; *Doherty vs. Shields*, 86 Hun, 303.

⁴ This is the reason given by the Commissioners in the note to the section abolishing the Bill of Discovery.

⁵ See cases under note 2, above.

these generalizations ; and, under one evasive pretext of construction or another, avoid the effects of a frank admission, and yet escape a prosecution for perjury. The consequence is that collateral issues which should never be litigated—the truth of which should be conceded on both sides—are constantly being joined under our reformed pleading. The practical result is that much time and technicality is wasted in proving facts which, under a truly scientific system of pleading, would have to be admitted ; or, if denied, would be denied at the expense of grave peril to the wilful obstructor.

The results of the code experiment in New York lead the writer to believe, that the best possible system of pleading would be the requirement of a statement of the facts of the case on the lines of a Bill in Equity under the modern United States and New Jersey practice, leaving it optional with the pleader to state the evidence of the facts, as he might prefer, but insisting upon his stating the facts in one form or the other as they occurred. Objection could be made to this as sometimes producing “intolerable prolixity in the pleading.” The answer is that this “prolixity” must come in somewhere. The facts must be stated some time. It is better that they should be once stated, and admitted, denied or avoided concisely, and in chronological order, by the pleader, as in the modern pleading in equity, than that they should be stated by witnesses on the stand under the many times multiplied “intolerable prolixity” of question, objection and answer, direct and cross examination. Of course with such a system would go the equity rule that a mere general denial in the answer, is not sufficient. In other words, the defendant, as well as the complainant, must sift out the facts of the transaction in dispute between them, must state how much, and what specific statements of the Bill, he admits or avoids, and what he denies, and give his version of the transaction.

Those who have practised under both Code and Equity pleading know the difference in results. You are often enabled under the Code, without danger to yourself, to put a plaintiff to the proof of facts you ought to have admitted. Had the same facts been pleaded under the detail form of an Equity Pleading, your answer compelled to be in similar detail would have necessarily made admissions, or set up other facts sufficient to remove such issues from the case. For if your client under oath denied the facts which could be proved against him, your case would be prejudiced by the practical loss of your main witness, when the maxim "false in one thing, false in all" was applied to his subsequent testimony. A curious proof of the probable truth of this statement is furnished by an historical incident in the development of equity pleading. Originally, every answer to a bill in equity was compelled to be made under oath. The Court then laid down the principle that it was unfair to search the conscience of a man, compel his answer to a state of facts under oath, and then attempt to overcome his answer by slight evidence and by charging him to be a perjurer. Consequently, the rule was laid down that where a defendant swore to matters responsive to the bill, the complainant could not overcome the allegations in the answer unless he proved them to be false by the evidence of at least two witnesses, or by the evidence of one witness corroborated by circumstances. In view of the easy consciences of most litigants, operating with full knowledge of this rule of evidence, considerable hardship was imposed on complainants. For this reason statutes have been passed in most jurisdictions changing this equity rule, and providing that a complainant may waive the answer being put in under oath.¹ If he does so, the rule of evidence requiring two witnesses, etc., does not apply. In most cases this privilege is used by complainants. Yet those who have practised under this sys-

¹ This is the New Jersey practice.

tem will bear out the statement, that the fact of the answer not being put in under oath does not relax the vigilance of the solicitor in being careful not to needlessly deny any fact that ought to be admitted or avoided; this because of the tendency of the Court to rule against a litigant attempting to mislead the Court. Note here that the charge of prolixity, often made against equity pleadings, was based chiefly on the custom of setting out documents in full, as when on a bill to foreclose a mortgage the whole instrument was copied in the bill instead of setting out only the important clauses. This was done to charge the defendant so many additional cents per folio as costs. This abuse has been remedied in New Jersey by a short rule of Court.

THE SAME REFORMS BETTER EFFECTED BY RULES OF COURT

Across the Hudson from New York State, the State of New Jersey has effected reforms in its Chancery and Common Law Practice, without the aid of a Code of Civil Procedure. A statute prescribes that witnesses may be examined *viva voce* in an equity case as at common law. The anomalies and absurdities of common law and equity pleading have been removed by a few short rules of practice. Besides the code and the cases under the code, the New York practitioner must consult an octavo volume of Court Rules. In New Jersey a small book about the size of our New York Rules of Court Practice embraces the Rules of Procedure of all her Courts. A short Practice Act, taking up a few pages of the Revised Statutes, takes the place of the first half of our Code of Procedure, with its 3397 sections. And it is probably within the truth to state, that the number of reported cases on practice questions, in New Jersey, would not exceed the number of volumes of reported cases on practice questions in New York *since the Code*.

An eminent New Jersey Counsellor¹ informs the writer that in twenty years' practice before their courts, involving an average of twenty cases a year in their Court of Errors, he has had but one practice case that has gone to the Supreme Court for decision, and that case involved the Construction of a section of the New York Code of Civil Procedure. The reforms in New Jersey have been accomplished by changing or recasting a few rules of common law and equity, the good body of the system being retained. In this simple way their practice has been modernized, and the defects of the old systems removed. It may well be doubted, therefore, whether New Jersey has not chosen her course of law reform more wisely than her more populous neighbor.

Again, in England, the Reforms in Judicial Procedure have been effected by the Practice Acts of 1873 and 1875, supplemented by the Rules of Court enacted under their authority in 1873 and 1883. How they have worked it would be interesting to learn from those practising under them. The absence of any trenchant criticism, or of any marked attempt to change them, would seem to indicate that they have reasonably effected their objects.

THE FAILURE OF THE FIELD CODE OF CIVIL PROCEDURE

As above admitted, if any branch of the law could or ought to be codified, the branch of adjective or procedural law is the one from which the best results should be obtained. We have shown the experiment has been a failure in New York by the admission of its own champions. The cause is assigned to various reasons. If a Civil Code were passed and produced similar bad results, it would not do the public much good to be told that the cause was "crafty and debased legislation," or any like excuse.

¹ William D. Edwards, Ex-Corporation Counsel of Jersey City.

ONE OF MR. FIELD'S ARGUMENTS IN FAVOR OF A CODE

Mr. David Dudley Field, in answering Mr. James C. Carter's able paper on The proposed Codification of our Common Law, triumphantly asks the question: "Has any code once passed ever been repealed to go back to the Common Law?" And he claims this fact is an implied conclusive admission that a poor code is better than no code at all.¹ One State in America, Florida, in 1869 passed a Code of Civil Procedure based on Mr. Field's New York Code of Procedure of 1848. Meeting with no favor, this code was repealed, as a whole, in 1873.² Even if this instance had not happened, this argument of Mr. Field's ignores certain practical difficulties in the way of returning to a Case system after once a Code has been adopted.

The Code is a complete enactment, a substitute for all the former law. Before any code can turn out well or ill in practice, some years must pass, and many decisions must be made explaining, extending, limiting or qualifying its meaning. It follows, that by the time a judgment can be arrived at that the experiment of the code was a mistake, the march of events prevents the resort to a repeal of it. If the code stood alone, suspended in mid-air as it were, we might repeal it, and go back to the old law. But in practice the old law so insensibly, and yet so effectually, becomes a part of the law as expounded under the code, that to repeal the code is to repeal this amalgam of the code and the old law, and to raise unending questions as to how much of the old law is repealed with it. The line of least resistance is, therefore, forward on the same line. Once codify your law, and you must keep tinkering at it from that standpoint; you can-

¹ Mr. Field's answer to Mr. Carter (pamphlet, p. 11).

² 54 Albany Law Journal (Sept. 26, 1896), 203. This is the only known instance of such a repeal. The Code was then in operation only four years, and the growth of the new law under it could not have been rapid or extensive.

not retreat; you cannot completely undo what you have done. Hence the gravity and the importance of the step.

THE BURDEN ON THE CODIFIER

Returning from this digression into collateral issues, we may note that since the Codifier attacks an existing institution, and proposes a substitute, the burden of proof rests upon him. This burden requires that he should be able to satisfy us.

First. What he means by a Code.

Second. What advantage would be gained by the adoption of the new system of expressing the law.

THE DIVERGENT VIEWS OF CODIFIERS AS TO WHAT A CODE SHOULD BE

The jurists favoring codification do not agree as to what codification means. They would not answer the question in the same way. We begin with Bentham.

BENTHAM'S VIEW

Bentham's idea of codification appears to have been a huge digest of the law solidified into a statute. As he expressed it, the law contained in these volumes of Reports should be written out in a code so that it would be "all plain reading, no guess work, no argumentation — your rule of action — your lot under it lies before you. Thus might it be, thus ought it to be." And he advises the new States of America to "shut their ports against the common law as they would against the plague."¹ In fact, the Code that Bentham conceived was probably, an elaborate digest extracted from the reported cases. To distinguish it, we may call the Bentham theory of Codification the Digest Code theory. It may be noted here that it does not clearly appear whether Bentham intended a code to contain simply the detail facts of different cases, with the rule as to each set declared, or whether the rea-

¹ Bentham's Works, Edin. 1843, Vol. IV, p. 504.

sons and arguments for the rule were to be added. He probably intended only the former. In any event the statement of some general principles might be made with reference to general reasons for their existence. This, however, would make such a code approach the form and substance of the Common Law Report in this respect.

HAWKINS' VIEW

In 1865 Mr. F. Vaughn Hawkins, who is in favor of codification, read a paper on Codification before the Juridical Society of England. This paper is remarkable for the fact that Mr. Hawkins clearly saw wherein lies an intrinsic defect of codes as compared with the case law; namely, the absence of the statement of the reasons for the rule and of illustrative cases. He declares that a code should contain —

First. The rules of law, with explanations, definitions, exceptions and qualifications.

Second. Examples of the application of the rules; namely, statements of the decisions of special cases.

Third. Reasons for the Rules; namely, passages from the opinions of judges containing the grounds assigned for their decisions of these special cases given as examples; in other words, statements of the *rationes legis*, as opposed to the *rationes decidendi*. The *rationes legis*, "the reasons of the law," as opposed to the *rationes decidendi*, "the reasons of the decisions," mean the reasons stated by the judge, as distinguished from the true scientific reasons on which the actual decision made may be supported. Thus the decision made may be right, and may have a sound reason for it not given by the judge, or imperfectly expressed by him; this would be the *rationes decidendi*; the reason stated by the judge, which may be wrong, or wrongly applied, or wrongly expressed, is the *rationes legis*.

Mr. Hawkins goes on to say: "Some persons seem to conceive a code or completely systematized body of law as

being what we may call law put into a strait waistcoat—a bare string of highly generalized rules reposing on definitions alone, and denuded of all concrete or explanatory matter. But a perfect code should contain all three elements.”¹

In so holding, Mr. Hawkins appears to be opposed to all of his brethren. The Code here condemned is exactly the kind of a code that Mr. Field and Mr. Fowler claim to be the only true kind of a code; all others are snares and delusions, and reintroduce all the defects of the common law.²

“A proper Code,” says the Albany Law Journal, in defending Mr. Field’s New York Civil Code from attack on the ground that it was a mere string of general principles and afforded no light for the decision of individual cases, “is a mere framework or skeleton like the ten commandments.”³

Mr. Hawkins further states that the Indian Code has introduced examples of cases as an aid to construction, but declares that it is still radically defective as a code, because it does not contain a statement of the third essential named, the reasons for the rule. Mr. Hawkins then goes on to declare that because the French Code, the Louisiana Code, and the proposed Civil Code of New York, the Field Code, do not contain these three elements, they are not true codes.⁴

It is strange that while Mr. Hawkins thus noted the three essential attributes of a good system of law which a common law report contains, and which are absent from all the existing codes, he should have overlooked the reaction of the possession of these attributes upon the construction of the writings in which the law under either system is expressed.

It is this reaction which allows what we have elsewhere

¹ 3 Juridical Society Papers, 110, 112.

² Fowler on Codification (pamphlet) p. 18.

³ 18 Am. Law. Rev. 860.

⁴ 3 Juridical Society Papers, 114.

called a scientific construction of the language of written case law to be employed, while only a grammatical or logical construction can be employed for written statute law. It is impossible to adopt this scientific construction of the language expressing rules of law in Codes, because of the absence of the statement of the detailed facts, and the reasons for the rule. That he did so overlook this necessary result is apparent from his use, in favor of a code, of the stock argument that the law under either system is expressed in language; hence, if it can be expressed in a report, it can be expressed in a code, etc.¹ This argument will be again referred to.

A CODE OF PRINCIPLES

The majority of later writers in favor of codification seem to favor a code of principles with illustrations or examples of cases decided under each. We say seem, because, as only the Indian Commission and Mr. Field have as yet written out a code, there is some indefiniteness as to the exact amount of condensation which would be adopted.

AMOS ON THE FIELD CIVIL CODE

Professor Amos thus condemns the Field Code: "The New York Civil Code may be described rather as a codification of text-books on the English Common Law, than as a codification of English Common Law itself. Apart from occasional scraps of terminology and arrangement borrowed from Justinian's Institutes and the Code Napoleon, the whole work reproduces, in an utterly undigested form, the notions and the very phraseology in which the English law is clothed in the most hastily compiled text-books. There is scarcely a symptom of a single ambiguous term having been submitted to the crucible of logical criticism, or of a complex notion having been reduced to its component elements with a view to its being intro-

¹ 3 Juridical Society Papers, p. 116.

duced afresh, under a similar guise, into the body of the New Code.”¹

HOLLAND'S VIEW

From the elaborate statement by Professor Holland of the preliminary work required to be done, before a line of the code itself should be written, it is evident that, in his view, a code should be most carefully constructed. He states that a code should only be constructed after years of preliminary expurgation, sifting and digesting, —involving classification and consolidation or condensing and abstracting,—and then, and only then, codification. Thus, he says: “Codification is hardly so much a separate process as the completion of consolidation; for a code is a digest in which every title has been consolidated.”² From which we might conclude that Professor Holland's idea of a code is like Bentham's, viz. A Digest Code. But he proceeds to limit this. “Consolidation, and consequently codification, are applicable to common law as embodied in concrete cases, which must therefore be reduced to their net results stated axiomatically before they can be subjected to these processes.” He means, therefore, a code something between Bentham's Digest Code and Field's Principles Code, or what we might call an Abstract Digest Code.

AUSTIN'S VIEW

Austin's theory of a code partakes more of a code of principles than of a digest code. He says:—

“Section 952. Hugo's objection is, that if a body of law affected to provide for every possible question, its provisions would be so numerous that no judge could know them all; and as to the cases which it left undecided (which would necessarily be numerous), the conflicting analogies presented by those cases would be in

¹ Amos, *An English Code*, 99.

² Holland, *Forms of Law*, p. 62.

exact proportion to the number and minuteness of its provisions.”¹ New York Lawyers will recognize in this a prophetic reference to the present New York Code of Civil Procedure and its 3397 Sections, that wonderful *simplification* of our law of Procedure.

CONFLICTING ANALOGIES

The unprofessional reader will need explanation of the term “conflicting analogies” used in the foregoing extract. In general terms it may be explained as follows: The facts of the case in hand include some facts in regard to which a rule or principle has already been declared; they also include other facts, on which a different rule has been declared. The question then is, which rule is to govern. The analogies between the facts of the case, and the special facts which have already been decided to make one rule or the other applicable, are the “conflicting analogies.” An actual example is the best object lesson. We take a recent leading New York decision on accord and satisfaction to illustrate the meaning of the term; because the “conflicting analogies” applicable to the facts of the case made the General Term of the Common Pleas decide one way, and made the Court of Appeals decide the other way.

A physician rendered services to a patient and sent in his bill for six hundred and seventy dollars. The patient disputed the bill as unreasonable and excessive. Finally, the patient sent the physician a check for four hundred dollars, enclosed in a letter in which he said: “I enclose my check for four hundred dollars (\$400) in full accord and satisfaction of your claim for services to date.” The physician cashed the check, and again sent in his bill crediting the four hundred dollars and demanding the balance of two hundred and seventy dollars. The patient wrote again, saying: “The check I sent in payment for your bill was sent upon the express condition that you

¹ Austin's Province of Jurisprudence, § 952.

were to accept it in full satisfaction. If you will not do so, return the check or the money." The physician did neither, but afterwards brought suit for the balance—two hundred and seventy dollars. The patient set up these facts as an accord and satisfaction, and as a bar to the suit. The courts before whom the question came agreed that, since the claim was a disputed one, and a check was tendered in satisfaction, there was a valid consideration for the accord and satisfaction. The disagreement between them arose out of the following "conflicting analogies." An accord and satisfaction is a new contract dissolving or ending a prior contract. A contract cannot be made unless the minds of the parties meet on the same proposition. Thus suppose A writes to B saying, "I will give you five hundred dollars for your bay mare, Fanny, payable one hundred dollars down and four hundred dollars in six months"; and B answers, "I accept your proposal and will sell my bay mare, Fanny, to you for five hundred dollars, provided you pay all cash in thirty days." Here there is no contract. The minds of the parties have not met on the same proposition. B cannot tender the horse and sue for the price; nor can A claim the horse as his, on tendering one hundred dollars and his six months' note. No contract is made until A's mind and B's mind meet on the identical proposition. All this includes well-known and undisputed principles of the law of contracts by correspondence. The General Term of the Common Pleas, noting the analogy between such cases, and the rules applied, and the particular facts of the case in hand, pursued this train of reasoning:—

An accord and satisfaction is a contract. To make a valid contract there must be consideration and consent. There is a new consideration for this accord. But there is no consent. The minds of the parties have not met on the same proposition. You cannot take one of a series of acts, viz. the acceptance of the four hundred dollars, and claim that to signify consent, when, at the same

moment, the party distinctly protests that he will not consent. On this theory, judgment was given for the physician on the ground that there was no accord.¹ The patient appealed to the Court of Appeals.

That court took a different view on the following grounds. The assent to a contract may be express or implied. In all cases of estoppel, although the party disclaims an intention to consent, yet the law seizes on some act of his rendering his protest unjust, and conclusively implies the consent on his part. This on the ground that no man shall be permitted to procure an advantage through his own wrong. Thus, in the case in hand, the four hundred dollars tendered did not belong to the physician. It was tendered to him on an express condition. To allow him to accept it, and still not be bound by the condition, would be to allow the physician to profit by his own wrong. If the physician took that money not intending to accept it as tendered, he converted it, or, in effect, stole it. It was not his property to take it in that way. On his doing so, as there would otherwise be practically no remedy for the patient, the law gives him one, by imputing to the physician the intention to act legally and not illegally. The law, therefore, implies from the taking of the money that it was rightfully taken; in other words, that it is accepted in pursuance of the condition attached to its tender. This implication is made conclusive against the would-be wrong-doer. The law in effect says: You took the money you had no right to unless you took it under the terms upon which it was offered; we will not hear you so allege, you accepted the benefit and you must be bound by the burden. The court distinguishes the cases of contracts by correspondence cited by drawing this valid distinction. In the case of the offer to buy the mare, nothing passes. When B changes the terms, he has not accepted anything of A's tendered upon condition. Now change the facts

¹ *Fuller vs. Kemp*, 40 N. Y. St. Rep. 672.

so as to make them in strict analogy to the case in hand, and note the difference. Let A write to B, saying: "I enclose my check for four hundred dollars in full payment for your bay mare, Fanny, to be delivered to me." Now let B write: "I have accepted and cashed your check, but the horse is not yours until you send me one hundred dollars more." Now you have the true analogous case. And under these circumstances the contract would be complete by estoppel on B. B could not keep the four hundred dollars and the horse too, and insist upon the other one hundred dollars.¹ He must elect to give up the horse or the four hundred dollars; and if he sued for the extra one hundred dollars, he could not get it, but must surrender the horse to A. The court thereupon reversed the Court below and gave judgment for the patient.²

AUSTIN'S VIEW (*continued*)

Austin then proceeds: "The objection proceeds on the mistake of supposing that a code must provide for every possible concrete case. To the first part of the objection it may be answered that either the future case must be provided for by a law, or it must be left to the mere arbitrium of the judge."³

The defect in this attempted answer is that the arbitrium of the judge means something different under the code system from what it means under the common law system. This can be seen most clearly by referring to Chapters V and VI. The growth of the law of contracts in restraint of trade, as exhibited in Chapter V, is a steady growth of scientific classification, a progress on logical lines of development from one stepping-stone to another. Each successive decision must follow the line of argument and reason marked out in the former cases, or show

¹ *Gruman vs. Platt*, 31 Barb. 328.

² *Fuller vs. Kemp*, 138 N. Y. 231.

³ *Austin's Province of Jurisprudence*, § 952.

some controlling difference in the facts creating a distinction founded on some good argument, why the rule should be different. The consequence is that the decision of each case, as it arises, is governed by known and fixed principles. The law of precedent prevents the "arbitrium" of the judge from being an arbitrary exercise of discretion, or of despotic power. The judge must either follow the former law, or show controlling reasons for not doing so. And the fact that the law is stated in connection with the special facts of each case, in view of which its rules are declared, renders possible the scientific construction of the written language in which its rules are embodied, which is the life and blood of a law of precedents.

The code section, on the contrary, stating a few abstracted facts, and not concrete cases, and offering no reasons for the rule, or argument for its existence, or illustrations of its application, affords no opportunity for scientific construction. In consequence, where the language or its application is not clear, the "arbitrium" of the judge is unlimited. For proof of this, examine the difference in discretion as to the decision of any special case that has arisen embracing contracts in restraint of trade, under the common law (see Chapter V), and under the codes (see Chapter VI). Note also that where the law of precedents prevails in connection with a code,—as in California as to a civil code, or in New York as to a code of procedure,—its effect is to continually limit and restrict the wide discretion of construction originally vested in the judge by the Code. Nothing could more plainly prove the truth insisted upon, and which is so clearly overlooked by Austin in the above argument, viz. that the "arbitrium" of a judge is one thing under a code system; it is quite another thing, and a power much more limited and restricted, under a case law.

Continuing the argument, Austin says: "And you do

not obviate the incompleteness inherent in statute law by making no law."

Austin here implies that the omission of a case from a code has the same effect as its omission from a system of case law. The truth is otherwise. (See p. 321, *infra*.) We merely pause to point out a flaw in what, at first sight, seems a brilliant epigram.

Austin, continuing, says: "The second part of the objection is founded on the supposition that the provisions of a code are more minute and numerous than the rules embraced by a system of judiciary law; and it is supposed that therefore the rules are more likely to conflict. Now it seems to me that this is the reverse of the truth. As I have shown above, a rule made by judicial decision is almost necessarily narrow; whilst statute laws may be made comprehensively, and may embrace a whole genus of cases instead of embracing only one of the species which it contains. And which, I ask, is the most likely to abound in 'competing analogies,'—a system of rules formed together, and made on a comprehensive survey of the whole field of law, or a congeries of decisions made one at a time in the hurry of judicial business?"¹

As is usual with rhetorical questions, this appears more telling than it really is. The implication is not true for two reasons. "Competing analogies" are dependent for their existence upon similar collocations of fact in the case to be studied, and in other cases subjected to different rules of decision.² A code, on the hypothesis, lays down the rule with reference to generalized facts applying to a "whole genus of cases" instead of to "one of a species." The same collocations of a few generalized facts with or without other generalized facts tending to the application of a different rule, are apt to occur oftener under a code than under a case system. The very abundance of distinctive special facts in a case

¹ Austin's Province of Jurisprudence, § 952.

² See p. 286, *supra*.

system renders it less liable to the operation of "competing analogies." Again, a code is made by getting a number of men together who, as it were, deduce the law, having regard to the whole field, and with their attentions not specially drawn to any one case or the decision thereof. A case system, on the other hand, proceeds on the same principles of scientific induction that is used by man in the investigation of the laws of nature in all other sciences. The special case presented is studied and classified by experts in the Art. An old truth is applied, or a new one is discovered, so that "justice shall be done according to our lights." The actual experiments so far made have proved that this laborious search for truth produces the best results. Even its opponents bear testimony to the wealth of materials in the English Case Law as compared with the Code Systems.¹

Austin, proceeding, says: "I admit that no Code can be complete or perfect. But it may be less incomplete than judge-made law, and, if well constructed, free from the great defects which I have pointed out in the latter."² Austin, therefore, believed in a code which would combine principles with a certain amount of detail. His code was not to provide for every possible concrete case.

AUSTIN ON THE FRENCH AND PRUSSIAN CODES

Again, referring to the Prussian and French Codes, Austin says: "It must be admitted that the Codes of France and Prussia, to which I at present confine my remarks, have not accomplished the primary ends of a code in the modern sense of the term; that is, a complete body of law intended to supersede all other law obtaining in the country. In France the code is buried under a heap of subsequent enactments of the Legislature and of the judiciary law subsequently introduced by the tribunals. In Prussia the mass of new Laws and authori-

¹ Bentham's Works, Vol. IV, p. 460. Amos, Science of Law, p. 383.

² 2 Province of Jurisprudence, § 952.

tative interpretations which have been introduced subsequently to the promulgation of the code, is many times the size of the code itself.”¹

He proceeds to argue that the ill success of particular codes proves nothing against codification. The person so arguing must further show that the code failed because of defects belonging to it as a code, not because of defects peculiar to itself. He then claims that avoidable causes have led to the failure of the French and Prussian Codes, “though, after all, the failure of these codes has been much exaggerated.”²

He then proceeds to enumerate defects in the French Code. The first “is the want of definitions of its technical terms . . . unless, therefore, the code contains a statement of leading principles, as well as details, the Code itself does not furnish the necessary guides to its own meaning; if those guides exist at all, they exist *en dehors* of the code.”³ The Louisiana Code was borrowed from and founded on the Code Napoleon. This lack of definitions must have struck its compilers as a defect, for they inserted definitions in the Louisiana Code. Note here a disagreement among codifiers. Mr. Justice Yost, in rendering the opinion in *Egerton vs. The Third Municipality of New Orleans*, 1 La. Ann. 437, says: “Definitions are at best unsafe guides in the administration of justice, and their frequent recurrence in the Louisiana Code is the greatest defect in that body of laws.”

Austin further says the French Codifiers mixed up the meaning of “*dominia*” and “*obligationes*,” and committed other blunders, in their conception and expression of the substantive law.⁴ In passing, he speaks of a similar “general incompetence” of the “authors of Justinian’s Compilations,”—the celebrated Roman Code of Laws.

¹ 2 Province of Jurisprudence, § 953.

² *Ibid.*, § 954.

³ *Ibid.*, § 955.

⁴ *Ibid.*, § 956.

Another defect of the French Code is that its authors did not design to make it "a complete body of statute law." They left many points open to be decided by various outside rules "*bon sens*" and "*équité*." Again, Austin says the Prussian Code of the Great Frederick is defective because not intended by its authors as "a complete body of law."¹

SCHUSTER ON THE FRENCH AND PRUSSIAN CODES

Compare this with the views of Mr. E. Schuster, who, in an article advocating the new proposed German Civil Code, in 12 Law Quarterly Review, 17 (January, 1896), says, speaking of Frederick's Code: "The chief fault of the code was tersely pointed out by Frederick in a marginal note to the last instalment of the second part, submitted to him in 1771, which read as follows: 'It is a very fat book, and statutes must be short, not lengthy.'"

And this same writer goes on to describe Frederick's Code as a code drawn out into too much detail, and consequently defective. Thus, he says: "The legislator's intention was that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a royal commission as to any doubtful points, and to be absolutely bound by the answer. This stereotyping of the law was in accordance with the doctrines of the law of nature, according to which a perfect system might be imagined, for which no change would ever become necessary, and which could therefore be laid down once for all, so as to be available for any possible combination of circumstances. It need not be mentioned that in the course of time this proved a mistake: the commission was dissolved; the right and duty of the judges to interpret

¹ 2 Province of Jurisprudence, § 958.

the law so as to give effect to changes in the general condition of things came to be recognized. Many of the provisions of the code became obsolete, others were expressly repealed by subsequent legislation, but the main principles remain, and many of them have received full recognition by the authors of the new draft."

And the same writer extols the French Code as better than the Prussian, because more was left to the "bons sens et équité," the "arbitrium" of the judge. Referring to Napoleon's Code Civile of 1804, he says: "But there are two features characterizing the *code civile* which give it a great advantage over the *Landrecht* (Frederick's Code): the first consists in the short summarizing statements which precede the principal heads; the second, in the avoidance of casuistical fetters. For the first time in the history of legislation broad principles are laid down, the application of which is left to those whose duty it is to administer the law."¹

Thus two codifiers, passing on the same codes, differ completely in their judgment upon them. Austin says that the defect in the German Code is that it is too general; Mr. Schuster claims its defect is that it attempts to be too minute. And while Austin condemns the French Code for too great generality, Mr. Schuster commends it for that excellence.

Test the glittering generality of Mr. Schuster's remarks on the beauty of the expression of broad principles in the French Code, by referring to the results of the practical tests in attempting to solve, by its provisions, cases involving contracts in restraint of trade contained in Chapter VI. (See Chapters V and VI.) Given "the broad principles laid down," how certainly can the advocate predict "the application" which will be made by those "whose duty it is to administer the law"? (See Chapter VI and note to Exhibit M.) But the point to be noted here is the divergent views of the advocates of codifica-

¹ 12 Law Quarterly Review, 23.

tion as to what a code should be and wherein lie its excellences and defects.

Mr. Schuster proceeds to show how, in spite of the "*Landrecht*," six coördinate systems of law now prevail in Germany; and in some places these are yet again modified by local customs, and hence the necessity of the new proposed German Civil Code.¹ The Prussian Code, therefore, has not even succeeded in becoming a substitute for the divergent systems of law, the existence of which, and the amalgamation of which into one, was the chief argument for its preparation and enactment.

FOWLER'S VIEW

Mr. Fowler says in his article on Codification, referring to the proposed Field Civil Code of New York (substantially the same as the California Code) : —

"There is another error which is made by the opponents of codification as it seems to those who view codes favorably ; namely, the assumption that a complete code must embrace a statutory statement of the thousands of decisions predicated of peculiar groupings of fact. A true system of codification is concerned only with those larger principles indicated ; those which have the force of law universally, or independently of the peculiar groups of fact to which they have, or have not, been applied." ² So Mr. Fowler advocates a Code of Principles.

THE QUESTION OF ILLUSTRATIVE CASES

Mr. Hawkins' conception of a code, as we have seen (p. 282), necessarily included these. Bentham,³ Austin,³ Macaulay⁴ and Pollock³ consider that they should be added. Pollock calls the invention of illustrations "the greatest specific advance that has been made in modern

¹ 12 Law Quarterly Review.

² Fowler on Codification (pamphlet), p. 18.

³ Pollock on Partnership, Introduction, p. iv.

⁴ Stokes' Anglo-Indian Codes, Introduction, p. xxiii.

times in the art called by an ingenious writer 'the mechanics of lawmaking.'"¹ Field and Fowler² and Professor Clark³ condemn the use of illustrative cases.

THE QUESTION OF THE REASONS FOR THE RULE

Only one authority (Hawkins) argues for this. As shown above, he contends for the fullest expression, not only of the principle, its exceptions and the illustrative special cases, but also for the expression of the reason for the rule and the reason for its application to the decision of special cases (in other words, the opinion of the judge in deciding the case), a near approach to a Code composed of Principles, and Abstracted Leading Cases. This is too near an approach to the Case Law to suit the other Codifiers. It would produce a Code somewhat similar to the Code, Pandects and Institutes of Justinian; a jumble of Statute and Case Law and Responses of Jurists (equivalent to opinions of judges), all enacted in statutory form; and, for that reason, criticised by Austin, and by others.⁴

THE QUESTION OF DEFINITIONS

Hawkins, of course, included definitions in his conception of a Code. The French Code omitted definitions, and Austin declares this to be one of its defects. We have already cited the Louisiana Court to the contrary. Mr. Field was not in favor of definitions.

THE QUESTION OF MAXIMS AND GENERAL RULES

These were inserted in the Code Justinian, in the French Code and in the Proposed Field Civil Code. The majority of European jurists, as the result of centuries of experience, consider this a mistake.⁵ Mr. Huc, Professor

¹ Pollock on Partnership, Introduction, p. iv.

² Fowler on Codification (pamphlet), p. 52, note.

³ Clark on Practical Jurisprudence, p. 390.

⁴ Austin's Province of Jurisprudence, §§ 872, 902.

⁵ Professor Munroe Smith on Bill to establish a Civil Code Arg., before Committees New York Houses, Feb. 25, 1886 (pamphlet), p. 18.

of law at Toulouse, condemned the "rules of interpretation in the French Code" as "senseless rules which are useless when they are not dangerous."¹

THE QUESTION OF FURTHER GROWTH

Since the law grows, as well after, as before, the enactment of the perfected code, a grave question has always existed as to how to deal with the changes and growth that result as time flows on. So important, in the view of Austin and Professors Amos, Holland and Clark, is the matter of making due provision for this growth, that they insist upon the necessity of provision for systematic revision and reënactment before Codification takes effect. Mr. Field and Ex-Judge Dillon, and other practical codifiers, would proceed without such a prerequisite. They also differ as to the mode in which this object may be best accomplished.

Austin² and Professor Holland³ are in favor of a law commission to decide moot questions. This expedient was adopted in the German Code, and found wanting. (See Schuster, above, p. 294.) Stephen insists that Codes should be reënacted about every ten years.⁴ Professor Clark insists upon supplementary enactment by means of a case law — precedents under the code, occasionally codified into it, say every five years or so, by the judges themselves.⁵ Bentham, on the contrary, is filled with horror by the suggestion of a case law supplementing a code, and says: "For this purpose it will be necessary to forbid the introduction of all unwritten law. It will not be sufficient to cut off the head of the hydra, the wound must be cauterized that new heads may not be produced. If a new case occur, not provided for by the code, the judge

¹ Professor Munroe Smith, "State Statute and Common Law." 2 Political Science Quarterly, 119, 133.

² Province of Jurisprudence, § 960.

³ Holland's Forms of Law, p. 63.

⁴ 6 Irish Law Times, 572, 573.

⁵ Clark's Practical Jurisprudence, p. 292.

may point it out, and indicate the remedy ; but no decision of any judge, much less the opinion of any individual, should be allowed to be cited as law, until such decision or opinion has been embodied by the legislature in the code.”¹

THE DISAGREEMENTS OF THE CODIFIERS

The above citations exhibit the wide divergence of opinion among codifiers, as to how a Code should be made, and what it should contain. One would have it a Code of principles and exceptions and details so as to cover all possible combinations of facts in special cases. Another says, this is all wrong, you should also include the reasons, and arguments, and illustrations, applying to your special cases. A third says, you should merely state broad general principles in connection with the more generalized facts to which they apply, and leave the rest to the arbitrium of the judge. They disagree as to whether illustrative cases should be included, as to whether you should insert definitions, and as to whether you should insert maxims and general principles. And, lastly, and most important of all, they cannot agree as to how to keep their code a code, after it has once been enacted as such. Under such circumstances the discussion of the question of codification is involved in great difficulty.

THE COMMON LAW A FIXED QUANTITY—EASILY CRITICISED

The Common Law is an existing institution. Its rules, principles and exceptions, and the form and manner of its promulgation, are part of our every-day life, well understood by those who are brought into direct contact with it. The advocate of codification who attacks it has a definite, coherent something which he can examine and criticise in detail. He is thus able to point out defects, and show wherein the system ought to be improved.

¹ Bentham's Works, Edinburgh, Vol. III, p. 209.

That a case law has defects, all will admit. That, in some instances, these defects can be removed by legislation, and by legislation only, all will admit. This happens when the growing system gets started, as it were, on a wrong line of development. The Statute of Frauds, and the Statute of Limitations, are remarkable instances of this class of reversal of, and improvement upon, prior rules establishing an erroneous public policy.¹ This also happens in cases where the result of the decision has no ethical significance; as whether a note shall have days of grace, or not.

Taking up, then, the existing system, the advocate of codification has no difficulty in pointing out defects. He calls attention to its immense bulk, its 2010 volumes² in England, and 3798 volumes in America,³ and to its increasing bulk.

Much of this apparent volume disappears, however, when we analyze these statistics. The implication is that all these volumes belong to one system of law. The fact is that the books of case law making this aggregate, embody the case law jurisprudence of about 47 independent systems of municipal law. These volumes embrace the case law of England, the case law of the United States Supreme Court and the case law of each of the States and Territories of the American Union. The 2010 volumes of English reports represent nearly six centuries of litigation and change; while the 3798 of American reports, though covering only about one century of actual time or an average of about 50 years, represent 47 separate and distinct systems of law, or an average of about 100 volumes to the State. These systems, except for their common origin in the English common law, are almost as distinct as the distinct systems of Italy, France and Prussia, likewise sprung from a common origin in the Roman law. At

¹ See notes to Exhibits A and B, Chap. V.

² Pollock's First Book of Jurisprudence, p. 295, note.

³ Dillon's Lectures on Jurisprudence, p. 265.

the same time the volume of reports in each jurisdiction differs widely. Taking the catalogue of the Bar Association of the City of New York, and assuming it to contain a complete collection, a rough computation down to 1890 gives the following results in three instances: the case law of New York State is embodied in 773 volumes; the case law of the State of New Jersey is embodied in 98 volumes, and the case law of Colorado in 14 volumes. Again, it would be fair in comparing bulk between the two systems to add up the volumes of statute law. Thus in Colorado there are 18 volumes of session laws, covering the same time as the 14 volumes of case law. In New Jersey there are 115 volumes of session laws, covering the same time as the 98 volumes of case law. In New York there are 151 volumes of session laws, covering the same time as the 773 volumes of case law. This computation includes some duplications of session laws in different compilations, but omits the different editions of the Revised Statutes, and of the Codes. These amount to 69 volumes of Revised Statutes; and numerous editions, generally annual, some plain and some annotated by different authors, of the Codes of Civil Procedure, the Penal Code, and the Code of Criminal Procedure. The reason why the volume of case law in New York State is largely in excess of the statute law, while the volume of case law in New Jersey or Colorado is not in such excess, is not far to seek. In Colorado and New Jersey the reports embody only the decisions of the Supreme Court and Court of Appeals, respectively; namely, the two highest Courts in the jurisdiction. In New York State cases decided by a judge at first instance are frequently reported, and numerous unofficial reporters exist, so that a case besides being reported in the official reports is often reprinted in one or more of the reports published by private enterprise, and this duplication or triplication of each case swells the apparent bulk of the system. Thus the total number of volumes of reports of cases decided in the highest Court of New York amount

to only 143 volumes in the Court of Appeals since that Court was established, and 78 volumes in the Supreme Court and Court of Errors while they existed as the highest courts of appeal, or 221 in all. So if we should compute the number of volumes of annual statute law of Parliament, and of the different legislative bodies, affecting the same jurisdictions whose volumes of case law are thus summed up, we would find the total amount of printed statute matter not so very much less in bulk than the printed reports referred to. If to this it be answered, that the greater part of this statute law so computed has been repealed, or reënacted, or become obsolete, we answer, that so likewise the greater part of these volumes of reported cases have become obsolete, or been overruled, or limited, — especially since the majority of its bulk is taken up with ascertaining the meaning of these very superseded and changed statutes.

The Codifier calls attention to the difficulty and the increasing difficulty in extracting from the numerous decisions the true *rationes decidendi*.¹ He dwells upon the chance order of development whereby most important matters are often left undecided and undetermined, while minor details of the same branch of the law are elaborated to a nicety.² He mentions the absence of unity and of coherence in its fundamental conceptions and classifications, arising largely from the history of its growth.² And in all that he says about the difficulties, the uncertainties, the incongruities, the contradictions, the enormous and increasing bulk, we agree.

These objections to the common law are generally stated in such a manner as to imply that they are inherent defects in the form of law under a case system. In truth, many of these objections are objections to the substance — the form and the substance being interwoven. Thus where cases become obscure and contra-

¹ Amos, *Science of Jurisprudence*, 484.

² Pollock's *Essays on Jurisprudence and Ethics*, 67.

dictory, or a departure is made along a wrong line of public policy, there the defect can and should be cured by a statute.

The advocate of a case system, therefore, while admitting the imperfections in the system, has always to ask himself the question as to each objection in detail, — is the law declared at present right? is it correct public policy? or is the certainty in this instance more important than the way in which the case is decided? According as these questions are answered, he would leave the system to its own law of development; or would pass a statute curing that particular defect, and interfering as little as possible with the general structure of the law. If he found the policy of the law correct, and its equity more important than its certainty, he would leave matters as they stood. This, on the ground that no system can be perfect; that defects must exist in all human institutions; and that our laws must share the common frailty of our natures.

THE CODE PANACEA

The advocate of the code system, on the contrary, has a *panacea* for all these ills. By a code he proposes to impart to the law “a greater accessibility, definiteness, formal organization and Compendious Brevity.”¹ Yet he admits that a code is not a sovereign remedy, that “no code can be perfect . . .” but, “. . . such are the evils of judicial legislation, that the expediency of a code, or of a complete or exclusive body of statute law, admits of no doubt, provided that the chaos of judiciary law, and of the statute law stuck patchwise on the judiciary, could be superseded by a good code.”² And to him the question is simply, what is the condition of the system of law in question? Is the proposed code better than the law as it now exists?²

¹ Amos, Science of Jurisprudence, 478.

² Austin's Province of Jurisprudence, § 968.

And although one of the Codifiers, Professor Amos, admits "the truth is that the above arguments against codification generally are in themselves unanswerable"; yet he says it is a relative question — depending on "two distinct elements; the one, the actual state of the existing system of law which it is proposed to codify; the other, the social habits and condition of the population."¹ And further on he says: "On the whole, then, it appears that in fixing attention upon one special Legal System — that of England — the state of the authorities, from which a knowledge both of the Unwritten and of the Written Law is to be obtained, is such that Some Organic Reform which shall tend to introduce Order, Uniformity and Lucidity, in the stead of the prevalent chaos and anarchy, is now imperatively needed."²

The question between the disputants thus becomes one of relative expediency. Yet, as each advocate insists that the system for which he argues is "the perfection of human reason," so far as human reason can approach perfection, the issue is, in principle, a wide one. The difficulty that here besets the opponent of the principle of codification is this.

THE CODE AN UNKNOWN QUANTITY—A SHIFTING CONCEPTION

Austin, Amos, Holland and Pollock, who thus learnedly argue the possibility and expediency of a code, have not yet made one.³ Under the above-quoted admission made by Professor Amos, it would appear to be a waste of time to argue the principle involved until some proposed code, said to be relatively better than the system of law it is proposed to replace, is presented. Until the codifiers shall have proposed a code with which they are

¹ Amos, *Science of Jurisprudence*, 478.

² *Ibid.* 488.

³ Sir Frederick Pollock's *Digest of the Law of Evidence* comes nearer to being a good Code covering its subject than any yet made.

satisfied, or shall have agreed upon the form in which it should be drawn, we might properly refuse to discuss the question. If, however, the dispute of opinion over the mode of carrying their alleged reform into execution is not due to the natural divergence of astute minds in grappling with a difficult problem, but to the impossibility of carrying out their principles into practice, then this disagreement as to the details is, in itself, proof of the fallacy in their theory.

Assuming this last to be the true view of the case, it is incumbent upon the opponent of codification who desires a final verdict on the question, and not a mere Scotch verdict of "not proven," to go to the root of the matter as best he may. For this purpose he must premise one or the other kind of code, and then deal with that in his argument. The tendency among the more celebrated advocates of codification is towards a Code of Principles. From their writings it may be assumed that Austin, Holland and Pollock consider that a code should contain the following elements; viz. a statement of all the principles of the law, in connection with a statement of the leading facts of classification, together with illustrations consisting of short statements of decisions made of special cases under the rule. And we may assume that their conception of a code does not include a complete incorporation into the code of the detail cases that have arisen under the common law; nor, in any case, the details of the arguments or reasons for the existence of the rule, or for its application. We may, therefore, safely conclude that the code intended by these writers is not a code of myriads of special instances, nor is it a code containing the arguments—the reasons for the rule, or for its applications and exceptions. Premising this much, we may now take up the general argument.

THE USUAL ARGUMENTS FOR AND AGAINST
CODIFICATION

Amos has clearly stated the arguments against codification which he has admitted to be "unanswerable."¹

THE ARGUMENTS AGAINST CODIFICATION AS STATED
BY PROFESSOR AMOS

The arguments may be summarized as follows: —

First. A system of law is the product of the customs of the People as affected by their origin, growth and history. Any attempt to express this in language is apt to be incomplete and defective.

Second. The inherent imperfection of language: "It is held truly that every law must be general in its character and ready to cover a multitude of acts which, at the time of making the law, cannot be specifically described. . . . The objection rather proceeds from a belief that the transactions of Mankind are so manifold, and the events so infinitely diversified, that the meshes of written Language are in all cases too large and coarse exactly and unflinchingly to include them. . . . For instance, Unwritten Law, . . . not being hemmed in by the somewhat imperious Restrictions of Formal Terms and Grammatical Sentences, is said to have a pliability or elasticity just sufficient to admit of its reaching the most minute modification in an unforeseen state of facts without involving any perilous amount of Vacillation and Uncertainty. In the use of this argument it is implied that a rule of law may be greater, wider and deeper than any possible expression of it."² This last sentence implies the argument of Field, Austin and Holland hereinafter referred to and answered. (See pp. 314 *et seq.*) The real implication is that a rule of law stated in a report in connection with the special facts of the special case, is by reason of such connec-

¹ Amos, Science of Jurisprudence, 478.

² *Ibid.*, 474.

tion with the special facts of the special case, and the arguments and reasons given for its existence and application, thereby freed from the trammels of grammatical construction and capable of receiving a scientific construction ; in other words, is endowed, according to the reason involved, with a capacity of being limited within, or extended beyond, the form of expression used to convey its meaning. And this implication is true. (See Chapters V, VII.)

Continuing, Amos says that, on the other hand, an inherent defect in written law lies in implying the "absolute exclusion of every other class of authoritative evidence of the law outside the written letter of the Law."¹ From this follows the fact that the judge is not bound by his predecessors, and hence vacillation and uncertainty as to the existence and quality of the rules. This inconvenience exists in France, though it is ameliorated by the works of the eminent Commentators on the Code.¹

The negative side of this is that a greater strain is put upon language than it is capable of bearing. "It is thus felt that to attempt to comprise the whole bulk of a legal system within the compass of legal rules must either result in the introduction (for a vast class of matters) of that sort of anarchy which follows from the absence of all certain rules whatever ; or else must reintroduce under the name of judicial interpretation all the irresponsibility, without the regularity and publicity incident to the modes of ascertaining the law which it is the distinct object of the code to exclude and suppress."²

Third. A code "opposes a standing barrier to the natural development and growth of law."²

The difference is as follows: The Common Law, the science of applied ethics, grows by a natural order of development, in the same manner as every other science grows ; namely, by the gradual investigation and classification of phenomena, and the march of the human mind from one conception to another, based on inductions from

¹ Amos, Science of Jurisprudence, 475.

² Ibid. 476.

the special instances subjected to investigation and decision. A Code, on the contrary, crystallizes the conceptions of knowledge entertained at the time when the code is written into the organic law — the supreme law. The question is not in the future, Are these conceptions true; but, what is the meaning of the words used? The order of development is then by cataclysms (viz. repeals or amendments), and not by growth. The reason of the law is no longer the law of its existence, and of its growth, but the sole question is, “is the law so written?” The answer to that question precludes discussion. It is not a question, — is the law just? but “is it so nominated in the bond?” These are the arguments against codification which Amos says “are in themselves unanswerable.”¹

THE ARGUMENTS IN FAVOR OF CODIFICATION AS STATED BY PROFESSOR AMOS

Yet he proceeds to say that the question is always a special problem — the question presented being simply “not whether any serious loss is incurred by codification, but whether the general gain is to outweigh the loss.”¹ And he says: “The main purposes of a code are to impart into the National System of law a greater Accessibility, Definiteness, Formal Organization, and Compendious Brevity.”¹

Let us examine these words written in capitals —

“*Accessibility.*” This is the “all the law in one volume” argument of Field and Fowler. The argument is answered by experience. No code ever made, ever accomplished this result. (See Chapter III.)

“*Compendious Brevity.*” This is another name for the “Accessibility” attribute. We have seen that the French Code attains this excellence, through omission. In other words, by leaving out all the rules and exceptions applying to the law of illegal contracts, a “compendious brevity” on this subject is attained. This brevity is at the

¹ Amos, Science of Jurisprudence, 478.

cost of omitting the subject-matter. (See note to Exhibit M, Chapter VI.) If this be an excellence, then the argument derived from the word is good. Again, the Field Code has escaped from the total omission which produces such "compendious brevity" in the French Code. It has done so, however, at the cost of increased verboseness. And still the cost of this comparative "compendious brevity," as compared with the common law, is as follows: In some instances, the ambiguity as to the rule in any special case remains of equal degree of uncertainty as before the passage of the code—with the added uncertainty that what is settled has become unsettled, requiring new decisions to fix. In other cases, a comparative certainty has been attained by ignoring the reason of the rule, and by fixing upon a general, yet not conclusive, earmark as the test of its application or exception—a classification producing injustice as often as justice.¹ The Indian Contract Act, in attempting to escape the inconsistency of the Field Code, has opened wide the door and let in the light of reason by speaking of the "reasonableness of the restraint." The result is that again the indefinite arbitrium of the judge, or the common law, is the guide; and not the words of the codifier. The result is that the brevity is attained at the expense of certainty.¹

"*Formal Organization.*" This refers to the scientific classification—division and subdivision—the Unity of Conception. It is in this respect that a code can excel case law. This, because a new scientific classification properly made by a great mind at some special epoch, ought to be more consistent and correct than a similar work carried on by many minds through long periods of time, and without special reference to all the general principles involved. The advantage to be derived from scientific excellence in this particular may, however, be obtained at too great a cost.

¹ See discussion of Law of Contracts in Restraint of Trade in these Codes, Chap. VI.

For it must ever be borne in mind that the phenomena a system of justice deals with, are the special disputes among men; not the abstract conceptions of general principles. The excellence of a system depends upon whether, in effect, justice is done between man and man. Austin failed to work out a theory of substantive law based wholly on rights; while, it is said, Professor Holland has succeeded. Yet, it cannot be said that between the time of Austin and of Holland, injustice was being administered, under the guise of English law, because that "Formal Organization" of the law had not been properly worked out. Correctness in the theory of classification is important — very important in any system of law. Yet it is not a prerequisite to substantial justice being administered under the system so defective. Every system of law is an example of the truth of this statement. For there is no law to-day, and there never has been any, which is possessed of the truly scientific "Formal Organization." And even, "codification" does not insure this merit. Thus the Prussian and French Codes are both defective in this respect.¹ So also is said to be the California Code. It depends upon the learning and skill of the authors of the code, whether there shall be an improvement in this respect.

"*Definiteness*" — Comparative Certainty. This is the great, the leading, argument for codification.

SOME PLAUSIBLE MINOR ARGUMENTS

But before going into its discussion let us deal with a few arguments of a minor nature. These are what Professor Amos calls "the plausible reasons in favor of codification, such as those based upon the advantages of discountenancing 'judge-made' Law, of giving Publicity to the Law, and of rendering the systematic study of it easy to everybody."²

¹ Austin's Province of Jurisprudence, § 956.

² Amos, Science of Jurisprudence, 477.

These arguments beg the question. They are the expression in another form of the "all the law in one volume" argument. In a certain sense the law of a code has greater publicity and systematic expression, because it is an authoritative statement of the rules of law in a small compass. But the resulting defects in the substance of the law itself, and in the practical administration of it, more than counterbalance this apparent gain. And the gain itself is apparent and not real, because, as is shown above, one of two things must happen. Either the warp and the woof of the meshes of the language employed, on the one hand, catch and retain special instances to which they were never intended to apply, and, on the other hand, let fall through them special instances of the abuse or inequity intended to be destroyed; or the language itself, to avoid this result, must be expressed in such generalized phraseology, based partly upon the reasons of the rule, that the only cure for the resulting indefiniteness is a final appeal to that "arbitrium" of the judge to do away with which was the main object of the passage of the code.

And so, having started out with the object of doing away with judiciary law, we find that a code must be drafted in one of two ways. Either all of its rules must be made hard and fast with reference to the presence or absence of a few facts out of the many existing in cases as they occur in actual life, in which case we have certainty, perhaps, but as often inequity as equity; or its rules must be so phrased as to leave a latitude of interpretation to the judge. In the latter case, we have the same uncertainty as at common law, with the added uncertainty that now the special case must be decided, not with reference to any prior decision, but upon the "arbitrium" of the judge, untrammelled by the learning and experience of the past. In stating this last alternative, we have assumed the code to be administered, in theory, as the French Code is, viz. without the prevalence of the

authority of precedents. If superposed upon a code—as has always been the case where English-speaking people have had a code—we have a series of decisions explaining it, each of which becomes authoritative in its turn as a guide to the decision of subsequent questions, the result is a growth of a new case law not less imposing than the one already superseded.

In a short time, this new case law becomes so potent in modifying, limiting and extending the language of your code that the law is no longer contained in the code, but rather in the decisions. These decisions simply constitute a new case law system having all the defects of the common law case law system, and more besides. Under the common law case law system, the necessity of deciding a special case leads to the discussion of the equity or inequity of the case. Under the code case law system, the equity or inequity arising in the case is of secondary importance. The first question is, What does the language mean? Again, the new case law, starting from a new fountain head, must decide over again matters already settled and at rest under the old system. The general language of the code is no more certain when applied to special instances the decision of which had been already made under the old law than it is when applied to new combinations of facts not theretofore arisen.

Assuming that the framers of the Code have attempted to avoid the arbitrium of the judge as far as possible, and have provided in minute detail for minute sub-classifications of facts, the result is as follows: If the statement of the facts of classification approach in minuteness of detail the facts of decided cases under the common law system, we have all the bulk and mass of that system, while the omission of the reasons for the rule and the arguments for its existence and application is the omission of the leaven in the mass—the living principle that gives to it what merit of system and coherency it has. As the facts of classification expressed in your code

become more and more abstracted from their combinations in actual life into combinations simpler in number and kind, your code will become more concise, less bulky and less in mass of material, but will become more and more uncertain in its application to combinations of facts in cases as they actually arise, and increasingly in need of the interpretation of the judge—the arbitrium you have been trying to avoid.

Thus the attempts of the codifier are foredoomed to failure. Starting, as Bentham did, with a desire to abolish judge-made law, he finds that he must either put all law into a “strait jacket,” as Hawkins expresses it, or must leave to the judge the same arbitrary power with regard to the actual decision of special cases which he attempts to take away from him with regard to the laying down of the rules of law said to apply to the case. None of the modern scientific exponents of codification would advocate the detail code of Bentham. They are all in favor of a code of principles. But a system of law which merely states the principles is no guide, for these are not often in dispute. The real disputes are over the application of the principles to actual combinations of facts—the issues of law cases. As Professor Munroe Smith truly says: “The uncertainty of the law lies almost entirely in the application of its rules.”¹ And the examples of actual litigations given in Chapter V are further proof of this fact. And so when a code states the principles merely, each case that arises under that code is decided not by the code, but by the *arbitrium* of the judge. Thus the Judge-made Law comes in again in one of two ways: either to interpret the meaning of the Code, and, having interpreted it, to decide the case accordingly without any regard to equity or inequity, but following merely the language as it is expressed (as in the case of the Field Code on Contracts in Restraint of

¹ Professor Munroe Smith, “State Statute and Common Law,” 2 Political Science Quarterly, 105.

Trade; see Chapter VI); or where the language as interpreted furnishes no certain rule (as in the case of the French Civil Code and Indian Contract Act on Contracts in Restraint of Trade; see Chapter VI) to evolve a rule from the inner consciousness of the Judge.

Under the first alternative the code system is inferior to the common law because of a defect in its substance — it is not a law of justice, but of language.

Under the second alternative it is inferior to the common law because, in the absence of the authority of precedents, it is entirely vacillating and uncertain, or, in the presence of precedents and of their binding authority, it begins again the grinding out of chaff and wheat. Thus the labors of years, with their slow progress and development, are cast aside as valueless only to go all over the same ground again. It would seem, therefore, that the “plausible” argument that a code does away with “judge-made” law, is more “plausible” than sound.

In passing, we may call attention to the fact that a system of law whose ruling principle is the search after equity in the decision of the particular case, must be superior to a system whose fundamental rule is, “what have the authors of this law said?”

Again, the decisions of special cases made by judges, under a system of law professedly basing one decision on the lines and reasonings of former decisions, must necessarily be more systematic, and coherent, and afford a better basis for prediction of the rule in future cases, and thus have greater certainty than decisions of special cases made by judges, under a system of law professedly based on the theory that no prior decision shall have weight in the decision of any subsequent case. We now come to the great, the leading, argument for codification.

THE CHIEF ARGUMENT FOR CODIFICATION

It has always been claimed that a code is necessarily more certain, more definite, than the common law. This

statement has been treated as almost a truism by most of the writers on the subject ; and has been enforced by an argument of apparent brevity, conciseness and rigorous logic. The argument is substantially as follows : —

The law as laid down in the Reports of Cases decided under the Common Law is a mere heap of particular decisions, in which case it is not law ; or, in those decisions, certain general rules applicable to more cases than the one case, in which the rule is declared, are laid down. The latter is the fact, as all admit. These rules so laid down are laid down in writing, and are abstractions from the special cases. Hence, if it is possible to write these rules out in the reports so that men can know them, it is also possible to write them out in a code so that they can be known.

This argument is put in different forms by the different writers. It is perhaps best to take up each author, and after quoting his way of putting it, make such comments as may be deemed necessary.

AUSTIN'S STATEMENT OF THE ARGUMENT

Austin says : “ That codification is practicable appears as follows. It is possible to extract from particular decisions, *rationes decidendi* else judiciary law would not be law at all but a mere heap of decisions depending, so far as not resting on statute, on the mere *arbitrium* of the judge. These *rationes decidendi* if stated in the abstract, and illustrated by typical instances, would be clearer than when lying in the concrete implicated with the circumstances of the particular cases. They would also be more general, abstract and adequate. For they would be so expressed as to apply to all cases of the species, and not limited to the cases, with their accidents, by which the *rationes*, or rules, were established. The induction previous to the application of the *ratio decidendi* of a decided case is codification *pro tanto* of judiciary law. The process is undoubtedly difficult, and great harm is done to the cause of codification by representing it as easy.

But if judiciary law is law at all, it is possible to codify it."¹

When Austin says in the foregoing paragraph "These *rationes decidendi* if stated . . . in the abstract . . . would be clearer than when lying in the concrete," etc., he makes a statement apparently true, but really false. A statement of a rule in a code may appear to be clearer than a statement of the same rule in a common law report, — that is, considering the statement as a mere question of the form of expression of the idea involved in it, — but the attempt to apply the rule in practice may, and generally does, reveal hidden ambiguities not suspected until the attempt is made. The discussion in Chapters V and VI illustrates the meaning here intended to be conveyed. The clearness which is the merit of the form of expression of a body of law is not only a clearness in the literary excellence of the statement of the rule, but clearness in the construction of the rule in its application to facts. The rule itself may be stated with scientific precision, and there may be no doubt what the rule is, yet the question of whether it applies to certain facts actually arising may be absolutely uncertain. Again, the rule may be clear in its statement, and clear in its application to some facts, yet may become absolutely uncertain, when a few other facts are added or omitted. This is a peculiarity of uncertainty which arises in statute law because of its generality.

Austin elsewhere states the difference between statute and judiciary law as follows: "The principal difference, therefore, between statute and judiciary law lies in a difference between the forms in which they are respectively expressed. A statute law is expressed in general or abstract terms, or wears the form or shape of a law or rule.

"900. A law or rule of law, made by judicial decisions, exists nowhere in a general, or abstract form."²

In this last sentence he contradicts himself. He has

¹ Austin's Province of Jurisprudence, § 948.

² Austin's Province of Jurisprudence, §§ 899, 900.

just argued that either the reason for the decision is a general rule applicable to other cases, or it is not law. It is admitted that cases do establish general principles. Hence they do exist somewhere. The fact is, they exist either in the opinion of the court deciding the case, *or in a legitimate scientific induction that can be made by any sound thinker from the facts and decision of the case to a general rule requiring such a decision of like cases.* It is the absence of the statement in the statute of *a sufficient number of facts in combination* to which the rule applies or not, that produces most of its uncertainty when the attempt is made to apply it to actual combinations of fact. It is the presence in the report of a common law case of all of the material facts to which the rule applies or not, that enables us to see clearly the meaning, force and application of the rule. We then reason by analogy to other cases, using the same process of reasoning that we use to guide our conduct in all other affairs of life.

At least so far as concerns cases of like facts which have heretofore arisen and been decided, the common law has an absolute certainty — unknown to a code. The fact cannot be better proved than by the following, known to every lawyer. When a new statute is passed, there is a feeling of doubt and uncertainty in the profession, as to its scope and meaning, until one or two cases have been decided under it. Then, and only then, do lawyers begin to feel that they can predict its meaning when applied to other cases. It follows, therefore, that this very implication of the *rationes decidendi* with the facts of the special cases is the basis of the true certainty in the rule. Not the certainty in the expression merely — but the combined certainty in the expression, and in the application of the rule to special cases. The presence of instances of the expression and application of the rule to the facts of special cases, enables a scientific induction to the existence of the rule, and a scientific deduction to its application in like cases. The proposal of Austin, Pollock and others to in-

clude illustrative cases in a code is a concession to this argument. In other words, law becomes like any other science a process of inquiry from particulars to generals and from generals to particulars. The reasoning faculty is its guiding star. And, in reasoning, it passes from one actual phenomenon of a special dispute with all of its implicated facts, to another actual phenomenon of a special dispute with all of its implicated facts. The result is such certainty as it is possible for a growing science to attain, and yet be true to experience as gained.

Law is the science of applied ethics — it is a kind of relative ethics always struggling on towards the goal of that absolute ethics, to be reached at the fabled millennium, if ever. The foregoing expresses the form and substance of the case law as it is. Now make it by a code “more general, abstract and adequate.” We no longer reason about particulars, but about abstractions from particulars. The absence of the mention of the special phenomena from which each abstraction was generalized, compels us to assume the abstractions as fundamental truths. We now spend our time in finding out, not whether these abstractions are true scientific inductions from the case in hand; but, whether the language in which they are expressed covers the case in hand. The result is either a certainty, which is not dependent upon any ethics in the result; or an uncertainty arising from the inadequate expression in the code of sufficient special facts in combination to enable us to classify our special case accordingly. This second result is not seen by Austin; the first is, practically, admitted by him.¹

Again, when Austin says that the induction of the *ratio decidendi* of a case “is codification *pro tanto* of the judiciary law,” he falls into a confusion of thought. The induction of the “*ratio decidendi*” from one or many cases, although expressed in writing, is never, at the common law, viewed wholly apart from its connection with the

¹ Austin's Province of Jurisprudence, § 914.

special facts of the special cases. Only when it is viewed as a grammatical statement of a proposition without reference to these special facts and cases, can it be said to be a "codification *pro tanto*." The abstraction and expression of these rules, under the common law system, under conditions where they never become in themselves the cardinal truths, but are kept, as it were, always in touch with the phenomena of the special cases of which they are both the abstractions and the expression, cannot be said to be, in any true sense, a "codification *pro tanto*" of judiciary law. When codified — in the form actually used in a code — they become abstractions, disassociated from the phenomena from which they were obtained by induction, and, in the process, they lose that scientific accuracy of response to reason, which is the chief merit of the case law.

HAWKINS' STATEMENT OF THE ARGUMENT

Mr. F. Vaughn Hawkins, in 3 Juridical Society Papers, 110, 115, says: "The legislator, whether judicial or otherwise, is a man of principles before he has legislated, but when he has legislated he must necessarily be a man of language." He then argues, that while it is true that a case law is in its earlier stages a law of principles, as the gaps fill in, judiciary law becomes circumscribed, precedent usurps the place of principle, the bulk of law increases from its details, and transactions become more complex, and the substantial additions to law become less and less, and "the trammels of precedent are found to be not less rigid and far more perplexing from their inconsistencies than the authoritative language of a code. At this epoch of law, we have, I think, pretty nearly arrived."¹

This was written in 1865. Is it possible that a code of that date would be found to still fit the English law as it has grown to-day? Sir Frederick Pollock speaks highly of the comparative value of the Indian Contract Act on

¹ 3 Juridical Society Papers, 116.

the subject of sale, as compared with the English law on the same subject, yet would not accept the former as an adequate codification of the latter.¹ And we have seen above the criticism made by Mr. Whitley Stokes on the Contract Act, after fourteen years of operation; and, in fact, on all the Indian Codes.

The first sentence of the above quotation from Mr. Hawkins' Essay is another sample of the confusion of ideas on this subject. The word "Language" is used as though the language of a Code and the language of a Common Law Report are forms of expression of legal rules identical in kind. The whole of this book is devoted to showing that these writings are subjected to widely different rules of construction,—the one a grammatical, the other a scientific construction; and that this difference is not accidental, but intrinsic, arising, as it does, out of a difference in their contents as great as the difference between a particular truth and a general principle. The Rosetta Stone, with its three inscriptions of Greek, Enchorial and Hieroglyphic, is all in writing. But here the resemblance between the hieroglyphic and the Greek inscription ends. And there is just as great a gap of distinctions of rules and principles whereby the meaning of the author is ascertained, between the Hieroglyphic, or modified sign writing, and the Greek, or alphabetic writing, as there is between the language of a Code and the language of a Common Law Report.²

HOLLAND'S STATEMENT OF THE ARGUMENT

Professor Holland thus expresses the argument: "Now, in point of fact, case law is either perfectly definite or it is no law at all. A set of cases establishes a rule with certain exceptions; a new combination of facts arise;

¹ Pollock's Essays on Jurisprudence and Ethics, 93.

² See Professor Tyndall's New Fragments of Science, article on Professor Young, for an interesting account of this stone and its part in Young's success in deciphering the Egyptian hieroglyphics.

does it come within the rule or within the exceptions? The judge comes to a decision, which he arrives at either because the new case is virtually provided for by the old rule, or because, failing to find guidance in the cases cited, he is led by his own sense of what is just. If he is acting upon a rule which he finds laid down in the cases, that rule, the *ratio decidendi* of those cases, is of course a grammatically expressed proposition, and is no more susceptible of two senses than if it occurred in an act of Parliament. If he is really, in the exercise of his own discretion, legislating for a *casus omissus*, then, if this be considered desirable, it would be better that he should be allowed to do it without disguise. The judge who can be trusted to make law clandestinely, under cover of interpreting the reported cases, may also be trusted to make it openly, in order to supply the deficiencies of a code."¹

When Professor Holland says in this extract that the rule, which the judge finds in the cases, is of course a grammatically expressed proposition, no more susceptible of two senses than if it occurred in an act of Parliament, he overlooks the immense intrinsic difference between the expression of a rule of law in a reported case and in a statute. He assumes that the grammatical construction, which is the only construction applicable to statutory forms of expression, is also the only construction applicable to the written opinions of the courts in deciding cases. The fact is, that nothing could be farther from the truth.

And when Professor Holland further claims that, if the judge is legislating for a *casus omissus*, he had better do so openly instead of clandestinely, he overlooks the fact that judicial legislation to cover a *casus omissus* in a code system is different in kind from judicial legislation to cover a *casus omissus* in the common law. When an omitted case, a case not covered by the language of the

¹ Holland's Essay on the Forms of Law, 56.

code, occurs in a code system, the effect is entirely different from the effect of an omitted or new case under the common law.

Under a code system, since a decision proceeds upon the ground of might instead of right, upon the ground of what is written instead of what is just, and the rules laid down are not dependent upon the reasons which sustain them, but only upon their being so laid down, the result is that there is no set of fundamental principles by reference to which an omitted case can be decided; and vacillation, uncertainty and ambiguity result.

Under the common law system, on the contrary, an omitted case in the sense here intended is merely a new case, a case involving facts never before submitted to decision. The principle or rule applicable is not, as is the case with an omitted case under the code, non-existent. On the contrary, it exists as one of the rules theretofore established, or as one that can be discovered, in the same way that all other scientific new principles are discovered, by a study of the phenomena of the past and of the present, and an induction from them. Thus the common law system deals with the phenomena as they occur in actual life, and is akin to all other concrete sciences, in that the appeal is always to the reason of the rule. Hence, in so far as our reason is capable of solving problems, there can be no omitted case.

In the code system, on the other hand, the appeal is always to the grammatical construction of the words used in expressing the rule. And, since the reason of the rule is not the foundation of its being, when the written language does not cover the omitted case there is no fundamental principle upon which it can be solved.

Resuming the argument, Professor Holland says: "A code is therefore asserted to be either an impossibility or an evil. An impossibility if it attempts to state the infinite variety of subsidiary rules which must necessarily be recognized before its general rules can be applied to

every case which may conceivably arise; an evil if it rests satisfied with a statement of the law with reference to the cases which have been already considered, because it must leave new cases wholly unprovided for. The fallacy upon which these alternative charges are grounded seems to be the idea that law when expressed in a code has any greater pretensions to finality than when expressed in statutes and reported cases. The true idea of a code is well described by the New York Commissioners as follows: 'All that we know of the law, we know from written records. To make a code is therefore to make a complete analytical and authoritative compilation from these records. Clearness, not finality, is the object of a code. It does not attempt impossibilities, for it is satisfied with presenting the law at that precise stage of elaboration at which it finds it; neither is it obstructively rigid, for deduction from the general to the particular, and "the competition of opposite analogies," are as available for the decision of new cases under a code, as under any other form in which the law may be embodied.'"¹

So far as concerns the impossibility of attempting to state the infinite variety of subsidiary rules, it may be admitted that both the code and common law systems are at fault. The fault is the fault of the infirmity of the human mind and of human knowledge, not a fault of an infirmity dwelling in one of these systems and not in the other. The question then becomes one of relative excellence between the two methods of expressing law,—the Statutory and the Case Method. So far as concerns all matters as to which certainty is more important than equity, the Statutory is the better form of expression of the rule. So far as concerns all matters as to which equity is more important than certainty, the Reported Case is the better form of expression of the rule. When, through gradual expansion, the ethical view of one age,

¹ Holland's *Essays on the Forms of Law*, 57.

perpetuated under the operation of the rule of precedent, has become unfitted to the ethical views of a subsequent age, or subsequent experience demonstrates that a mistake has been made in laying down a rule, and that the contrary rule would be more conducive to equity in the greater number of cases, then it is necessary to reverse the rule of the case law. To do this it is necessary to introduce the higher force of statutory expression. This, because too frequent overruling of the rule of precedent by an appeal to reason, where the two have thus become conflicting, would lead to an uncertainty and vacillation, more harmful than the harm done by the existence of error in the particular rule of law so outgrown.

Again, when a branch of the law is exceedingly ancient, when nearly all of its ramifications have been worked out, and any further growth is exceedingly slow, as is the case with the present criminal law of England; and when, as is the case with criminal law, certainty is of the greatest importance, then a codification of the rules of that law into forms of statutory expression is less likely to lead to disastrous results, and may compare favorably with the more elastic expression of the same rules in the common law system. The consequence is that, in an advanced society, a criminal code may be defensible, the point being that a rough and ready certainty is more important in that branch of the law than refined distinctions. Yet even here the necessity of a certain indeterminateness to meet the differing equities of special cases is expressly and impliedly admitted. It is expressly admitted where the code or statute, having defined the crime, gives to the judge a discretionary power, within limits, of punishment for the same. It is impliedly admitted where, in expressing different degrees of crime as to which different discretion is vested in the judge as to the amount or kind of punishment, the language is so drawn that great difficulty is experienced in determining from the particular facts under what section of the statute an indictment

should be framed; and it is also impliedly admitted in the rule of practice that the jury are the final judges upon the mixed conclusion of law and fact involved in each case.

In the common law as it exists, therefore, the province of statutory law may be said to be confined to one of the three classes above mentioned. Under these conditions the greatest amount of certainty which is consistent with the greatest amount of excellence in the equity of the law is attained. And when, in the infinite variety of special combinations of facts, it becomes necessary to lay down a rule not theretofore known, or to apply an old rule to a new or omitted case, the inquiry proceeds on scientific principles. The problem is solved in the same manner as other problems in other sciences are solved; namely, by the exercise of such powers of reason as the human mind possesses. In solving the infinite variety of the special problems presented to it for solution, the common law system possesses a superior method over that of the code system. This method consists in the fact that it proceeds on scientific principles of logical induction and deduction from particulars to particulars. Its ultimate premises are the facts of the cases from which its generalizations are derived, not those abstractions themselves. As in every other science, its experiments — the cases — are the ultimate facts of reference by which all its abstractions are tested.

The code system, on the contrary, deals with these abstractions as the highest truth in themselves. If the special case is properly solved by the general rule, well and good; if not, so much the worse for the special case. The consequence is that the validity of the general rule is not continually tested by the cases to which it appears applicable. The rule prevails, though bad, if it covers the case. The question is, does it cover. This is a question of construction. Ambiguities and uncertainties arise. And when the resources of grammatical construction have been exhausted, the system contains no reserve

force of reason to uphold or guide its solution of special problems.

It is true, therefore, that while under both systems it is an impossibility to attempt to state the infinite variety of subsidiary rules, the common law system is relatively superior so far as concerns the first branch of the alternative above stated by Holland.

In stating the second branch of the alternative, that a code is an evil if it rests satisfied with the statement of the law with reference to cases which have already been considered, because it must thus leave new cases wholly unprovided for, there is omitted by implication all reference to one of the weakest features of codification.

As shown above, a code is uncertain and indefinite from its generality, not only in regard to new cases not then known or conceived, but also in regard to cases which have actually arisen and been decided. This, because generality of expression produces an ambiguity and uncertainty in the application of the rule to the facts of special cases already known, as well as to the facts of special cases not yet known or conceived. And, from the experience under all codes which have ever been enacted, we might say, without fear of contradiction, that the difficulties of uncertainty and ambiguity in the application of the abstract rules of a code to the concrete facts of life are more numerous and persistent in regard to combinations of facts which are known, than they are in regard to the relatively few entirely novel combinations of facts which are developed by future experience. At least, this is a fair induction from the experience of lawyers with the codes of procedure. These codes have unsettled more law than they ever made certain.

Referring now to the quotation which Mr. Holland makes from the report of the New York Commissioners on the proposed civil code, we have this criticism. The extract quoted asserting the similarity of written Code Law with written Case Law implies the same confusion

of ideas above referred to. If the analytical and authoritative compilation from the case law records — the code mentioned — is expressed in the form of statutory law, as a compilation containing a generalized statement of the rules without reference to the special facts involved, the whole character of the compilation is radically changed, and, as shown above, a new and different method of construction must be adopted to arrive at the meaning of this written language.

The dispute between Mr. Holland and the opponents of codification, so far as concerns the statements made in the last sentence quoted from Mr. Holland's essay, is a dispute of fact. We would be pleased indeed to have a code which presented "the law at that precise stage of elaboration at which it finds it." But such a code must be either in extreme detail, in which case it is obstructively rigid, or it must be expressed in such general language that it fails to cover with any certainty the known, as well as the unknown, special cases.

FIELD'S STATEMENT OF THE ARGUMENT

Mr. David Dudley Field delivered an address on Codification before the Law Academy of Philadelphia in 1886, and at page 14 of that address he thus expressed the argument: "But it is said that there are certain portions of the law of precedents that cannot be expressed in language. Is not this a contradiction in terms? The law of precedents implies that there are precedents, and they of course are couched in words. If these words mean anything, the meaning can be expressed; if they mean nothing, the precedents are of no import. The law is a rule for the guidance of men; when a precedent expresses or implies such a rule, it can be written; if it cannot be written, it is neither rule nor precedent. Yet law is a rule for human conduct; it cannot be that unless it be known. To require men to follow a rule when they do

not know what it is, would be as much as to say it is no rule to them at all."

This appears conclusive, but it involves the same error of affirming that the written law of a Code is identical with the written law of a Case System, and subject to the same rules of construction. The truth is that the law is known when expressed in the case. But you cannot abstract it without losing some of its substance.

THE NEW YORK CODE COMMISSIONERS' STATEMENT OF THE ARGUMENT

The New York Code Commissioners express the argument thus:—

"The question whether a code is desirable is simply a question between written and unwritten law. That this was ever debatable is one of the most remarkable facts in the history of jurisprudence. If the law is a thing to be obeyed, it is a thing to be known, and if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it. . . . Whatever is known to the judge or to the lawyer can be written, and whatever has been written in the treatises of lawyers or the opinions of judges can be written in a systematic code."¹

These last quotations exhibit in the Code Commissioners a confusion of thought of a similar character. The law as written in a Case System is published and known, as well as the law written in a Code; the difference is in the volume of the writing and the manner in which it is expressed; namely, whether it is generalized and abstracted, or whether the abstractions are stated in connection with the special facts from which they are derived. The last sentence of the quotation would seem to indicate that the Code Commissioners referred to a codification of the kind advocated by Mr. Hawkins; namely, the including not only of the principles and the facts, but of the arguments

¹ Report of Code Commissioners of N. Y. Civil Code, p. vii.

and the reasons on which the code rules are founded. Only on this understanding of their meaning does the argument they use approach soundness. That this was not their meaning is shown by the fact that the New York Civil Code is not a code of the character described by Mr. Hawkins, but is a code of principles merely. In fact, Mr. Hawkins refers to the New York Civil Code as one which is not the proper kind of code by reason of the absence of some of those elements which he considers to be essential to a good code.

The New York Code Commissioners, developing further the argument founded on this confusion of ideas, say: "If we look, for example, at any of the leading cases reported, we see the facts given, the conclusion of the judges and reasoning by which the conclusion is reached. Whatever legal proposition is necessarily involved in this conclusion is to be deemed an established rule of law. This rule may be written in a code, or it may be left in the reports. Is it any more flexible in the one form than in the other? Certainly not, unless the judges feel themselves at liberty to depart from it, so long as it remains in the reports alone. But that would be to declare that the decision is not law."¹

The first sentence of the foregoing extract shows that the Code Commissioners understood the essential attributes of a common law report. In view of this fact, it is all the more surprising that they can ask the question, "is it any more flexible in the one form than in the other?" or that they can assume that the rule written in the code, is exactly identical with the rule left in the reports. The fact is, that an abstract principle or rule expressed in language and considered apart from actual phenomena, is one thing, and has one meaning. The same principle expressed in the same language, but always considered in connection and touch with the phenomena from which it sprang, is quite another. The latter prin-

¹ Report of Code Commissioners of N. Y. Civil Code (1866), p. xxiii.

principle is capable of development or restriction upon the lines of right reason; the former principle is capable of no development or expansion, except upon the lines of reasoning as to the grammatical meaning of the words used to express it.

AMOS' STATEMENT OF THIS ARGUMENT

Professor Amos in his book on *An English Code*, p. 67, thus refers to this branch of the argument: "It is said that there is a gap that cannot be bridged over between a system of law which rests for its perfection upon an adequate use of language, and one which rests for its perfection on the possibility of firmly grasping its central principles. . . . Even in England at the present day the notion of a perfect code presents to most people's mind, as it seems to have done to Bentham's, a vast number of states of fact, with an equally large number of precisely Written Rules carefully adjusted to them. If a Code meant this, there might indeed be good ground for apprehending the substitution of a so-called 'law of Language' for a 'Law of Principles.' But this meaning of a Code is neither a necessary nor a true one."¹

It is difficult to follow the reasoning of the last sentence. If the detail Code mentioned consisted of a digest or abstract of the Reported Law contained in the cases so as to include the special facts of each case, the rule declared and the general outlines of the reasons and arguments for the decision, it might be possible to interpret such a code by the same rule of scientific construction now used in deducing law from reported cases. (This is proved. See Chapter VII, Title II, and Chapter X.) If the detail Code omitted the reasons and arguments in connection with the facts — to that extent a grammatical construction would be rendered necessary.

¹ Amos' *An English Code*, p. 68.

A detail code which merely gave the facts and the rule on the facts would be peculiarly liable to the objection that the disputes as to the law would then be a war of words. But a detail code stating the facts, and the rule, and in an abstracted form the arguments and reasons for the rule on the facts, would approach the common law reports in extent, and in so far as it approached the reports in excellence of detail, would lend itself to the application of the same system of scientific construction — a rule of construction which is of the greatest excellence, but which cannot be used except with reference to the detailed facts of special cases. And when so used, it is simply in each individual instance the application of right reason to the solution of a problem — untrammelled by words or forms of words — the way it should be.

In this last quotation we have a sample of the elusive nature of the Code dispute. Professor Amos here implies that he has answered this argument against Codification by admitting that it is an argument valid as against a detail Digest Code, but invalid as against a Code of Principles.

We, therefore, merely recommend the reader to compare this statement of Professor Amos as to the inapplicability of this argument to a Code of Principles with the concrete examples set forth in Chapters V and VI in discussing the Case and Code Law; and we will allow him the privilege of choosing any Code he pleases as the one he will defend against this attack.

GENERAL DISCUSSION

And so we might take up in detail the like arguments of other advocates of Codification and make such answer, based on the same lines, as the occasion required. But we have already trespassed too much on the patience of the reader. For all these arguments *pro* and *con* might have been summarized on one side or the other, and so

a certain amount of reiteration avoided. In so doing, however, some clearness of conception would have been lost in the condensation. Again, the interest of the personal method, the seeing in juxtaposition the argument and its answer, not in the language only of the advocate on one side, but in the very words of each contestant, affords the reader the power of judging between them for himself, under the full conviction that he has both sides presented to him, and not merely the garbled version too often made of an adversary's argument. It would not profit much, however, to continue this method, because we have taken as examples for discussion the views and arguments of all the leading Advocates of Codification; and the arguments of others are laid on the same lines.

In concluding this chapter, we would add that a study of the authorities for and against Codification compels the conclusion that the discussion has been too much confined to generalities. For this the advocates of Codification have been chiefly to blame. Whenever defects in any particular Code have been pointed out, the answer has always been,—well, that is not the right kind of code;¹ or, as in the case of the Field Civil Code,—all things are human; or, as in the case of the Indian Contract Act,—that it is not possible to produce perfect laws, but only “good working laws.”²

The only way to arrive at conclusions, when discussing abstract general principles, is to test them by their concrete examples. The conflict between advocates of different theories, confining themselves to assertions and denials of generalities, is about as useful as the celebrated combat of Don Quixote with the windmills. Had the physicists, since Newton's time, taking different sides in the conflict over the corpuscular and wave theories of light, confined their activities to assertions and denials of

¹ Austin on the French and Prussian Codes, Province of Jurisprudence. §§ 953-962.

² Pollock's Essays on Jurisprudence and Ethics, 93.

the generalizations involved, no progress would have been made ; and the scientific world would have been in doubt down to this day. Fresnel's experiment, conclusively proving the wave theory to be a true and the corpuscular theory to be a false explanation of the phenomena, was simply the testing of each generality by one more concrete example in nature.

And so, in the discussion of the Code question, nothing is to be gained by further assertion or denial of generalizations. We must test our principles by our facts. We have attempted to carry out this idea in this essay. The results are presented. But there must always be some feeling of uncertainty ; until, not merely one branch of the law, but all branches, have been submitted to a like analysis, under the operation of both systems. At the same time the character of the problem makes it almost certain, that what is found to be true of the laws of the expression of legal principles embracing one province of the law, will be found to be true of the laws of the expression of legal principles embracing all provinces of the law.

It remains only to add to these considerations the practical argument, and the final theoretical argument, against Codification. These are set out in the next two chapters.

CHAPTER IX

THE PRACTICAL ARGUMENT

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I

THE DIFFICULTY IN CODIFYING ARISING OUT OF THE INEVITABLE GROWTH OF THE LAW

Assuming, for the purposes of the discussion, that Codification is correct in theory, there yet lies before us a great, and as men are now constituted an insuperable, practical difficulty. This difficulty is that the passage of a Code does not stop the growth of the law. So long as a society progresses in industry, arts, science and ethics, so long must the rules of law change and grow to keep pace with the moving equilibrium. As Mr. Leonard A. Jones, the author of several excellent text-books on law, says: "If it were possible to make such a complete Code, it would not retain its completeness beyond the day of its enactment. The Courts must necessarily interpret it, and their interpretation must be upon common law principles, and thus the complete Code becomes incomplete, and common law once more a part of the law of the land."¹ Mr. Jones here assumes that a system of Case Law is to be added to the Code system. The theoretical Codifiers deny the necessity of this. Experience with all existing Codes, experience hereafter referred to, appears contrary to this denial. Omitting this branch of the issue at present, we

¹ Article on "Uniformity of Laws." 28 Am. Law Review, 547, 559.

may take up first the experience had under Codes in English-speaking Countries. The experience of all these Codes has been that a Code and a Law of Precedents combined, merely furnishes a new departure for the law so codified. Such has been the effect of the Codes of Procedure. Where, as in the case of the Civil Code of California, a Code of Principles has been expressed with "compendious brevity," it has not even always assumed the importance of a new departure. Witness Professor Pomeroy's strong plea to the California Courts to construe it as simply in affirmance of the preëxisting law except where the express language prevents; and the view of the California lawyer, before cited.¹

The result is as follows: You cannot construe the Code without a knowledge of the old law. You cannot understand the Code except in the light of the decisions made under it. The necessity of learning the Old Case Law exists. The need of knowing the New Case Law is paramount. What lawyer practising under the New York Code of Civil Procedure dares take out an attachment without careful study of the latest decided cases as to how his affidavits should be drawn, whether based on knowledge or on information and belief of the affiant?² So the New Case Law encroaches upon the Code to such an extent that the living law is in the Cases, not in the Code. Take, for example, the New York Code of Civil Procedure. Each year at Albany some dissatisfied practitioner passes an amendment changing a word or a phrase in a section. Thus the section as it stood, and the cases construing it, are expressly or impliedly changed. Worse yet, some other section in some other part of the Code has probably been affected so as to change the natural construction of its language when taken alone. Such a snag surely trips some one some day. And so the merry pro-

¹ "The Civil Code of California," Pomeroy. 3 & 4 West Coast Reporter. See pp. 268, 269, *supra*.

² See note in 2 N. Y. Ann. Cases, 58.

cess of change and repeal goes on, complicated by the learned attempts of the Courts to extract sense from this confusion worse confounded. The consequence is that the busy practitioner can neither rely upon his Code, nor upon his Cases. The one may have been different in language when the case he relies upon as construing it was decided; and the other, although correct when decided, may have been reversed by a subsequent legislative change in the language. If the practitioner, therefore, would take no chances of failure, he must, each time a practice question arises under this Code, examine the session laws year by year for any changes in the language of the sections of the Code, and then compare the dates of the Cases with these dates to ascertain the effect of the Cases. And what is true of the New York Code of Civil Procedure would be equally true of any other Code. Truly, it is not too much to say, with the Code advocate, that our system of procedure is the worst in the world; and it is not too much to differ from him when he says this would not have been so had the Field Code of 1848 not been superseded by the Throop Code of 1880. The fact is, that these very difficulties in the operation of the old Field Code led to the amended Throop Code; and this last, to successive yearly amendments, resulting in the present chaos and weariness of spirit. And every lawyer actually practising under this system, be he Code Enthusiast or Case Law Champion, will accede to the above picture as not overdrawn.¹ And this is the practical working out of the captivating "all the law in one book" theory.

José M. Mestre, a leading Havana Lawyer, trained under the Spanish Code, but compelled to leave Cuba through the political troubles of 1868, came to New York City, studied law at Columbia Law School, was admitted to the Bar and practised law in New York

¹ See article of Mr. J. Newton Fiero in Albany Law Journal, September, 1896.

State for a number of years. With this practical experience in the operation of the diverse systems, he was in an unusually good position to render a practical judgment. In discussing this question, he used to say that, in passing our Code of Procedure, and retaining our Case Law with it, the New York Lawyers were trying to fuse the infusible; and that we would never get rid of the worst evils from which we suffered until we abolished precedents under the Code. His position was that one system or the other could properly exist,—which, was a question of expediency for the particular State,—but not the two together. His judgment in this respect is somewhat borne out by the history of different code experiments. But, as will be shown below, even when you prohibit a case law, a natural law of human nature rises superior to the prohibition, and precedents exist and flourish clandestinely, if not openly.

The law of growth of the Case Law is an attempt by the Courts to solve special problems by argument and reason. The law of growth of a Code is an interpretation of language by the Courts with recurring cataclysms of amendments, substitutions and repeals by the Legislature.

It is as though the Creator, in evolving his creatures by his slow law of organic evolution, should conclude that, on the whole, better results could be obtained by allowing these slowly working forces to have full play for a few months at a time, and then be checked or reversed in action by earthquakes and cataclysmic changes in the conditions of life and habitat.

So thoroughly have the theoretical and practical Codifiers appreciated the evils resulting from this combination of Code and Cases, that nearly all of them insist upon the wiping out of any adherence to precedent in deciding cases arising under a Code.

The Roman Law is peculiarly distinguished from the English Law by the fact that the Common Law is a law

of Cases occasionally modified by Statutes, while the Roman Law was a law of Statutes (we speak here of the Prætorian Edict) occasionally interpreted by illustrative Cases, the responses of learned lawyers. These responses have been of different value at different periods of the development of Roman Law. Up to the time of the Code Justinian, it was lawful to cite them in the argument of new cases.

As a consequence, through the custom of many centuries, the responses of great and learned lawyers to questions arising under this Code had become precedents and authorities for the decision of subsequent cases, almost as binding as our own law of case precedents. Unlike our Case system, however, they were not authoritatively binding,¹ but were only used as Argument. The best way to describe the difference is to liken it to a well-known distinction in our Common Law Cases. The difference is, that if a case cited is Authority, its ruling must be followed on the principle of "*stare decisis*." If the case cited is from another jurisdiction, then it is said to be mere argument, *i.e.* only to be followed in so far as the decision accords with sound sense. The decision of the highest Court of New York State is Authority in that State; but only Argument if cited in England, Massachusetts or elsewhere; and *vice versa*. Now this was the situation of these Responses under the Roman Law. They were not Authority, but they were Argument. And, in the discussion of new cases, these different authors were cited with more or less weight on the decision to be made. The result was that, at the time of Justinian, this source of law had become of immense bulk, redundant and contradictory. Justinian revised all the law into his great *Corpus juris Civilis*; and, to prevent the evil for the future, forbade all attempts to extend the law by way of interpretation, including in the prohibition Commentaries as well as Judicial Decisions;

¹ Markby's Elements of Law (4th ed.), p. 58, § 92.

and threatened the person who should disobey the injunction with the penalties of forgery.¹ The threat was futile. The making of law books went on, and Justinian himself was compelled to add 122 novels to his already perfect code. So Article V of the Code Civilis of France prevents ordinary judicial interpretation from becoming authoritative.² And the German Code expressly provides: "The opinions of law professors and the views taken by prior judges shall not in any way be considered in future decisions."³

Yet, in spite of these prohibitions, decisions and commentaries are published; and the courts do resort to them; and they have some weight in the decision of cases, though not authoritative.⁴ Not being authoritative, the practitioner never knows whether the former ruling will be recognized or a new one made. Unending uncertainty results.⁵

So experience has taught that even the threat of a possible punishment for forgery cannot overcome the natural tendency of the human mind to seek for, and defer to, precedent. And no prohibition of any Code has been successful in stamping out this innate tendency. Again, as no reasonable demand goes long without a supply, the demand for light on the special cases governed by a Code, and yet not clearly included in its provisions, leads to Commentaries of private writers. These, in the end, grow into a literature of no mean size and extent. Mr. Best, in 1856, comparing the bulk of English and French law and speaking of the French Codes, then only fifty years old, comments on the fifty volumes of Commentaries of

¹ Markby's Elements of Law (4th ed.), p. 43, note.

² Ibid., p. 58, § 92.

³ Allgem. Landrecht, Introduction, § 6, cited in Markby's Elements of Law, p. 59, note 1. Ex-Judge Dillon says that case law is a part of every system, only in Europe it is not "authority." See article on "Our Legal Chaos." 2 Political Science Quarterly, 91, 96.

⁴ Markby's Elements of Law, p. 59, note. Clark's Practical Jurisprudence, 263, 264.

⁵ Amos' An English Code, p. 125, referring to the French Code.

Toullier and Traplong on the Code Civile, the thirty-one volumes of Loche on the Codes Napoleon and the growing "Bulletin de Lois" (the new laws) rivalling in volume the English Statute Book.¹ From which we derive the truth that in a growing society, law grows. Whether, therefore, your law is in a Code, or in Reports, it will keep growing and changing to meet the wants of an advancing civilization. And whether you legalize and allow Precedents as Authority, or prohibit them, they will exist and flourish, and finally overrun the Code itself. The question then is, shall your law grow as a law of Precedents? Or as a law of Codes and Precedents? Or as a law of Codes and Clandestine Precedents?

The theoretical Codifiers have plainly seen this defect of a Code system and attempted to cure it by various devices. Professor Clark is in favor of a Code interpreted by Precedents which shall be authoritative, but revised and reenacted in accord with their results every five years.² Austin advised continual amendments on suggestions from the judges. These, he insists, should be incorporated into the Code, not left as mere supplements. And he instances the neglect of the French and German law to incorporate the amendments and decisions of the Law Commission into the body of the Code as defects in those systems.³ Professor Holland insists upon a "law Council" whose province it would be to incorporate new law.⁴ Mr. Schuster bears testimony to the utter failure of such a council in the case of the German Code.⁵ Stephen says that Codes should be reenacted about every ten years.⁶

¹ Best on Codification. 1 Juridical Society Papers, 209, 226.

² Clark's Practical Jurisprudence, 292.

³ Austin's Province of Jurisprudence, § 960.

⁴ Holland's Essay on the Forms of Law, 64.

⁵ 12 Law Quarterly Review, 17, 22.

⁶ 6 Irish Law Times, 572, 573.

II

THE DIFFICULTY ARISING OUT OF THE DIFFERENCES
IN THE CHARACTER, ABILITY AND SPRINGS OF
ACTION OF THE AUTHORS OF CODE AND CASE
LAW

But even assuming that it were possible to have a Code System in full working order unmodified by precedents either by authority or clandestinely, — a condition never yet existing in human affairs, — you would still be confronted by a defect in the machinery of lawmaking which does not exist in the Case System. These proposed remedies for the practical difficulty in codifying the law arising out of the necessity of the Code keeping pace with the growth of the law, all have a fundamental vice — the same vice which attaches to the original proposal to codify the law. This vice consists in the change, which this proposal contemplates, in the writers, the authors, the makers, of the law.

The authors and makers of the Case Law are Judges — men trained to their profession through long and weary years of preparation, service at the bar and final elevation to the bench. Through such training Judges are imbued with a certain legal habit of thought, and argument, and conclusion — a habit which becomes a second nature to all lawyers, and a habit, by reason of which, in spite of occasional aberrations, through numerous decisions by different minds in all branches of human activities, the principles and exceptions of any one system of Case Law are kept within usually correct boundaries of consistency. Indeed, if we consider the length of time through which our Case Law has been developing, and if we consider the number of minds by whose separate and unconnected action the present system has been worked out, we ought rather to marvel at its astonishing symmetry and completeness, than to criticise its occasional anomalies and in-

consistencies. Again, these men are met and sworn to do justice between man and man according to their lights. The principle of their action, both in theory and practice, is right ; not might.

The authors and makers of a Code law are the members of the Legislature. How different in character and equipment for the task in hand these are from Judges, it would, perhaps, be invidious to state. Any one having practical acquaintance, for example, with the Legislators of Albany, Trenton or Washington, and their characteristics and modes of operation, needs no enlightenment on this head.

Again, we all know that in matters of legislation, whether involving private or political questions, the principle of action is might ; not right. Reason governs the decisions of Courts. Force governs the decisions of Legislatures.

All this is so evident, so patent, that the Code advocates attempt to avoid its force by claiming that the Legislature cannot, and does not make a Code ; but the Commissioners, learned men appointed by it, make it. And so also, in amending a Code, the Legislature *should* be guided by these same Commissioners. The reply to all this is that for the Legislature to abdicate its functions and blindly follow in the lead of such a select body of Commissioners would require a fundamental change in the theory and practice of our Constitutions. The theory of our Constitutions is, that all legislative power is vested in the Legislature, and not in a committee or Commission appointed by it. Any attempt on its part to expressly vest these powers of legislation in such a commission would be void.¹

And the practice is in exact accord with the theory ; not perhaps to such an absolute extent in the case of the initial passage of a code, but still substantially and completely so, so far as concerns subsequent amendments. For it must be borne in mind that since the new Code, *ex*

¹ *State vs. Young*, 29 Minn. 474 ; *Ex parte Hall*, 48 Cal. 279, 313.

hypothesi, extends over the entire field of law, no law should be passed except under the censorship and consent of these Commissioners. For they are the only ones competent to foresee the effect of each new law on the construction of the Code. Experience has shown that no Legislature will, in fact, thus abdicate its powers. Nor, is it at all likely that any one ever will. So even if your original draft Code passes as drawn by the Commissioners by Grace of God and the good will of the Legislature, the next and each succeeding session sees amendment on amendment intentional or unforeseen, drawn, not by the Code Commissioners, but by some member seeking the petty advantage of his constituency, until your symmetrical body of statute law has disappeared to give place to a hotch-potch of contradictory legislation which is neither "flesh nor fowl nor good red herring."

And this situation of contrast between the capacity and fitness of these respective proposed Authors of the Law must continue until the members of the Legislature become equal in learning and attainments to the Judges on the bench.

Again, conceding that your Constitutions were changed; and the Commissioners sat to enact law, not as Judges in the way Judges do in the light of a concrete case after argument *pro* and *con* from interested advocates paid to present all possible arguments on either side, but as Commissioners in the privacy of their consultation room and study drafting a Code, and deciding in one block a multitude of cases, not argued before them by litigants affected by them, but simply in the light of their introspection and reason; which, of these two authors of the law, would arrive at just results in the great majority of instances? But the conception itself is absurd, for the Legislature and the Judiciary must be kept distinct. And so long as water runs, and grass grows, Legislators are not going to abdicate in favor of Code Commissioners, however learned.

Human nature is as it is. The Lawmaker must work

with such agencies as we have. As men and things are now constituted, the growth and development of the law — the ethical part of it — is safer in the hands of Judges, than in the hands of Legislators. The growth of Judge-made Law — whether through accident or otherwise, it matters not — is governed by the Law of Right. The growth of Legislative Law is governed, largely, by the Law of Might. It is not safe, therefore, to take the control of the system out of the hands of those who have so nobly and so ably fashioned and worked on it for centuries; only to put it into hands of those less intelligent, and usually impelled by other motives than the desire to be just. Were codification scientifically correct in the abstract, this consideration alone would make it relatively bad in the concrete.

It has been argued that private ownership of land is ethically indefensible. The force of the argument is, from the point of view of absolute ethics, unanswerable. But we must take into consideration our relative condition. It may be a great evil that John Smith does not allow the villagers in his beautiful park. But it would be a much greater evil if, in carrying out the theory, the handling of the vast sums of our economic rent were to be put into the hands of our local politicians.

So codification, even if theoretically correct, would, under the prevailing conditions, be attained at too great a cost.

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RECAPITULATION

In the foregoing chapters we have outlined the nature of the Code and Case systems. We have stated the patent fact that although all law, whether Code or Case law, is written, different rules of construction are applied to discover the meaning of its authors. We have inquired whether this historical fact is accidental or necessary. We have found that this difference in the rules of construction has arisen out of an intrinsic difference in the contents of these forms of writing. We have discovered that this difference in the contents consists in the possession by the Cases of a full statement of the detail facts, the reasons and arguments for the rule, and for its application to the facts, which is absent from the Code.

Incidentally, we have noted that the rule of the Case law system is never expressed in words, except in connection with the Cases,—the combinations of special facts,—in the light of which it is evolved, and which it governs. We have noted that the science of law as embodied in Cases deals with the actual combinations of facts in the cases decided or to be decided, and that these constitute the observations or experiments on which the truths, the general principles, are built up. The abstract rule, the principle, is never considered as a thing by itself, to be authoritatively expressed and thenceforward become unchangeable except within the limits of grammatical construction. The general rule so obtained from the observations and experiments made in the field of the science — the litigated cases — is subject at any moment

to reëxamination. Its validity, so far at least as concerns its application to future cases, is no greater than the reason for its existence. Its meaning is not bound up within the four corners of the writing by which it is expressed. Although the facts of a case arising are like those of a case already decided, and within the purview of the language used in expressing the principle, or its application, the principle is not applied unless there be valid reason for its extension to the special case so presented.

On the other hand, the Code system apotheosizes the abstract principle, the general rule, into a God to rule its world. The meaning of the rule must be found in the words used within the four corners of the writing. The observations, the experiments of the Science of Code law, are no longer the actual facts,—the phenomena as they occur,—but the abstractions from those facts made by the Codifier; namely, the one or two supposed material facts which the wisdom of the authors of the Code have deemed worthy of separate mention, as the earmarks of classification and as the criterion of the rule. When these selected abstractions of fact exist, in the special cases presented, the decision prescribed by the rule in the Code must be made.

Here the methods of Case and Code law differ. When, at the Common law, all the facts of the special case are known, the rule to apply is not expressly or impliedly implicated with them. It is to be discovered or applied by the use of reason and analogy. When, under the Code system, all the facts of the special case are known, some of them involve the selected facts mentioned in the Code in connection with a rule, and this rule must be applied without regard to reason.

The *data* of the common law from which its general truths are worked out are the actual facts of each case. The *data* of the Code system on which the application of the general truth depends are the few facts mentioned in the Code in connection with the rule or its exception.

THE ARGUMENT CONTINUED

In all that has been said we have drawn distinctions between Code law, as understood and defined by most of the theoretical Jurists, and Case law. It only remains to meet a possible argument.

Let us suppose an advocate of Codification to argue with Mr. Hawkins for a fuller Code — a Code with arguments, reasons and illustrative cases. Let us suppose such an one to argue that by so drafting a Code all the merits of the Common Law could be attained, without its defects. To such an one we would answer: Your Code, however drawn, would be an abstraction of what now exists in the Reports. In the process of abstraction it would lose in definiteness of statement and of illustration. Facts thought to be immaterial would be omitted. The resulting abstractions of the facts of cases would approach the Code system above mentioned, and be different from the Common Law system, in that the *data* of your science would not be nature,—things as they are,—but abstractions from nature. Not only must your facts be condensed and abstracted, but arguments and reasons also must be condensed and abstracted. If all this were well done, it is possible that the resulting Code might be the best yet devised. But unless this abstraction proceeded to great condensation of the volume of matter, the gain in comparative brevity would be more than counterbalanced by the defects arising from the partial omissions and condensations. And if the condensation were considerable, the nearer such a code approached a Code of Principles, the more it would have, in common with such a Code, the defects above pointed out.

If to this it be answered that the Common Law Reporter himself abstracts the facts of the special case from all the actual details that are embodied in it, hence why not proceed to greater abstraction, the answer is twofold.

In the first place, the facts of every observation or

experiment in any science, when recorded for future use, are abstracted to a certain degree. The investigator puts down all he thinks material, and all he considers might or could have any bearing on the solution of the problem. The Reporter of a Common Law Case does likewise. In other words, the attempt is not to abstract, but to state fully all the implicated circumstances. If any facts are omitted, it is because they cannot be conceived to have any bearing. The Code writer, on the other hand, strives to see how much he can condense, and with how few facts he can get along. The attempt is to dispense with all facts that do not appear to be material. In an experiment it often happens that the facts thought to be of no consequence are afterwards found in subsequent investigations to contain hidden meaning and to develop great importance. The full statement of all the facts enables a true interpretation to be put in subsequent observations upon earlier experiments.

The case of *Mitchell vs. Reynolds* is an example of this. The report of that case states the sale of a good will of a bakery in a parish in London. The opinion mentions the protection, the covenant not to trade, furnished the buyer, and says that restraints of trade are good or bad according to the limits in space; that a restraint over all England is invalid, over a county good. Note here that the Report states no details of facts as to what was the extent of the trade of the bakery so sold, whether its customers were within the limits of the parish, or covered a larger or a smaller space. Yet, as indicated by the subsequent development of the law on this subject, enlightenment on these particulars was specially needed. Such facts constitute the true basis of a correct ruling on the individual contract. Thus the Report itself was defective in not expressly going into sufficient detail. It happens, however, that the defect was in this instance of no consequence. The trade involved — that of a bakery — implied the absence of possibility that its circle

of customers could have extended over more than a very limited space. Here, for the purposes of subsequent deductions to be made from the case, the statement in the report of the kind of business implies the limited space of its sphere of influence, and enables the Court, in solving subsequent disputes, to correctly ascertain the limits of what was actually decided in this leading case. Subsequent cases, under differing conditions, followed or distinguished the arbitrary space limits of partial and general restraint mentioned in this case, until the exact question arose in the Nordenfeldt Gun Case. This case involved a covenant restraining trade throughout the world. This covenant was void under one branch of the ruling in the old case. But the common law always allows us to inquire into the reason of the rule, and for its application. So inquiring, the Court saw that the *reason* given in the Reynolds case for the validity of the covenant was the proper protection of the purchaser. This protection depended, as to its limits in space, upon the nature and extent of the business. Under the changed conditions in the later case, the same reason required a world-wide restraint, which, in the earlier case, required a restraint over a parish. Hence reason triumphed in the decision.

A Codifier drafting a Code section in the light of *Mitchell vs. Reynolds* might easily draw one substantially as it is done in the Civil Code of New York or in the Indian Contract Act. We have already shown how both of these would have compelled an erroneous decision of this Nordenfeldt case and of many other disputes. It follows that with abstraction begins liability to error.

But to return from this digression. What is here insisted upon is that the Common Law Report records the facts, the *data* of the science of applied ethics, the law, in substantially the same way as any observation or experiment in any other science is recorded. The Code System, on the contrary, pursues a method of

abstraction which is not the method of any other science.

In the second place: It is one thing to abstract or condense the present Case Law into the form of a digest, and another thing to crystallize that digest by enactment into a Statute. A digest may be good as a digest, provided you have the cases at hand for reference to check and correct it, but it would be of altogether different value if suddenly enacted into a statute. Yet this is substantially what is contended for. No one would be in favor of enacting the present reported cases as statutes. If so enacted, awkward questions as to how the writings ought to be construed would be raised, and there would be no gain in *brevity or certainty*. The compilations of the Roman Law made under Justinian happen to contain in this way abstracted Case Law (and Text-book Law) all enacted in the form of Statutory Law. The history of the *Corpus Juris Civilis* is a history of the difficulties arising out of such compilations.¹

Assuming, then, that the Case Law, if enacted into a Statute, would receive the same construction as at present, no gain has been made. And assuming the Case Law has been abstracted, the very abstraction of it is in violation of true principles, in that the *data* with which all sciences should deal, and from which their truths should be induced, should always be the actual occurrences among phenomena, and not human abstractions from them.

THE FINAL GENERALIZATION — A DIFFERENCE IN METHOD

The final generalization, then, from which all the differences of Statute and Case Law flow is this. Case Law deals with the actual phenomena that occur in everyday social life, the actual observations or experiments made in social life by man. Code Law deals with abstrac-

¹ Austin's Province of Jurisprudence, §§ 902, 906.

tions from these phenomena. The final distinction, then, from which all the other differences between Code and Case Law flow is a difference of Method.

The problems of Case Law are solved by comparing the facts of the actual experiment in social life with the facts of other experiments in social life, and classing the former facts with the facts theretofore happening bearing the strongest general analogy. This comparison of actual phenomena with actual phenomena, and classification of them by likeness or unlikeness into classes dependent upon the greatest number of like characteristics, is the scientific method.

The problems of Code Law, on the other hand, are solved by comparing the facts of the actual experiment in social life with some few facts mentioned in the Code which have been abstracted from other experiments. Thus the method pursued is to class the phenomenon under investigation, not with other complete phenomena to which it bears the greatest number of characteristic resemblances, but with these abstractions. This is **not** the method of any other science. In no other science is the mere presence of one or two attributes of a phenomenon allowed to dictate the existence of a general principle involved. And in no other science is the presence or absence of some new characteristic in the phenomenon conclusively precluded from affecting the establishment or expression of the principle involved.

The method of Case Law is, therefore, the method pursued by all the other sciences. The method of Code Law is, therefore, not the method pursued by any other science. The result is, since law is itself a science, that Case Law rather than Code Law is the proper form of its expression.

THE OBJECTION THAT SOME RULES OF LAW ARE PROPERLY EXPRESSED IN STATUTES

To the truth thus stated the answer of the Codifier is obvious. It is that the argument just presented proves

too much: that we have already admitted statutory law to be the proper form of expression of some legal rules; that we have already asserted law to be a science, and hence not less so, so far as concerns the province of statutory law than so far as concerns the province of case law; yet now we claim that, because it is a science, it should rather be expressed in a Case than in a Code form. And now, without traversing the facts, let us see what may be said in reply to this objection.

It is true that the common law of to-day is made up of case law and of statutory law, and statutory law has the same characteristics as code law. The consequence is, that either a portion of the common law, namely, the statutory law, is unscientific in its method, or there is a scientific reason why a portion of the law may be cast in a statutory mould, while another portion must remain in the form of case law. That there is a valid distinction as suggested, and that the common law division of case and statutory law is relatively correct, must now be proved.

ALL LAWS INVOLVE A RULE OF CONDUCT

The question to be discussed involves a broader question. Before we can assert a scientific reason for the difference in form of expression between Case and Statute law, we must know what Case and Statute law are, must class them with something else deeper and broader than either.

Now both Case and Statute law are alike in one thing. They represent the rules laid down by the social unit as guides to its conduct. Hence Case and Statute law may be said to be a portion of the conduct of societies. They are so in the strict sense of constituting acts of the societies, and also in the sense of merging into actual conduct, when these acts or decisions are executed, or carried into effect. Whatever of intrinsic difference there can be between them, therefore, must lie in the different

kinds of conduct involved. The question then resolves itself into what constitutes the conduct of social units, and wherein do different portions of such conduct differ, if at all. This inquiry resolves itself into the question of the differences between the portions of conduct of an individual. This, because the conduct of the individuals composing it is the conduct of the social unit.

The discrete whole which we call a Sovereignty or State is an aggregation of units. This whole cannot think for itself, or act for itself, independently of like action by its parts. Thus an individual man is an organism consisting of millions of cells. When he runs or walks, he acts as a unit, and the cells of which he is composed do not themselves perform like actions. A society, being an aggregation of individuals not constituting an organism, cannot act as an organism in the sense that an individual so acts. The army marches twenty miles, not as an entity, but each individual soldier marches twenty miles. Action then, taken by the whole, is resolvable into like action taken by the individuals.

It follows that the conduct of bodies of men bears a true analogy to the conduct of an individual man. In each case a large portion of conduct is described as good or bad, and a large portion as indifferent. The laws of man are a part of the conduct of society. As the resolves of an individual are the expression of his intention to govern his own conduct, so the laws of man are the expression of the principles by which the social unit desires to guide its conduct. The laws of man cover conduct which is good or bad, or which is indifferent. The broadest distinction between Laws of Man lies in those which tend to equity or inequity, and those which have no apparent effects either way. Mr. Herbert Spencer's definition of conduct as applied to individual action, therefore, applies equally well to the action of the aggregate of individuals, the social organism.

He says: "Conduct is a whole; and, in a sense, it is an organic whole — an aggregate of interdependent actions performed by an organism. That division or aspect of conduct with which Ethics deals is a part of this organic whole — a part having its components inextricably bound up with the rest. As currently conceived, stirring the fire, or reading a newspaper, or eating a meal, are acts with which Morality has no concern. Opening the window to air the room, putting on an overcoat when the weather is cold, are thought of as having no ethical significance. These, however, are all portions of conduct. The behavior we call good and the behavior we call bad are included, along with the behavior we call indifferent, under the conception of behavior at large. The whole of which Ethics forms a part is the whole constituted by the theory of conduct in general; and this whole must be understood before the part can be understood. Let us consider this proposition more closely.

"And first, how shall we define conduct? It is not coextensive with the aggregate of actions, though it is nearly so. Such actions as those of an epileptic in a fit are not included in our conception of conduct; the conception excludes purposeless actions. And in recognizing this exclusion, we simultaneously recognize all that is included. The definition of conduct which emerges is either acts adjusted to ends, or else the adjustment of acts to ends, according as we contemplate the formed body of acts or think of the form alone. And conduct in its full acceptation must be taken as comprehending all adjustments of acts to ends, from the simplest to the most complex, whatever their special natures, and whether considered separately or in their totality.

"Conduct in general being thus distinguished from the somewhat larger whole constituted by actions in general, let us next ask what distinction is habitually made between the conduct on which ethical judgments are passed and the remainder of conduct. As already said, a large

part of ordinary conduct is indifferent. Shall I walk to the waterfall to-day? Or shall I ramble along the seashore? Here the ends are ethically indifferent. If I go to the waterfall, shall I go over the moor or take the path through the wood? Here the means are ethically indifferent. And from hour to hour most of the things we do are not to be judged as either good or bad in respect of either ends or means. No less clear is it that the transition from indifferent acts to acts which are good or bad is gradual. If a friend who is with me has explored the seashore, but has not seen the waterfall, the choice of one or other end is no longer ethically indifferent. And if, the waterfall being fixed on as our goal, the way over the moor is too long for his strength, while the shorter way through the wood is not, the choice of means is no longer ethically indifferent. Again, if a probable result of making the one excursion rather than the other is that I shall not be back in time to keep an appointment, or if taking the longer route entails this risk, while taking the shorter does not, the decision in favor of one or other end or means acquires in another way an ethical character; and if the appointment is one of some importance or one of great importance, or one of life-and-death importance, to self or others, the ethical character becomes pronounced. These instances will sufficiently suggest the truth that conduct with which Morality is not concerned passes into conduct which is moral or immoral, by small degrees and in countless ways.”¹

THE DISTINCTION BETWEEN LAWS RELATING TO ETHICAL AND TO INDIFFERENT CONDUCT

In like manner, the conduct of society which is regulated by laws embraces conduct which is good or bad and conduct which is indifferent. On the one hand, the regulation prescribed as a law of conduct may enjoin conduct plainly for the good of mankind, or may prohibit

¹ Spencer's Principles of Ethics, § 2.

conduct plainly detrimental; or it may simply prescribe a conventional and convenient decision of some question which might well be ruled either way. The merit of the prescribing of the rule in the last instance being, not its just or unjust results, but the necessity of a fixed and certain rule applying to an indifferent matter, which, however indifferent, must be decided one way or the other.

So far we have viewed the matter as a question of conduct. But as laws act prospectively and not retrospectively, we must view them from the point of view of rules for future guidance. As such, they have resultant effects upon us for good or evil, or no apparent effect. As shown above, the resolves of an individual are of no ethical importance unless the conduct they cause has ethical results. So likewise of the laws of a nation.

The principles of law, the rules of law, or rules or principles of any science, are of no value except as guides to conduct. Man placed in contact with the forces of nature must act. His action may mean life or death to himself, or it may lead to results of no appreciable magnitude. If he possessed the knowledge of Omnipotence, he would know that the most trivial action of his life might better be done in one way than in another. Not having that knowledge, he is constrained to guide himself by the best lights of his intelligence. As to all those apparently indifferent matters concerning which he has not sufficient knowledge to make a correct decision, and as to all those matters the correct decision of which in any one way seems to be of comparative unimportance, he must lay down empirical rules. Where, however, the result of his decision may be of consequence to himself, he relies upon no fixed rules to govern his conduct. In such instances he decides each case as it arises with all the powers of knowledge and reason he may possess.

This difference of method in our course of action extends through all branches of science. The fact that

ordinary men, in matters of science, simply follow the dictum of the experts in the science, does not militate against this. In such cases ordinary men, instead of relying upon their own knowledge and skill, rest the decision upon that of experts; but the experts themselves use the method above outlined, and not any other.

The Common Law, in prescribing rules by statute for the decision of those cases not involving any special equities, follows the same method. For only in case the result of the decision produces injustice, can it have any grave effect upon the good of individuals, and thence upon the good of society. And where it has no such effect, it is only as a matter of convenience that we lay down one rule as the correct rule for guidance. An arbitrary decision is better than none at all.

Wherever, then, the subject-matter of the conduct-involved is of comparative indifferent moment to society, where the goodness or the badness of it is not apparent, or the subject admits of decision either way, certainty being of more importance than the result of the decision, in such cases there is scientific warrant for the expression of the rule of law in the form of a statute. But where equity is involved, where a decision in one way cannot be made without good or evil results to society, then, in such cases, there is scientific warrant for the expression of the rule of law in the form of a reported case. And just as, in the case of individual conduct, we have conduct which is plainly good or plainly bad merging by infinitesimal degrees into conduct which is indifferent, so, in the case of society, we have determinations of the individual cases which are plainly just or plainly unjust, and so involving equities and requiring statement through the medium of cases, merging by infinitesimal gradations into rules of law which are plainly indifferent, and so properly requiring statement through the medium of statutes.

The last sentence, however, has not stated the distinc-

tion broadly enough. In fact, by drawing attention to the plainly good and plainly bad conduct as constituting the line of demarcation, it has obscured a truth of even deeper significance, which must now be referred to. The individual disputes of men, as they arise, often present questions of great complication. These difficulties generally arise out of the necessary incongruity between the absolute ethics — the ethics of the perfect man — and the relative or applied ethics possible to be applied in any one age of an advancing society. That an ethically correct decision of the complicated special case so presented should be made is important, as it will become a future precedent calculated either to advance or retard true progress.

Yet the condition of knowledge is such that we do not know what is equity, or which decision of the case would advance the interests of the race. We are unable to decide the case off-hand, and even after considerable argument and debate the question may be still in doubt. In these instances, and they constitute the majority of the actual litigations arising which are taken for decision to the Courts of last resort, we have the choice of two methods of decision,—the Case Law and the Code. By the Case Law system, we arrive at the assertion of the rule and its application only after careful examination and analysis of the special case, and others like it. By the Code system, these special cases are decided off-hand, so to speak, by the general phraseology of a code section never drawn with complete prescience of its application or results. The consequence is, that both by reason of the character and ability of its makers, and by reason of the method pursued in discovering and stating its truths, the Case Law system is better calculated to correctly decide these moot questions as they arise than a Statutory system would be. All the difficult and unsettled problems of our social activities are, therefore, in the first instance, better left to the slow and careful elaboration of a Case

system, than attempted to be cast into moulds to fit the archetypes in the minds of Code Commissioners. We say, in the first place, recognizing thereby that if a wrong departure is made by the Case system, resort must, in most instances, be had to a Statute to set the rule right.

Hence we may clearly infer a fundamental difference, within the limits of the scale, necessitating a continued existence of the two modes of expression, and, at times, great difficulties in the practical solution of the problem as to how much of the field should be covered by Statutes, how much left to Case law.

A FURTHER OBJECTION

An objection can be made here which should be met. It requires a modification of the above statement. The reader may well ask this pertinent question. You say that there is scientific warrant for the existence of the statute and common law, as applied respectively to different fields of human conduct; that the decision of matters resulting in justice or injustice should be left to case law; and that the decision of matters of indifferent moment should be left to statutory rule. Murder and Robbery are plainly unjust. In the English law, and the laws of many States of the United States of America, this province of conduct,—the criminal law,—embodying matters of plainly ethical significance, is now expressed in statutory form. Is this pursuant to true principle? or is the common consent to this mode of treatment of this branch of the subject wrong in theory? A retrospect will aid us in answering this question.

THE DISTINCTION BETWEEN THE CIVIL AND THE CRIMINAL LAW AS TO CODIFICATION

At common law the law of Crimes was divided into *mala in se* and *mala prohibita*. The latter class comprised chiefly questions of indifferent ethics, equivalent to the matters covered by statutes in the civil law. The former

class involved ethical results. This class, the *mala in se*, were embodied in the common or case law of crimes at the common law; while the *mala prohibita* were covered by statutory enactments. It is worthy of note that the *mala in se*, the crimes of murder, robbery, etc., were at a still earlier period—the Saxon and Danish times—embodied in statutes (the laws of Alfred, Canute, etc.). These statutes, however, were themselves derived from, and crystallizations of, still earlier unwritten custom or case law.

It is only incumbent upon us, therefore, to show why it is proper that rules relating to crimes constituting *mala in se* may be properly expressed in statutory form, while rules regarding civil acts, constituting like clear infringements of the equitable code, should not be so expressed.

In the first place, as has been pointed out, the crimes constituting *mala in se*, acts bad in themselves, e.g. murder and robbery, were for many centuries matters of case and not statute law, and apparently no inconvenience arose therefrom. The subsequent incorporation of the rules in regard to them into statutes is defensible on the following grounds. And the ground mentioned below, based on the powers of the jury in criminal cases, applies equally to crimes *mala in se* or *mala prohibita*.

There is a difference between Criminal law and Civil law that robs the expression in statutory form of ethical rules regarding crimes of the danger lurking in the expression in statutory form of ethical rules regarding civil rights. This lies in the fact, that in all crimes (*mala in se*) there must not only be the overt act evidencing the crime, but the *intent*; and, second, in the fact that the jury are the practical judges of the law and fact. The consequences are twofold.

Codification, as we have shown, is the abstraction of a few salient facts from the complication of possible circumstances, and the application to those facts of a rule

prescribed. In civil law, when the facts mentioned exist, the facts being found, the rule prescribed enforces the judgment which the court registers. And if the salient facts are present and proved by competent evidence, the verdict and judgment must accord with the statute. If the jury disregard their obligations and find against the evidence, or if they disregard the instructions of the Court, the judge orders a new trial until such time as a jury is found which will properly decide the case according to the law and the fact. The result is that when the test facts exist, a Code rule of Civil law is inevitable in its operation. And herein lies the merit of certainty in the Code, and the defect of injustice. For the limitations of human knowledge and powers of expression in language are such that, on the one hand, the classification and rule so established will embrace combinations of fact never intended to be covered, and, on the other hand, will fail to include others that should have been covered, and so produce inequity.

But the requirement and peculiarity of the substance of Criminal law is that not only must the overt act, say of shooting with a dangerous weapon, exist, but there must also exist another element not capable of exact ascertainment; namely, intent, a mental state, mental attitude to kill. Thus if a man pulls a pistol in an epileptic fit, and wounds another, his act is not a crime. Yet he is liable in damages under the Civil law. Again, the statutory rule of Criminal law as to certain overt acts constituting a crime may be as definite as you please to make it, and the evidence of the killing — the overt acts indicating intent, etc. — may be as cogent and convincing as two and two make four, yet the jury may decide the special case as their feelings or prejudices dictate, and the judge cannot overrule the verdict or grant a new trial.

“No man shall be twice put in jeopardy” is the fundamental maxim of the English Criminal Law. It is a palladium of our liberty and is embodied in some Con-

stitutions (U. S. Const., Fifth Amendment). And this maxim emerges in the rule that in a Criminal case the jury are the sole judges of the facts and the State has no appeal. And this, in practical effect, means that they are sole judges of the law and fact; for when the whole combined issues are left to them, if they choose to disregard the law on the evidence, their verdict of acquittal is final. No judge can set it aside or order a new trial. Nor is there any appeal. An instance in point is the usual one of where a husband kills his wife's paramour with all the evidences of premeditated intent, yet the jury acquits and he goes free, though the statute allows no such exception to its operation. Again, the trumpety pleas of emotional insanity so often successful with juries, and the acquittal by juries of offenders in excise cases, even where the evidence is clear, furnish other examples.

The coöperation of these two elements in Criminal law prevents the rule established by the statute itself from having inevitable operation on the salient facts as classified, hence gives scope for the decision of any special case according to its equities without regard to the classification of the statute. Hence criminal law lends itself to Codification with less likelihood of resulting gross injustice in any special case arising under it.

When to this power of Criminal law to rise in its decisions of particular cases to an equity higher than the statutes, we add the convenience of condensed statement and definition, it may be seen that the admission of the possible propriety of codifying Criminal law by no means involves a similar admission as to Civil law.¹

¹ It is only proper to add that the writer would not be understood as endorsing the public policy involved in the special instances stated, where a certain alleged equity of the special case causes juries to disregard the law and the evidence. They are cited merely as notorious examples of a distinction in fact and practice between the two systems, often overlooked, and which yet has a most important bearing, from a practical standpoint, on the question of codification.

The point insisted upon is that the main defect of Codification is its inflexibility, its inexorable operation when the facts stated as test facts exist. This inflexibility of operation, or inexorable necessity, does not exist in Criminal law, but does exist in Civil law. The rule of the Criminal law must thus have free operation according to its letter when the result is just; but if the result is, according to the popular ideas, gross injustice, the final arbiter, the jury, may disregard it and do justice. Not so in the Civil law. At the same time the positive prescription of the rule, followed by obedience to it by judge and jury, except in cases of gross injustice in its application, has the distinct advantage of certainty under ordinary conditions.

The intelligent reader may reply: But there are true cases of clear injustice on the facts in civil law as well as in criminal law. Why, then, should not these also be expressed in statutory form, since no one disputes their existence or their character?

The answer is, that nothing would be gained, while much would be lost. On the hypothesis, in the clear cases presented, the Court could not be less sound in its decisions than the Code would be. And in all more complex applications of the rule, or of its exceptions, the light of reason applied to the solution of the special problem is a more adequate guide than a rule laid down, without clear prevision that it might apply to the special instance. The words in which you would abstract these known cases would not only include the combinations of fact you had in view, but also others not mentally grasped, and would likewise exclude combinations of fact which should have been included. The special case arising, and so to be tested by these generalizations, must therefore be decided not according to equity, but according to your prearranged abstractions. On the jury finding the facts, or the evidence being uncontradicted the judge so finding them, the rule must be as declared. If the

jury find otherwise, the verdict is set aside, and a new trial had until a jury is found which will obey the ruling of the court, and give a verdict accordingly. There is no elasticity. The equity of the individual case can never override the provisions of the statute.

THE ANALOGY BETWEEN LAW AND OTHER SCIENCES

In the foregoing argument we have asserted that Case Law is a Science. This is admitted by one of the most able advocates of Codification.¹ In fact, the proposition is too plain to need authority for its statement. It follows, then, that if the theory of codification be sound as applied to Case Law, it is sound as applied to Astronomy, Geology, Chemistry, Mechanics, Electricity, Medicine, Political Economy, or any other science.

In answer to this it cannot be said that the laying down of the true principles of law is of more consequence and importance to daily life, than the laying down of the true principles of any one of these sciences, say especially medicine and political economy. Further, since it is admitted by all that law is a science, it is incumbent upon those, who claim that law as a whole should be codified, to prove that it would be of benefit to mankind for every other science as a whole to be codified; or else to show some fundamental difference between law, and the other sciences, which relieves them from this burden. A little further on we discuss some possible claims of fundamental differences sufficient to sustain this latter view. (See pp. 381 *et seq.*; 398 *et seq.*)

For the present, assuming that law is a science, like in its fundamental characteristics to other sciences, we proceed to show the bad effects of codification on the other sciences as proved by history; and hence, the bad effect of the codification of law. The experience of the European races in this respect has been full of lessons.

¹ Pollock's *Essays on Jurisprudence and Ethics*, p. 237.

THE RELIGIOUS CODE

It happens that in historic time men generally believed that the mysteries of the universe had been explained to them. All physical laws were thought to be codified in the Bible. To those who may object to any comparison between a legal Code made by men, and a divine Code based on Revealed Religion, the following considerations may be presented—considerations which, when viewed without passion or prejudice, prove the validity of the argument based on the proposed analogy. At different periods in the World's history, Theologians have asserted the prevalence of certain alleged laws of Nature, and have supported their statements by the alleged authority of the Bible. That the Earth was the centre of the Universe, that the Universe was created in six days, that the Age of Man upon the Earth was measured by the lives of six Methuselahs, that disease and insanity were the result of magic and the machinations of the Devil, were a few of these beliefs. And these beliefs were held in no mild fashion. On the one hand, in the earlier ages, Christians suffered martyrdom for asserting them; and, on the other hand, in the later ages, Christians punished, by flames at the stake, those who denied them.

Subsequent observation, investigation and experiment have shown the error in these beliefs for which stern and earnest men yielded up their lives, or took the lives of others. And the same progress in Scientific Knowledge which has thus contradicted the theories of nature so held by the Saints, the Fathers, the Popes and the Churches, has likewise proved that the theories so stoutly maintained were mere human interpretations of the text of the Divine Writing, and not the text itself.

In consequence the mistakes in Astronomy, Geology and the other sciences occurring in the Code of Natural Laws constructed by an Origen or an Augustine are as human, in their origin and in their character, as the errors

and oversights occurring in a Code of Human Laws made by a Tribonian or by a Field.

The Religious Code of earlier centuries is as truly the work of man, as any Code of laws ever made by man; and the analogy between them is, therefore, perfect. We, of to-day, can scarcely conceive how real, how tangible, in former centuries, was the codification of the sciences contained in the writings of revealed religion. It may help us to some sharpness of conception of the truth if we look at it from the point of view of the consequences of a disagreement with the code.

If a lawyer practising under the California Code condemns a rule of law therein laid down as untrue in fact, and pernicious in its consequences, and so advises his client, such advice may cause the loss of a lawsuit. But when Bruno upheld the heliocentric theory against the geocentric, his divergence was expiated in flames at the stake,¹ and a similar difference of opinion in Galileo caused his imprisonment for years.²

The Code of the laws of nature existing in the Middle Ages, then, was a code not to be lightly trifled with. The effect of that code in retarding the growth of the human mind, and the progress of the human race, can hardly be overestimated. The gradual breaking up of this code is the history of the Conflict between Science and Religion. It may be read at large in Professor White's book on the History of the Warfare of Science with Theology, or Professor Draper's Conflict of Religion and Science. We refer to some of the familiar examples.

As concerned geography, the code prescribed that the earth was flat and surrounded by four great seas.³ Six hundred years later (1327 A.D.) Cecco d'Ascoli, a noted astronomer, was burned alive at Florence for publicly

¹ White's History of the Warfare of Science with Theology, Vol. I, p. 130.

² Ibid., Vol. I, Chap. III, Titles III and IV.

³ White's Warfare of Science (1st ed.), p. 16. See also History of the Warfare of Science with Theology (Vol. I), pp. 89-114.

asserting that the earth was round.¹ In 1519 A.D. Magalhaens made his voyage around the world, and this section of the code was repealed.

In the region of astronomy the Code declared that the geocentric doctrine, the doctrine that the earth is the centre of the universe and that the sun and planets revolve about it, was the true doctrine.² The heliocentric, or Copernican theory, though existing long before the Code, was crushed out by it, lost for centuries, and only prevailed after a conflict of great historical interest.

At Venice, February 16, 1600, Bruno was condemned to be treated gently "without the shedding of blood," and was accordingly burned alive for the heresy of affirming that the sun was the centre of our universe and that the fixed stars were other suns.³ Ten years after this martyrdom the telescope of Galileo proved the truth of the Copernican theory.⁴ Yet it was not until Kepler had discovered his Laws of Motion, and Newton had demonstrated the Law of Gravitation, that this section of the Code of Science prescribed by Revealed Religion was finally repealed.

The theological view of comets—the theory that they are "signs and wonders," portents sent by an angry God to scare his people—was an allied section of the Revealed Code. Because of the appearance of what is since known as Halley's Comet, in 1456, Pope Calixtus III. "decreed several days of prayer for the averting of the wrath of God, that whatever calamity impended might be turned from the Christians and against the Turks."⁵ In 1577, while Europe was alarmed and the churches filled with terror-stricken multitudes, because of

¹ White's *History of the Warfare of Science with Theology*, p. 107.

² *Ibid.*, p. 115.

³ Tyndall's *Fragments of Science*, p. 490. The Belfast Address, White's *History of the Warfare of Science with Theology*, Vol. I, p. 130.

⁴ White's *History of the Warfare of Science with Theology*, Vol. I, p. 130.

⁵ *Ibid.*, p. 177.

a like apparition in the heavens, Tycho Brahe observed the monster, and announced the orbit of its motion, precluding possibility of harm to the earth.¹ Kepler confirmed his conclusions. Yet many years passed before the din and clamor of theological astronomy was silenced by the logic of observation and induction, and one more section of the Revealed Code was repealed.¹

That Chapter of the Revealed Code which deals with the province of Geology has had an instructive fate. The Code had laid down that "in the beginning God made the Heavens and the earth"; hence nothing has been made since then—neither land nor sea, nor deposits, nor strata, nor fossils, nor any other of the changes in the earth's crust lying so plainly revealed in Nature.² The first adventurous spirits who proclaimed some of the truths of Geology were banished from Paris, and forbidden to live in towns, or enter places of public resort.³ In the eighteenth century Buffon, for stating a few simple geological truths, was deposed from his position; and, like Galileo, ignominiously forced to recant.⁴

The history of the great dispute over the nature of fossils is a history of Code *versus* Case law in that science. All things having been made in the beginning fossils were "Sports of Nature" or "mineral concretions," or "Creations of plastic force," or "Models made by the Creator before he had fully decided on the best forms of creatures."⁴ St. Augustine identified a fossil tooth discovered in Africa with that of one of the giants mentioned in Scripture.⁵ And after resort had been had to one refuge after another to explain their presence in accordance with the Revealed Code, came the crowning

¹ White's History of the Warfare of Science with Theology, Vol. I, pp. 201 *et seq.*

² White's Warfare of Science (1st ed.), p. 111.

³ *Ibid.*, p. 112. White's History of the Warfare of Science with Religion, Vol. I, p. 215.

⁴ *Ibid.*, p. 215.

⁵ *Ibid.*, p. 225.

attempt at compromise between the fact and the Code, in the astonishing theory — that the Author of that Code had placed them there for the purpose of testing the faith of men in his utterances as Revealed!¹

Again, the Code affirmed that the universe had been created “in six days.” To deny this was to fly in the face of the Scripture ; for Genesis speaks of six days each made up of “the evening and the morning,” and not six periods of time.² But this section of the Code has been abandoned to its fate, and even such popular preachers as the Rev. T. DeWitt Talmage³ have taken refuge in the compromise construction that its language is figurative and means “six good whiles.” Mr. Robert Ingersoll has cleverly satirized this position in his Talmagian Catechism as follows : “Question. How long did it take God to make the Universe? Answer. Six ‘Good Whiles.’ Question. How long is a ‘good while’? Answer. That will depend upon the future discoveries of geologists. ‘Good Whiles’ are of such a nature that they can be pulled out, or pushed up ; and it is utterly impossible for any infidel, or scientific geologist, to make any period that a ‘Good While’ won’t fit.”⁴ And so the march of knowledge has repealed this section of the Revealed Code.

Again, the Code affirmed by necessary implication a certain age of the world, not exceeding six thousand years.⁵ The discoveries made in the early part of the nineteenth century in the caves and drift beds of different parts of the world have repealed this section. And the recent discoveries made by the investigators of the buried records in Assyria and Babylonia confirm this repeal from another standpoint.⁶

¹ White’s History of the Warfare of Science with Religion, Vol. I, p. 231.

² Professor Stuart of Andover, quoted in White’s History of the Warfare of Science with Theology, Vol. I, p. 224. ³ A Brooklyn preacher.

⁴ Six Interviews with Robert G. Ingersoll, p. 364.

⁵ White’s History of the Warfare of Science with Theology, Vol. I, p. 241.

⁶ Huxley, Some Controverted Questions, p. 398.

Again, the Code affirmed a universal deluge. And so late as this century we find those who insist on the accuracy of this section of the Code.¹ But the investigations of George Smith among the Assyrian tablets of the British Museum in 1872, and later discoveries, have shown that the account in Genesis is an adaptation of earlier myths² founded on some local catastrophe. And so another section is repealed.

Again, the chapters of this Code reveal a certain order of evolution of life upon the earth. As late as 1885 Mr. Gladstone has attempted to prove that this order of development was affirmed by natural science. Professor Huxley demolished this apparent rock of faith in several essays of remarkable satirical and logical power.³ And the reverend Canon Driver, professor in Oxford, admits the inconsistencies between the Mosaic and Scientific accounts, and says: "Read without prejudice or bias, the narrative of Genesis i. creates an impression at variance with the facts revealed by science."⁴ And so one more section of the Code was repealed.

Another section of this Code revealed an exact chronology from the creation of Adam to the death of Christ. After some difference of opinion this time was fixed by common consent as four thousand years before the Christian Era.⁵ The discovery of evidences that the Babylonian people existed and were civilized enough to write their own history in cuneiform writings on tablets more than nine thousand years ago,⁶ and the discovery in Assyria of sun-dried bricks stamped with the names of Kings who must

¹ Huxley, Essay on "Lights of the Church and Light of Science," in *Some Controverted Questions*, pp. 391, 400.

² White's *History of the Warfare of Science with Theology*, Vol. I, p. 237. Huxley's Essay on "Hassadra's Adventure," in *Some Controverted Questions*, p. 456.

³ Huxley, in *Some Controverted Questions*.

⁴ White's *History of the Warfare of Science with Theology*, Vol. I, p. 246.

⁵ *Ibid.*, p. 252.

⁶ *Ibid.*, p. 259; 50 *Popular Science Monthly*, 863 (April, 1897).

have reigned before the date given in the margins of our Bibles for the epoch of the Flood,¹ and the discovery throughout the world of the flint implements of prehistoric man in connection with animals and deposits of the Quaternary and Tertiary epochs, repealed this section.² In other words, it has been proved that "man was on this continent (North America) when the climate and ice of Greenland extended to the mouth of New York Harbor."³ And the thousands of years in which Niagara has been cutting away the higher level of the gorge from Lewiston to Goat Island is but an hour or a minute in the year represented by this earlier period.

Another section of this Code represented man as having existed in a state of original perfection, and having fallen, through Eve, the Serpent and the apple. The flint implements, the pottery, the weapons and ornaments discovered in the caves and drift deposits containing evidences of the presence of Primeval Man, have not only proved the crude savagery of the man of the Stone age, but the orderly development of man through different grades of civilization from the savage of the rough stone or Palæolithic period, through the savage of the polished stone or Neolithic period, and through the man with the bronze weapons of the Bronze age, and the man with the iron implements of the Iron age, to our own recent Steel age.⁴ And researches in Comparative Ethnology sustain the conclusions of Anthropology.⁵ And so another section of the Revealed Code was repealed.

Another portion of the Code affirmed the existence of witches. There is no bloodier chronicle in the world than the torture and death meted out under this section,

¹ White's History of the Warfare of Science with Theology, Vol. I, p. 264.

² Ibid., Chap. VII, pp. 266-283.

³ Ibid., pp. 279, 280, 282.

⁴ Ibid., Chap. VIII. Lubbock's Prehistoric Times, pp. 2 and 3.

⁵ Lubbock's Prehistoric Times, Chaps. XIV to XVI. White's History, Chap. IX.

through many centuries, to innocent creatures.¹ The thunderbolt was thought to be the weapon of the "Prince of the Power of the Air." Franklin's lightning rod revealed this Bogie in its true nature.² Through the repeal of this section of the Code man has harnessed for his business uses the dread bolts of heaven — witness the electric light, the dynamo, and the trolley car. And the method of praying for rain in time of drought has been supplemented by systematic arboriculture.³

In the region of Chemistry and Physics the Code declared that all investigation of the laws of nature was unholy.⁴ Three centuries before Francis Bacon advocated the experimental method, Roger Bacon practised it.⁵ And for this breach of this Code section Roger Bacon spent fourteen of the latter years of his life in prison.⁶ For denying the existence of magic, other investigators suffered fines, disgrace, torture and death.⁷ By slow degrees bold men, setting at naught the pains and penalties prescribed by this section of the Code, gradually passed by their discoveries from magic and alchemy, to the truths of physics and chemistry; and one more section of the Revealed Code was repealed.⁸

Another Chapter of the Revealed Code clearly affirmed Demonology — that insanity was merely "demoniacal possession."⁹ But this Chapter has been repealed by the advance of the Science of Medicine.¹⁰

Another Chapter of the Revealed Code affirmed that there was a single primitive language, Hebrew, and that

¹ White's History of the Warfare of Science with Theology, Vol. I, pp. 350-364.

² Ibid., p. 364.

⁵ Ibid., p. 386.

³ Ibid., p. 372.

⁶ Ibid., p. 389.

⁴ Ibid., p. 386.

⁷ Ibid., p. 391.

⁸ Ibid., Chap. XII.

⁹ Ibid., Vol. II, Chap. XV, pp. 97 *et seq.* See Huxley, Some Controverted Questions, pp. 317-391.

¹⁰ White's History of the Warfare of Science with Theology, Vol. II, p. 167.

all animals had been named in that tongue by Adam.¹ This remained the accepted truth by Churchmen until the beginning of the eighteenth century.² But the discovery of Sanskrit, the discovery of earlier names for animals than the Hebrew, the discovery in Egypt of pictures of animals with their names in hieroglyphics at a period earlier than the agreed date of Creation, repealed this section of the Code.³

In the region of political economy the Code represented by both the Old and New Testaments condemned the taking of interest for money.⁴ The long fight of the political economists against the usury laws, a fight not yet ended, is another example of the retarding effect on human progress of the crystallization of ideas effected by a code.⁵

QUASI-SCIENTIFIC CODES

Not only has the code of nature contained in revealed religion been a barrier to the advance of science, but the general principles established by the authority of great names in science, being received by lesser lights with too great credulity, and acted upon as of transcendent authority, and not of value only in so far as the observations show them to be true, have themselves constituted a kind of codification of science by scientists, and have retarded the progress of science.

The following may be mentioned as familiar examples.

Of all sciences — that of mathematics seems to be the one which, being most abstract, would be best fitted for codification. For many centuries it was deemed that this science ended with the Books of Euclid, and the further investigations of Archimedes. Yet the invention by Leibnitz and Newton of the *infinitesimal* and *flux-*

¹ White's History of the Warfare of Science with Theology, Vol. II. Chap. XVII.

² Ibid., pp. 180-187.

³ Ibid., pp. 196-206.

⁴ Ibid., Chap. XIX, p. 265.

⁵ Ibid., Chap. XIX.

ional calculus constituted a great step in this science, overruling the old code; and many mathematicians deem that the new geometry of Lobatchewsky is as great an advance in the methods of human reasoning.¹

Again, English Mathematicians by reason of veneration for the great name of Newton, or by reason of national bias in the dispute between Newton and Leibnitz as to who was the discoverer of the Calculus, "for considerably more than a century failed to perceive the great superiority of the notation introduced by Leibnitz to that which Newton introduced. Thus while Continental Mathematicians, by the use of the infinitesimal calculus, were making great strides in the science, the English Mathematicians, wedded to their method of fluxions, were at a comparative standstill."²

Logic has suffered from like causes. For centuries, under the great influence of the name of Aristotle, all reasoning was deemed to be included in the moods of the syllogism — no argument that could not be reduced to one of its forms could have any validity. Yet Mr. Herbert Spencer has pointed out the fallacy of this contention,³ and has elaborated a theory of reasoning the most complete yet presented.

Physics has been retarded by like causes. The great authority of Newton upheld the corpuscular theory of light long after it should have been relegated to the background of exploded provisional hypotheses. After Fresnel's experiment had conclusively proved the undulatory theory to be the only true one to explain the known effects, it was noted that other observations and experiments, from which similar inductions might have been made, had not been given their full force on account, probably, of the great authority weighing upon the other side of the controversy.

¹ Helmholtz, Popular Scientific Lectures (2d series), p. 43.

² 13 Encyclopædia Britannica (9th ed.), 10.

³ Principles of Psychology, §§ 294, 302, 309, etc.

Thus have certain rules of Science framed by men of transcendent genius—men fit above all others, as Code Commissioners, to frame such rules—been proved by plodding observation and experience to be in error. How, then, can we justly expect any Tribonian to be equal to the task of framing a good code, when the sciences involved include at once the greatest complexities requiring solution by man, and an accurate knowledge of two sciences yet in their infancy,—Political Economy and Applied Ethics.

But there is a greater lesson to be learned from these facts. And this is that all true progress has been made by observation and experiment untrammelled by the conclusive authority of preconceived ideas. Thus the history of science is but the history of theories of Nature entertained at different times, which have been replaced by others on further investigation in the same fields. And in so far as the truth observed in the new observation has received ready acceptance on its merits, has the progress of man been healthy and rapid; and in so far as its acceptance has been prevented by a slavish adherence to fixed ideas, has the progress of man been checked and retarded. And a Legal Code drawn by a Tribonian or a Field has a similar effect upon the Science of Law, as a fixed but erroneous Code drawn up by a Cuvier or an Agassiz has upon the other sciences.

A case law, on the other hand, by reason of its appeal, like the other sciences, to reason, sometimes, as the other sciences do, rises superior to mere authority.

The rule of the Case law whereby Courts sometimes overrule former decisions, and refuse to follow the law of precedent, is thus shown to have scientific warrant. When restricted, as it generally is, to matters of great importance having far-reaching effects on the welfare of society, it is a proper exercise of the spirit of reason and reform triumphing over the spirit of conservatism. When a wrong principle working widespread injustice

has been set in motion, it is more important to stop its further operation, than it is to stick to a hide-bound consistency. A faith unfaithful should not leave us falsely true. While in most cases of error in decision the great gain of certainty in the law requires our adherence to the rule until the Legislature shall right the wrong, that remedy is too distant and precarious where the larger interests of society are at stake.

If we were now to inquire what is the distinction between a Code system of a science or of law and a Case system of a science or of law, we would find that the distinction lies simply in this: that when in a science or in law we adopt a code, every observation or experiment arising in the future must be decided by the rule prescribed in that code, without regard to whether that rule be the true expression of the actual relations between phenomena, or a false expression of them. On the contrary, when the new observation arises under a case system, it is always open to inquiry to ascertain what are the true relations of nature involved in the particular case.

The general principles of science are expressions of our interpretations of the sequences or coexistences of phenomena. The general principles of law are expressions of our interpretation of the true relations that should exist between certain phenomena of social life.

If the principles established in our scientific code are incorrect, the facts as they develop in nature give them the lie. If the general principles of law established by our code are incorrect, the facts established in nature cannot give them the direct lie (except in most extreme cases, like the *Riggs vs. Palmer* decision), but the resulting reaction of the injustice upon the social organism is evil, and tends to harm or death, and so gives them the indirect lie as not being laws of the kind that should have been made.

It follows, therefore, that since codification of each of

the other sciences has proved to be a mistake, having grave results detrimental to the interests of man, codification of the science of law would be a mistake. The truth is, that for the well-being of man it has always been more important that each individual problem presented to him for action and materially affecting his fortunes should be well decided in one of two ways rather than that he should understand the principle on which a decision should be made. Without the knowledge of anything to guide him, his decision on any particular problem must, in the long run, on the doctrine of chances, have an equal chance of being right or wrong. His study of the principles involved is solely for the purpose of obtaining a guidance which may enable him to be oftener right than wrong. This principle, or rule of guidance, cannot be laid down in the first instance, but has to await the development of his experience from a number of cases before it can be expressed.

If now, at any stage of his development, with only the amount of experience already gained, he cuts himself off from the experience of the future, and relies entirely upon the experience of the past, he will make mistakes in future cases. To this it may be answered, there is always opportunity to repeal, or reënact, or amend your code, as soon as the mistake is discovered, and so retrieve the error.

The answer is that the mistakes which have been made under the code are unjust decisions which have already produced their evil results, and which, on the hypothesis of their plain inequity, would not have occurred under the case system. For on the hypothesis the rule of the code unjustly decided them; and on the hypothesis the rule of the code would not have been the rule adopted as the rule of the common law decision. The result is that case law decides more individual cases justly than code law: this because, when the facts of the case are presented, you have not, as in the case of a code, one rule

laid down which produces equity or injustice, as it may happen, but the entire mass of existing legal rules and exceptions, or a new rule, if you choose to make one, to meet the equity of the case.

THE ANALOGY BETWEEN LAW AND MEDICINE

If law should be codified, then medicine should be codified. The one is no less intimately associated with the necessities of our daily life than the other. Law is a part of the science of Sociology. Medicine is a part of the science of Biology. Medicine deals with the life of individuals considered as separate units. Law deals with the life of individuals considered as units constituting an aggregate. If it be wise to lay down a hard and fast rule to govern our actions in the contingencies of any and all disputes, — the interactions between individuals, — then it is wise to lay down principles that must be followed as to the diagnosis and treatment of all diseases — the interactions between individuals and their environment. If it be wise to say in a code what contracts in restraint of trade shall be void and what contracts shall be valid, then it is wise to say in a code what principles of treatment should be adopted in the diagnosis and treatment of typhus or consumption.

The reason why no proposition has ever been seriously made to codify medicine, while propositions have been made to codify law, seems to be that in the one case we acknowledge our comparative ignorance of the true principles involved; in the other case, we assert our comparative knowledge. But, in truth, in both instances our knowledge is so provisional and so incomplete that codification is inadmissible. Codification implies complete knowledge, and this we have not. Before codification can be suggested, there must go a long education of decisions of special instances, the cases of science or of law. It is not too much to say that both in science and in law, when we have acquired what knowledge

we have by the method of accumulated experiences, it is inexpedient to cast aside this method and substitute another.

THE ANALOGY BETWEEN LAW AND ELECTRICITY

Again, take any science or art in which of late years men have been actively interested, and note how the existence of an Authoritative Code discouraging or prohibiting individual effort towards the discovery and application to special problems of the true principles involved, would have dwarfed the growth and progress of theoretical knowledge, and of its practical applications. In the last few years the science, or art, of Electrical Engineering has made giant strides. Less than twenty years ago some scientists predicted, that the possibilities of the inductive current as a motive power had been exhausted in the production of one-half a horse power. Lately, in a comparative test of draughting power, one of the electric motor engines constructed by the Baltimore and Ohio Railroad for use in their Baltimore Tunnel has dragged two of their largest and most powerful steam locomotives all around that yard, and done this against their full power exerted in a contrary direction. And to-day trolley cars filled with passengers are climbing grades hitherto only thought possible to be surmounted by cable traction. Spurred on by the usual goads to human ambition, immense capital has been invested in developing this field, and the best brains in the land, in laboratory and factory, have exerted their utmost powers, by observation and experiment, to harness this new force for man's uses, and to correctly decide the infinite problems presented in its production and application. As a consequence, the advance has been so rapid that it has been impossible for the literature of the subject to keep pace with the discovery. Go to a machine shop and begin to build a dynamo according to the principles expounded in the latest text-books of the science, and the

shop men will laugh at you ; and you will learn that the text-book authorities, on which you rely, are from four to five years behind the theory and the practice of the shops. Imagine, then, the absurdity of attempting to codify the Principles and Rules of Electricity as a practical guide to men working in that field. And imagine the still greater absurdity of leaving these principles and rules to be decided upon and promulgated by delegates to a convention elected by a *plebiscite*. And the same truths hold good of the theory and practice of Codification in all the other arts and sciences, including law.

It remains to deal with certain objections which may be made to the foregoing argument.

THE LAWS OF MAN AND LAWS OF NATURE — THEIR LIKENESS AND UNLIKENESS

The argument has assumed that the principles of Science, as expressed in what we call the Laws of Nature, are sufficiently like the principles of Jurisprudence, as expressed in what we call the Laws of Man, that what is true of one set of laws is true of the other. The argument is, that because a codification of the laws of nature is inexpedient, therefore a codification of the laws of man is inexpedient.

Yet this assumption of a fundamental likeness between Laws of Man and Laws of Nature has been denied. As Sir Frederick Pollock says : “ The nature and extent of the analogy between laws in the strict or political sense, and the uniformities in the course of physical events which we call laws of nature, have often been discussed. Blackstone and earlier writers pressed the comparison with rhetorical inexactness, which has been rebuked by the later analytical school, with some excess of severity, as if the likeness were merely verbal and misleading.”¹

Austin even claims that the word “ law ” can only be applied to laws of nature in a metaphorical or figurative

¹ Pollock's Essays on Jurisprudence and Ethics, p. 42.

sense. He treats the laws of nature as laws improperly so called.¹ But the word "law," as applied to laws of nature in the scientific sense, has acquired too strong a foothold to be so dislodged. Why should the jurist have any more right to appropriate it to a specific meaning than the scientist? The truth is that there is a fundamental likeness, and a fundamental difference, between the laws of nature and the laws of man. Whether we can reason by analogy from one to the other, therefore, depends upon whether we are using the terms in the same sense in the different parts of our argument. The distinction between laws of man and laws of nature, deep seated and real as it is, does not affect, while the likeness supports, the foregoing argument.

THE DISTINCTION BETWEEN LAWS OF MAN AND LAWS OF NATURE

We proceed to prove this proposition. And first as to the distinction. "In all cases," says Christian Blackstone's Editor, "where it" (the word law) "is not applied to human conduct, it may be considered as a metaphor; and in every instance a more appropriate term may be found. . . . When we apply the word law to motion, matter, or the works of nature or of art, we shall find in every case that, with equal or greater propriety and perspicuity, we might have used the words *quality*, *property* or *peculiarity*."² The same distinction is very clearly expressed by Professor Huxley in his Science Primer's Introductory in a passage which is quoted with approval by Sir Frederick Pollock in his Essays on Jurisprudence and Ethics, p. 46.

Professor Huxley says: "While there is this much analogy between human and natural laws, however, certain essential differences between the two must not be overlooked. Human law consists of commands addressed

¹ Austin's Province of Jurisprudence, §§ 8, 181, 182.

² Cited in Pollock's Essays, p. 42.

to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken.

“Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature. And they remain laws only so long as they can be shown to express that order. To speak of the violation or the suspension of a law of nature is an absurdity. All that the phrase can really mean is that under certain circumstances the assertion contained in the law is not true; and the just conclusion is not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is a universal law, and, as such, admits of no exceptions.”

We do not quarrel with this statement of the facts, because it embodies the statement of the truth from another point of view. We do, however, dispute the attempted application of this truth to interfere with the necessary results of the foregoing argument built up on a true resemblance. The object of the theoretical jurists¹ in insisting upon this divergence — which they claim is fundamental — is to prevent the application to juridical questions of analogies drawn from the other sciences. And, if the distinction is as fundamental as claimed, that object might be accomplished. However much this alleged distinction might affect other analogies that might be drawn between laws of man and laws of nature in other respects, it cannot affect the likeness in them in so far as concerns the question of codification. And now as to the likeness on which the argument is founded.

¹ Pollock's *Essays on Jurisprudence and Ethics*, pp. 44–59.

THE LIKENESS BETWEEN LAWS OF MAN AND LAWS
OF NATURE

Sir Frederick Pollock, after quoting Christian as above, says: "Still the resemblance, notwithstanding all criticism, is a real one. The laws made by princes and rulers aim with more or less success, though never with perfect success, at producing uniformity of conduct within the field of action to which they apply."¹ And he goes on to show that the likeness lies in the fact of this idea of uniformity: "A law of nature is obeyed . . . because there is no room for disobedience."² Its sequence is inevitable. "Thus it would be with men's actions if the law were always obeyed; and therefore we seem to see in nature a law more perfect than man's, because never broken."³ The difference, on the other hand, is due to this possibility of disobedience: "Their object is a certain uniformity, but the uniformity does not necessarily ensue. Nay, the law would still be a law⁴ if no single person obeyed it on any one occasion. But a law of nature is inseparable from uniformity; or, rather, it is uniformity itself."⁵

The likeness here insisted upon of "aiming" at uniformity resulting in absolute uniformity in one case, and usual uniformity in the other, implies the real, the fundamental, likeness to be here emphasized. The sciences of Psychology, Physiology, Astronomy, etc., deal with the laws of nature. The science of Jurisprudence or Legislation deals with the laws of man. Are they distinct in

¹ Pollock's *Essays on Jurisprudence and Ethics*, pp. 42, 43.

² *Ibid.*, p. 44.

³ *Ibid.*, p. 43.

⁴ It would seem that here Sir Frederick Pollock is using the word "law" in still another sense. He refers to the writing, the paper and ink, rather than to the enactment plus its execution and operation. A law on the statute books not acted upon and a dead letter, is a nullity from the standpoint of the meaning given to the word by the scientist. Set it into operation, and its operation brings it into a true analogy with the laws of nature; it becomes a force in the environment of forces.

⁵ Pollock's *Essays on Jurisprudence and Ethics*, p. 44.

character? or have they aught in common? The answer is that they are fused into one generalization as being all parts of human knowledge. The propositions, the laws of each and all of these sciences are, therefore, simply the expression in language of what we know about them. The sum and substance of that likeness is that both the laws of nature and the laws of man are "our way of stating as much as we have made out of that order," viz. the order of the Universe. The laws of nature and the laws of man are both simply the expression of what we think are the true rules of each science to guide our actions.

In other words, man attempts to make his laws, his rules of conduct for the social unit, conform to the true laws of nature,—so far as he understands them,—as consistently as he attempts to make his individual conduct conform to his knowledge of these other laws. And this he does from necessity, not from desire. Nature is at his back, in either instance, to punish his failure. A law of man and a law of nature are alike in that they both express our knowledge of how we think nature acts. And the true law of nature—the actual sequence of events—may just as easily disobey our expression of our knowledge of the workings of our assumed laws of nature, as it may override our puny attempts by legislation to reverse natural law. As when the French Assignats fell in price, although death was the punishment of the citizen who refused to take them at par.

So long as the laws of man are not dependent upon mere chance for their enactment or their reactions, but arise out of the interaction of the social organism and the environment, so long will the mode of expression of those laws be subject to the same laws as the mode of expression of our knowledge of nature, and so long will an argument drawn from the other sciences be valid as applied to law.

A law of nature says: "Bodies attract each other inversely as the square of the distance." To put it as a

law of man would be expressed: "Bodies shall attract each other inversely as the square of the distance." A law of man says: "Thou shalt not murder." Or, to put it in the form of a law of nature: "Murder destroys the race." The one law is never disobeyed. The other is sometimes violated. What is the true likeness and the true distinction? The true likeness is that in both man expresses his knowledge of the relations of phenomena. That bodies attract each other as stated is proved in each instance. That those societies which allow murder become extinct under the law of survival of the fittest is a truism. The law of man "Thou shalt not murder" thus in the long run becomes the law of nature. The society which is governed by the contrary rule dies. The difference is: That, in the one case, the effect is worked out immediately—there is direct equilibration; in the other case, the effect is worked out by a slower process—there is indirect equilibration, and under conditions where it is difficult to see the working of the law, because its effects are obscured by other causes.

Now if we examine nature, we find that the something which produces this apparent difference between the laws of life, as compared with the laws of physical nature, is consciousness. Consciousness, or Mind, is a force which reacts upon nature and distinguishes animate from inanimate objects. The function of consciousness is to choose the beneficial and reject the deleterious. It is highly probable that it arose from the advantage derived in the struggle for existence by those organisms which, through the possession of it, were able to pick out a more suitable environment. In other words, consciousness and motion go together. Without consciousness motion would have been aimless. Without the power of motion a consciousness could not produce its best results in conserving the best life possible under the conditions of the environment. The power to choose is the gist of consciousness. The power to choose correctly is the test of a consciousness

calculated to preserve life. This depends upon knowledge. As Mr. Herbert Spencer has defined it: "Life is the definite combination of heterogeneous changes both simultaneous and successive, in correspondence with external coexistences and sequences"; or to express it in shorter phrase: "Life is the continuous adjustment of internal relations to external relations."¹ Now every wrong adjustment has its penalties or pains in nature. The insane man who steps in front of the limited express, and so dies, may be compared with the artisan who steps aside as the train passes, and so survives. In the one case, the adjustment between inner and outer relations is so imperfect that the consciousness so defective perishes. In the other case, a better correspondence preserves existence. Consciousness is the legislature of the individual. He may will as he pleases — to jump over the moon, or to go from New York to Albany. The one remains a nullity beyond the expression of it, because beyond his powers; the other may actually be carried out. There is no consciousness of the social aggregate. The legislature, representing the will of the majority of the discrete whole, stands in its place. The legislature in the exercise of the conscious will of the aggregate may also enact what it pleases. If it enact something contrary to natural law, — as that fires shall not burn, — its enactment remains a nullity. If it enact: "Thou shalt not steal," its enactment may or may not be carried out, dependent upon the obedience or disobedience of others of the discrete whole. If the law of nature, that such action is detrimental, has been registered upon all the minds affected by the law, then obedience to the law becomes a reflex action — the law is a law of nature. If the harmful results of the act have not been so registered, then the law may be temporarily disobeyed by those minds in which correspondence of inner and outer relations as to this have not yet been truly established. But, in the end, these minds, through

¹ Principles of Ethics, Vol. I, § 7.

the indirect equilibration produced by the law of the survival of the fittest, are weeded out; and the law of man and the law of nature become harmonious.

It follows that the facts of psychology and sociology are no less subject to the reign of law and order than the facts of physical life. And being so, it follows that what is true of the proper mode of acquiring and expressing the truths of one set of phenomena, is true of the proper mode of acquiring and expressing the truths of the other.

So much for the fact that, even if this distinction between laws of man and laws of nature, the possible exception to the one and the necessary working of the other, were true, such distinction would not affect the validity of the inference, that the true scientific method of ascertaining and expressing the truths of the concrete and physical sciences is the true scientific method of ascertaining and expressing the truths of the science of law.

THE AMBIGUITY IN THE EXPRESSION "LAWS OF NATURE"

But there is a further answer to this objection. When this distinction is asserted as a reason why a principle holding good of the proper expression of the rules of other sciences is not a principle holding good of the proper expression of the rules of law, the words "Laws of Nature" are used in two different senses in the two portions of the argument. The distinction insisted upon is both true, and untrue. It is true in one sense of the phrase "Laws of Nature"; and untrue, in another sense, of the phrase "Laws of Nature." So far as it is true, it is a truism of no value, and leading to no results. So far as it is false, it is misleading in obscuring the fundamental likeness between the laws of nature and laws of man, by reason of which likeness the assumption implied in the foregoing argument is fully warranted.

By the expression "Laws of Nature" we may mean either one of two entirely different things.

First. The actual sequences in nature — the laws of nature which are intrinsically true without regard to whether we actually know them, or can truly express them. These laws of nature we do not really know. From time to time we think we know them, and we give expression to them in language, only to find, through further experience, that we have made errors in alleging or expressing them, and that revisions are necessary to keep pace with advancing knowledge. The special or general laws of nature we thus allege and claim to know about, as true laws of nature, — Kepler's laws of motion,¹ Dalton's law of gases,² Carnot's law of heat,³ Dove's law of winds,⁴ Ohm's law of electric force,⁵ Faraday's law of lines of induction,⁶ — are really "Laws of Nature" within the second meaning of the term as given below, and not within the first meaning of the term as stated above; for all our statements as to them are founded on relative, not absolute, knowledge. Thus, Kepler's laws of motion are inaccurate in not explaining the perturbations in the movements of the planets, which even the genius of Newton only partially detected.⁷ And Faraday's law of Electrolysis is doubted and not yet confirmed by experiment.⁸ Many other examples could be added from the history of every science.

Second. Our mode of interpreting or expressing these actual sequences in nature. Our expression in language of our knowledge of them. These are the general or special laws of nature which we allege as such, and instances of which are given above. These laws of nature are the only "Laws of Nature" that we can talk about and rea-

¹ Encyclopædia Britannica (9th ed.), Vol. II, p. 753.

² Jevons, Principles of Science, Vol. II, pp. 91, 92.

³ Ibid., p. 257.

⁴ Ibid., p. 168.

⁵ Maxwell's Elementary Treatise on Electricity, p. 99.

⁶ Ibid., p. 45.

⁷ Encyclopædia Britannica (9th ed.), Vol. II, p. 753.

⁸ Maxwell's Elementary Treatise on Electricity, pp. 102, 103.

son about, as such, for the reason that they comprise the whole body of those assertions about special and general laws which we make in describing the action of the forces in nature, and they represent the sum and substance of all our knowledge of nature, and of all our interpretations of nature's works. The laws referred to in the first meaning of the term "Laws of Nature," above given, are simply the unknown laws actually at work, of which these last asserted "Laws of Nature" may, or may not, be the true interpretations.

Now in the quotation from Professor Huxley, just above given, when the laws of man are said to be different from the laws of nature in that one can be disobeyed and the other cannot, we are using laws of nature in the first sense, in the sense of the actual sequences in nature which are inevitable, and most of which are unknown to us. It is only in this first meaning that a law of nature is absolutely necessary in its action, that each instance is a proof of it; and yet we may know nothing of the why, or the wherefore. In this sense the meaning of the term "Laws of Nature" is simply the general statement that all that is, is. It is not a statement of a truth from which, from our experience of the fact, we can predict the future. Hence, it is simply the general statement that the universe is governed by laws, but it is not a statement of what those laws are, or how they act. The moment the term becomes extended to include a statement of what these laws, general or special, are, and how they act, that moment the law or laws of nature referred to become laws of nature of the kind known and alleged by us as such (and hence not necessarily true or absolutely inevitable in action), and so they are unquestionably laws included in the second, and not in the first, meaning of the term.

It is evident, then, that between the laws of nature in the first sense, and the laws of man, no true comparison can be made. It is true that the laws of man may be obeyed or disobeyed, while the laws of nature have no

exceptions. But the distinction is of no value, because we use the word "Laws" in two distinct senses. By the laws of man, we mean specific instances of known rules laid down which have been, or can be, obeyed or disobeyed. By laws of nature, we mean the unknown causes of the sequence of events. We are thus merely asserting that there is a difference between the known, and the unknown, a proposition not disputed. We have also merely asserted an unlikeness and not a likeness — and knowledge of phenomena is solely dependent upon likeness, not unlikeness.¹

THE TRUE ANALOGY BETWEEN LAWS OF MAN AND LAWS OF NATURE

If, therefore, we are to compare the laws of man and laws of nature to any effect, we must use the word "Laws" in the same sense in both clauses of the proposition. Its contents must be *known* laws of man and *known* laws of nature. So using the terms, the laws of man again mean the special instances of acts of the Legislature and rulings of the Courts with which we are familiar. And the laws of nature mean, not the mere uniform sequence of events, not the mere allegation that the sum of all the consequents is embodied in the sum of all the antecedents, but the special statements that masses attract each other inversely as the square of their distances, — the law of gravitation, — or that equal volumes of gases exactly correspond to equivalent weights of the substances — Gay-Lussac's law.² And when we further investigate

¹ Science arises from the discovery of Identity amid Diversity. (Jevons, Principles of Science, Vol. I, p. 1.) "It is the prerogative of Intellect to discover what is uniform and unchanging in the phenomena around us. So far as object is different from object, knowledge is useless and inference impossible. But so far as object resembles object, we can pass from one to the other. In proportion as resemblance is deeper and more general, the commanding powers of knowledge become more wonderful. Identity in one or other of its phases is thus always the bridge by which we pass in inference from case to case." (Ibid., p. 4.)

² Jevons, Principles of Science, Vol. II, p. 339.

these statements, we find that what we mean by laws of nature — when we use the words in such sense that any useful comparison can be made between them and the laws of man — are those statements made by scientists constituting our interpretation of certain special phenomena occurring in nature. Thus, “The law of gravity is of so simple and general a character, and is apparently so disconnected from the other laws of nature, that it never suffers any disturbance, and is in no way disguised but by the complication of its own effects. It is otherwise, however, with those entirely secondary laws of the planetary system, which have only an empirical basis,” and reference is made to the west-to-east motion of the satellites of some of the planets as not necessitated by any principles of science, and as being broken by the retrograde motions of the satellites of Uranus and Neptune.¹

In this instance (the law of Gravity), therefore, so far as we know it, there is complete concordance between the law of nature, *i.e.* the working of nature, and the law of nature as expressed by man, *i.e.* the expression of the law by Newton.

But there are cases where the laws of nature, *i.e.* the workings of nature, are partly according to the laws of nature, *i.e.* the expression by man of this working, and partially not. Thus Jevons, in discussing exceptional phenomena in his *Principles of Science*, Vol. II, p. 339, says: —

“The best instance which I can find of an unresolved exceptional phenomenon consists in the anomalous vapor-densities of phosphorus, arsenic, mercury and cadmium. It is one of the most important laws of chemistry, discovered by Gay-Lussac, that equal volumes of gases exactly correspond to equivalent weights of the substances, and this holds generally true of any elements which we can convert into gas or vapor. Unfortunately,

¹ Jevons, *Principles of Science*, Vol. II, p. 326.

phosphorus and arsenic give vapors exactly twice as dense as they should do by analogy, and mercury and cadmium diverge in the other direction, giving vapors half as dense as we should expect. We cannot treat these anomalies as limiting exceptions, and say that the law holds true of substances generally but not of these; for the properties of gases, as previously noticed (Vol. II, p. 250), usually admit of the surest and widest generalizations. Besides, the preciseness of the ratio of divergence points to the real observance of the law in a modified manner. We might endeavor to reduce the exceptions by doubling the atomic weights of phosphorus and arsenic, and halving those of mercury and cadmium. But this step has of course been maturely considered by chemists, and is found to conflict with all the other analogies of the substances and the principles of isomorphism. One of the most probable explanations is that phosphorus and arsenic produce vapor in an allotropic condition, which might perhaps by intense heat be resolved into a simple gas of half the density; but facts are wholly wanting to support this hypothesis, and it cannot be applied to the other two exceptions without supposing that gases and vapors generally are capable of resolution into something simpler. In short, chemists can at present make nothing of these anomalies. As Hoffmann distinctly says: 'Their philosophical interpretation belongs to the future. . . . They may turn out to be typical facts, round which many others of the like kind may come hereafter to be grouped; and they may prove to be allied with special properties, or dependent on particular conditions as yet unsuspected.'

The history of man is a history of his attempt to learn the secrets of nature — is a history of his expression of assumed laws of nature which subsequent investigations have proved defective or provisional. The growth and progress of science has been a growth and progress from totally erroneous statements by man of the supposed laws

of nature, *i. e.* rules governing the sequence of phenomena, — laws which had no counterpart in the objective world around him, — to a closer parallelism between his expression of these rules and the actual operation of the rules. Yet the tendency to give to the phrase “Laws of Nature” the exclusive meaning of the unknown immutable laws of nature is strong. Thus in the able book above quoted, Jevons’ *Principles of Science*, a book largely occupied with the mistakes and progress of scientific conceptions, we find it stated under “Real exceptions to supposed laws,” that “No law of nature can fail; there are no such things as real exceptions.” This proposition is undoubtedly true. But, in the statement of it, we use “Laws of Nature” in the sense of these unknown principles. Now we cannot discuss or argue about the unknown. It follows that we can only argue about laws of nature — their likeness and unlikeness to other laws — when we mean by laws of nature the expression by man of his knowledge of those laws; in other words, his statements as to what those laws are.

In the very passage in which Professor Huxley has insisted upon the difference between laws of man and laws of nature, as above quoted, he has also drawn attention to a fundamental likeness between the two which in effect sustains the distinction here insisted upon. He says in the passage quoted in Sir Frederick Pollock’s book, a portion of which is given above:¹ —

“When we have made out by careful and repeated observation that something is always the cause of a certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported. . . . But it is desirable to remember that which is very often forgotten, that the laws of nature are not the causes of the order of nature, but only our way of stating as much as

¹ Pollock’s *Essays on Jurisprudence and Ethics*, p. 46.

we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move.

“The laws of nature are, in fact, in this respect similar to the laws which men make for the guidance of their conduct towards one another. There are laws about the payment of taxes, and there are laws against stealing or murder. But the law is not the cause of a man’s paying his taxes, nor is it the cause of his abstaining from theft or murder. The law is simply a statement of what will happen to a man if he does not pay his taxes, and if he commits theft or murder; and the cause of his paying his taxes or abstaining from crime (in the absence of any better motive) is the fear of consequences which is the effect of his belief in that statement. A law of man tells (us) what we may expect society will do under certain circumstances; and a law of nature tells us what we may expect natural objects will do under certain circumstances. Each contains information addressed to our intelligence, and, except so far as it influences our intelligence, it is merely so much sound or writing.”

Professor Huxley here speaks of a law of man from the point of view of the sanction, the penalty in cases of disobedience, what society will do if it is not lived up to. But in the very statement of this point of view as prescribing a uniformity like that of a law of nature, we imply the correlative truth that the action prescribed, in default of which society is to act, is itself a proposed uniformity prescribed by society. And since society prescribes what it thinks is good for it, and enjoins what it thinks is bad, the expression of the law is the expression by society of its views on the proper action and reaction of its individuals on the environment; in other words, is the expression of its views of what it considers

to be the true laws of nature, by acting in accord with which its continued existence may be best assured.

Take, for instance, the law of man, "Thou shalt not murder." It is probable that this is a true law of nature (as applied to the members of a particular social unit). On general principles a society which recognizes and enforces the contrary rule must sooner or later fall to pieces. Some savage tribes, as Mr. Herbert Spencer has shown, seem almost to live under such a régime.¹ But they are tribes of exceedingly low development, not pressed upon, in the struggle for existence, by higher types. Taking our own advancing civilizations, it is clear that in the last four thousand years great progress has been made towards a nearer approach to the ideal standard in this respect. Murder has not only become less frequent among individuals, the law of man is merging towards the uniformity of a law of nature, but the legalized murder of war is itself becoming to be recognized as only another form of the same crime against society. Infanticide is one of the worst of modern crimes, yet there was a time when it was widely prevalent. "Far from being regarded as being a crime, child murder has been throughout the world in early times, and in various parts of the world still is, regarded as not even an offence — occasionally, indeed, as a duty."² The extreme rarity of the crime in civilized life, as compared with old times, is but another instance of the indirect equilibration that is effected by legal principles when they truly represent natural laws. When we consider that what progress has been made in these respects has been made in something like, say, eighty or one hundred generations, and that among bird-fanciers and naturalists experience has shown that but little variation can be effected in the physical attributes of a species through a like number of generations, we can the better realize how

¹ Spencer's Principles of Ethics, Vol. I, pp. 341-351.

² Ibid., § 125.

slowly, yet how surely, the laws of nature work. And so we may conclude that our law of man which says, "Thou shalt not murder," is an expression of a higher law of nature, which says, "the social unit that permits murder must die." But whether it is so or not, only experience of the future will tell. For the present we know that, so far as our knowledge goes, the law of man is in harmony with a law of nature, and is a true statement of our knowledge of that law of nature.

And it is because in any statement we may make of this knowledge there is implied the statement that the expression of the law is a true expression of the immutable law, that the tendency is to look upon laws of nature as immutable truths having no exceptions, and to obscure the fact that what we call laws of nature are our statements of the workings of these truths. And these statements are true or false according to the knowledge of the times and the stage of progress we have reached.

Thus some so-called laws of nature are true laws of nature, and some are false. And since we have a way of presuming that what we know up to date is true, we look upon the laws of nature, which we have laid down consonant to all experience up to that time, as the true expression of the laws of nature — the actual workings of nature. And as soon as some new observation proves an exception that disproves the rule, we no longer call that rule a law of nature, but relegate it to the limbo of exploded theories. Yet first, last and all the time, the expression "Laws of Nature" denotes simply our statements of the immutable order of nature; in other words, our explanations of phenomena to date, whose validity is dependent on the correctness of our knowledge. There is not a law in all the category that is not subject to the possibility of being declared no law of nature in case a true exception occurs.

When we thus view the laws of nature as meaning not the true sequence in nature itself, but our human expres-

sion of our ideas of what the true relations between phenomena are, it is plain that the alleged fundamental distinction between laws of man and laws of nature, so far as it affects our argument against codification, disappears.

For the laws of man, likewise, are merely the expressions of our ideas of what the true relations between men and men, or men and things, are or should be. And if our laws of man sometimes turn out to be untrue in their operation, because of failure to enforce or because of disobedience, the failure is due to the lack of knowledge on our part, or on the part of those disobeying them, of the true laws of nature according to which we should act, in just the same way that when our asserted laws of nature turn out to be no laws of nature, the failure has been due to our lack of knowledge of all the conditions. And if the law, "Thou shalt not murder," turns out to have exceptions, its exceptions are due to lack of complete knowledge on the part of finite minds affected by it, a lack of knowledge which will continue the exception only so long as the underlying law of nature needs to work out its inevitable results. The real law of nature, which we have failed to express, will sooner or later vindicate itself, and our human law on the subject will be reinforced by the survival of the fittest who adopted it, or repealed by the death of the least fit whose conduct did not correspond with the requirements of the true law.

THE OBJECTION FOUNDED ON THE FREEDOM OF THE WILL

There is still another objection which could be made to the foregoing argument against codification, and which should be met. It may be objected that law differs from all the other sciences, in that we ourselves can make its general rules what we will, while the principles of other sciences are superior to the knowledge or the will of man. This objection is many-sided. From one point of view

it is only another way of stating the distinction between laws of nature and laws of man adverted to. That is, that a law of nature cannot be disobeyed and has no exception, while a law of man implies the possibility of obedience or disobedience. From another point of view, it implies that men are free to make laws as they choose, to any purpose that they choose. In this connection a law of man is used as the equivalent of the will of man, and the entire freedom of that will to act in any way it pleases is implied. In other words, we have the doctrine of the freedom of the will asserted in another form; not as applied to an individual will, but as applied to the joint or resultant will of an aggregate of individuals.

Mr. Froude expresses this argument when he says: "When natural causes are liable to be set aside and neutralized by what is called volition, the word 'science' is out of place. If it is free to a man to choose what he will do or not do, there is no adequate science of him. If there is a science of him, there is no free choice, and the praise or blame with which we regard one another are impertinent and out of place."¹

It happens that just as what we call the freedom of the will in man is limited by conditions of space and time, so is the freedom of the will in a sovereignty. Thus, when we bring iron into contact with moisture in air, oxidation takes place, and rust appears. The Legislature could pass a law which would enact that, under the facts of such a special experiment there should be no rust. But the law, when passed, would not change the course of nature. The natural law would survive, and the rust would be there. On the other hand, the English Parliament, being untrammelled by any constitutional prohibition, might without rhyme or reason pass a law giving A's property to B. Such a law would be grossly unjust; yet, in the absence of a revolution, would have full effect. B would receive A's property. It might be argued that

¹ Short Studies on Great Subjects, Vol. I, p. 11.

this difference between the general principles of law and the general principles of other sciences is intrinsic and fundamental; that, therefore, no valid parallel can be drawn, and hence that codification, inadmissible in the natural sciences, may be entirely scientific in the science of law itself.

It behooves us, therefore, to examine this alleged intrinsic difference with some care. Are these two instances really diverse in nature? or, is there an underlying likeness temporarily obscured?

If we examine the two instances, we find this difference in the facts presented. In the iron-rust case we have merely the interaction of portions of the inanimate world upon each other,—the iron, the moisture, the air, and exposure. We are dealing with inanimate forces and conditions. In the confiscation of A's property for the benefit of B, we have the introduction of a new element, viz. the force exercised by animate beings. We are dealing with the interactions of the animate and inanimate worlds.

Now it is a peculiarity of the interaction of the animate upon the inanimate world, that while the force of animate nature cannot change a law of nature, it may prevent the action of a law of nature by changing the conditions or antecedents. In other words, animate nature is one of the forces of nature, and, when put into operation, produces effects. But, like all other forces, its mere co-existence is not sufficient; it must be brought into the field of action and must act by physical agents. To give a specific instance. A compound of nitre, charcoal and sulphur is known as gunpowder. Place this in a closed receptacle and apply a spark, and an explosion results. The force of all men represented by all the Legislatures in the world could not make a valid law to the contrary. But any single man, by adding a little water to that powder, could render it harmless.

The power, then, of animate nature over inanimate

can be exercised only as all other power is exercised, — by setting in motion physical forces. When, in a given instance, out of a certain combination of facts, certain results happen, a given force has acted under given conditions. When, in a similar combination of facts, certain other results happen, either a new force has acted, or the same force has acted under different conditions. Roentgen's observation that a new effect — the dark line on a photographic plate — had resulted from his experiment with the cathode rays in a Crookes tube, and his inference that a new force had acted, led to the discovery of the X rays, and is a recent illustration of this truth. Science requires our unhesitating affirmance of the truth that the antecedents, or some of the antecedents, are related to the consequents, or some of the consequents, by a causal connection. The uniformity of nature is an axiom to which science allows no exception.

Now, included in the antecedents, is animate life. And included in animate life, for our purposes, are the desires and actions of men. The existence of individuals with desires leading to actions constitute a force or condition, or rather forces and conditions, in nature as real and potent as any other factor. When these forces desire to act on their environment, there is a range of action between the impossible and the possible. Given the presence of the conditions for the explosion of gunpowder, no law that men might make could prevent an explosion; this is the attempt to compass the impossible. But men can prevent this explosion by passing a law, and enforcing it by men chosen for the purpose, preventing the combination of the conditions necessary for its occurrence; this is the attempt to do what is possible. How do these two attempts of man to create effects by law differ? Simply in the conscious action of the animate upon the inanimate world in one or the other of two ways. In the first place, when we pass a law that, although all the concurring forces and conditions are present, there

shall be no explosion of the gunpowder, we have not changed the conditions of the experiment in any way; our conscious action has not resulted in any physical action having any causal connection with the experiment, hence the experiment is unaffected; no new force has been put in operation sufficient to overcome the existing conditions. In the second place, we have gone further than pass a law. We have put the force of men or society in operation to change the conditions of the experiment and prevent the occurrence.

Thus, the English Parliament might pass all the laws they pleased against dynamite explosions, and they would be of no avail. But when they go further and provide for the carrying out of the law by surveillance, search, arrest, indictment, trial, conviction and deportation, and when men proceed to act under the law, forces are set in motion which change the conditions under which such explosions occur or threaten to occur. That the result of such laws so enforced is not, like the addition of water to gunpowder, the prevention of the event, is due to the shifting strength of the forces so brought into play upon the conditions of the experiment. In other words, the desires or fears which would affect one dynamiter to desist may not have the same effect upon another. But if we knew beforehand all about the man so expected to be influenced, we could predict with certainty his resulting action. Our uncertainty arises, therefore, not because the event itself is uncertain, having in view all the conditions, but because our knowledge of the antecedents is not complete; and hence we cannot unerringly infer the consequents. In the case of water added to the gunpowder, however, we know from many trials the unvarying result; we can predict the consequence and know the reason for it. Now it happens that nearly all the laws we are ever called upon to pass are affected with this uncertainty, an uncertainty arising from our lack of knowledge of the conditions under which they act.

The laws of man are to the aggregate what desires are to the individual, a nullity until acted on. They never act except through the instrumentality of man. And when they act they become a fact, a truth in nature either through the act of men enforcing them — the sheriff ousting A and giving B possession; or the act of men obeying them — B surrendering possession to A. And it is because we do not know how A and B are going to act in a special instance, because A and B are themselves forces or conditions of indeterminate and unknown amount and kind, that we cannot predict the action of a rule of law with the certainty with which, for instance, we predict the action of Boyle's law of gases.

This phase of the question, that a law of a Legislature or a court is a nullity until, by its application to the outside world, changes result there in consequence of it, can easily be overlooked. President Jackson pithily expressed the difference when, in the great conflict over the constitutionality of the charter of the United States Bank held to be valid by the Supreme Court of the United States, he said, "Let John Marshall, sitting at the other end of Pennsylvania Avenue, construe the Constitution as he will; I execute it," and he vetoed the charter.

THE INEXORABLE UNIFORMITY OF NATURE

It now remains to be considered whether this interaction of the law upon the external world, although not known by us so that we can predict its effects, is guided by law; or is the creature of chance. This branch of the matter has been so ably covered by Mr. Herbert Spencer — England's greatest thinker — that we cannot do better than quote his words: —

"If the sole thing meant is that sociological provisions can be approximate only, — if the thing denied is the possibility of reducing sociology to the form of an exact science, — then the rejoinder is that the thing denied is a thing which no one has affirmed. Only a moiety of

science is exact science—only phenomena of certain orders have had their relations expressed quantitatively as well as qualitatively. Of the remaining orders there are some produced by factors so numerous and so hard to measure, that to develop our knowledge of their relations into the quantitative form will be extremely difficult, if not impossible. But these orders of phenomena are not therefore excluded from the conception of Science. In Geology, in Biology, in Psychology, most of the previsions are qualitative only; and where they are quantitative their quantitateness, never quite definite, is mostly very indefinite. Nevertheless we unhesitatingly class these previsions as scientific. It is thus with Sociology. The phenomena it presents, involved in a higher degree than all other, are less than all other capable of precise treatment; such of them as can be generalized, can be generalized only within wide limits of variation as to time and amount; and there remains much that cannot be generalized. But so far as there can be generalization and so far as there can be interpretation based on it, so far there can be science. Whoever expresses political opinions—whoever asserts that such or such public arrangements will be beneficial or detrimental, tacitly expresses belief in a Social science; for he asserts, by implication, that there is a natural sequence among social actions, and that as the sequence is natural, results may be foreseen.

“Reduced to a more concrete form the case may be put thus: Mr. Froude and Canon Kingsley both believe to a considerable extent in the efficiency of legislation, probably to a greater extent than it is believed in by some of those who assert the existence of a Social science. To believe in the efficiency of legislation is to believe that certain prospective penalties or rewards will act as deterrents or incentives—will modify individual conduct and therefore modify social action. Though it may be impossible to say that a given law will produce a foreseen effect on a particular person, yet no doubt is felt that it will pro-

duce a foreseen effect on the mass of persons. Though Mr. Froude, when arguing against Mr. Buckle, says that he 'would deliver himself from the eccentricities of this and that individual by a doctrine of averages.' But that 'unfortunately, the average of one generation need not be the average of the next.' Yet Mr. Froude himself so far believes in the doctrine of averages as to hold that legislative interdicts, with threats of death or imprisonment behind them, will restrain the great majority of men in ways which can be predicted. While he contends that the results of individual will are incalculable, yet, by approving certain laws and condemning others, he tacitly affirms that the results of the aggregate of wills are calculable. And if this be asserted of the aggregate of wills as affected by legislation, it must be asserted of the aggregate of wills as affected by social influences at large. If it be held that the desire to avoid punishment will so act on the average of men as to produce an average foreseen result, then it must also be held that on the average of men the desire to get the greatest return for labor, the desire to rise into a higher rank of life, the desire to gain applause, and so forth, will each of them produce a certain average result. And to hold this is to hold that there can be prevision of social phenomena, and therefore Social Science.

"In brief, then, the alternative positions are these. On the one hand, if there is no natural causation throughout the actions of incorporated humanity, government and legislation are absurd. Acts of Parliament may, as well as not, be made to depend on the drawing of lots or the tossing of a coin; or, rather, there may as well be none at all; social sequences having no ascertainable order, no effect can be counted upon — everything is chaotic. On the other hand, if there is natural causation, then the combination of forces by which every combination of effects is produced, produces that combination of effects in conformity with the laws of the forces. And

if so, it behooves us to use all diligence in ascertaining what the forces are, and what are their laws, and what are the ways in which they coöperate.”¹

It is unquestionably true, then, that the effects of legislation are determined by fixed laws, and are not the creatures of chance. Provided the rule of law is within the power of the Sovereignty to effect, whether it shall become a rule of nature is dependent : first, upon the desires and actions of the executive officers ; and second, upon the desires and actions of those whom it affects. If the first refuse to execute it, it becomes a nullity. If they execute it, the next question is whether those whom it affects submit to it, or are forced to obey. In either event the action of these two classes of persons is not dependent upon chance ; but is dependent upon causes, which, although we do not know them, are yet in action ; and, had we omniscience, could be known, and their results predicted. It follows, therefore, that had we full foreknowledge we could, in each special case, predict the results of a rule of law with the same certainty that we can predict that iron will rust.

Between the law which declares that under certain conditions iron will rust, and the law which declares that the property of A shall belong to B, there is, then, no such difference as that implied. In the concrete case both laws are inevitable in the inexorable necessity of their action. Whatever of uncertainty there may be in the latter case as compared with the certainty of the former instance, arises from our comparative lack of knowledge. The uniformity of nature is there, though we do not know its workings in detail.

So much for the parallelism between the certainty of action in a rule of law when once laid down, and the certainty of action in a physical law. Note here that there is no implied assumption that this certainty of action, if all the facts were known, would lead to action

¹ Herbert Spencer's Study of Sociology, pp. 45, 46.

according to the law of man as enacted. It might just as well be action against the law. The true law being unknown, the one we have enacted may not be the true expression of the workings of nature.

THE SCOPE OF LEGISLATIVE FREEDOM OF WILL

There remains yet another branch of this objection. We have not yet made clear this apparent paradox. The rule of law laid down is that A's property shall belong to B. It might as well have been the other way. Is the choice by any aggregate of men of these alternatives a choice of necessity or of chance? The answer is that the choice between these conflicting rules is determined by law, and not by chance. If this were not so, there is no reason why, in the course of man's development, the idea of property rights, and of justice, should have developed. If this were not so, there is no reason why we should be shocked by a law which would propose to give A's property to B. This shock to our feelings is proof that a force is at work in the contrary direction. To the savage man, the primeval man, living a hermit life like the Rogue elephant, the idea of such a law would be consonant, not repugnant, to his feelings. But as, through the institution of the family, sprang the tribe; and, through the tribe, the nation; there has developed in men's minds the necessity of limiting the scope of individual action by the necessities of a like liberty to all. Hence, from the necessities of joint life, or aggregate action, arose the conception of equality, of equity, of justice. The pursuit of life, liberty and happiness has proved more successful in those nations where the force of aggregation so resulted, than in those where it did not. Life, liberty and property are better protected; the law of equity is more prevalent in England than in Persia. This force has reacted. In the struggle for existence among nations, England occupies a more powerful position than Persia.

But this force which moulds law — the force of equity

in social phenomena — is nothing more nor less than a necessary rule, or product, derived out of the forces, physical and animate, at work. It is a part of the law of progress, of the law of evolution. While, in a certain sense, it is possible for us to lay down the rules of law either way, this facility is due to our ignorance of all the facts. If we knew all the facts, two results would crop out and become known. On the one hand, the decision of the particular matter in one of two ways might bear no causal relation to the good of society; in other words, be of indifferent moment. On the other hand, the decision might be of immense importance to the future good of society; in other words, it might embody its aggregate life or death.

Now laws are the resolves made by society to govern its action. If the resulting action has no effect for good or evil, it is unimportant which way the question is decided, what rule is laid down. If the resulting action has effects for good or evil, it is sometimes of the greatest importance what rule is laid down. We ourselves lay down these rules. Our effort must always be to lay down the true course of action, the rule producing the best results. Whether we do so or not is dependent on our knowledge. The science of legislation, now in its infancy, *i.e.* the science of what laws are best calculated to advance the growth and happiness of the social unit, is but a branch of the wider science of right living. If we make our laws wisely, *i.e.* in consonance with nature's laws, then we succeed. If we make our laws unwisely, attempt to change nature, then we fail. The result is the criterion. In determining or making the laws to govern the conduct of the members of the social unit, we proceed in the same manner as when we determine what course of action the individual should pursue. We have recourse to knowledge and reason.

AN science, and all knowledge, is the attempt to learn the true connection between the A and B of the phenom-

ena in the environment, and the *a* and *b*, images of these phenomena, in the mind.¹ The advancing knowledge of the true equivalence existing between the relations of objects in the outside world, and the relations of the images of these objects in the inside world, is Progress. The life of the individual is sometimes dependent on this knowledge, dependent on a correct decision between two courses of action presented. Yet again, the effect of a decision either way has no appreciable bearing. Thus the image of the tree it feeds on, on the retina of a giraffe, if it always suggested and was followed by the action flight, would result in the dying out of that species through lack of nourishment. The animal would perish through lack of knowledge, through lack of a true correspondence between its mental images and external objects. So again, if the image of a bushman with bow and arrow in hand should be mistaken for the food tree, and lead to corresponding action, or inaction, that animal would perish through similar lack of a true correspondence between inner and outer relations. Again, a thousand other objects of the habitat, imaged on the animal's eye, might lead to no action ; and yet produce, practically, no results good or bad. Thus the environment of every animal is filled with numerous conditions, or objects. Many of these have no appreciable influence beyond the fact that they exist. That even those which seem indifferent in their effects exercise an influence, is shown by the fact that whenever the conditions of the habitat change, the animal changes to meet it. Yet that all the surrounding conditions are not actively producing causal effects of equal magnitude on that and other animals, is shown by the fact that other animals, different in kind, exist in the same habitat. Some of these conditions in the environment, however, do exercise over the animal the immense powers of life and death. Should a fox mistake the hounds for a flock of geese, his error would mean the ex-

¹ Spencer's Principles of Psychology.

inction of his line. Between conditions in the environment having these grave effects and conditions having no apparent results, there exists every grade that can be conceived.

Now what is true of the single animal, is true of the aggregation. In other words, the laws men enforce in social relations are a portion of the forces in the environment of that people. These laws may relate to matters of little moment or concern to the welfare of the race, the results of action either way may be of comparative unimportance. Yet again, the correct decision by these laws of some problem, in a special case, may mean the life or death of the society. And between these extremes stretches a gradation of steps joining the one to the other, leaving the dividing line shadowy and indefinite. It follows then that it cannot be truly said of a society that its laws might be made either way. While this may be true of immaterial and unimportant matters, it is not true of matters really tending to the good or evil of the society.

A society which, without just cause, delivers A's goods to B is one which, other things equal, will not survive in competition with one which recognizes A's property rights. We say other things equal; because, where so many causes are at work as in the competition between nations or civilizations, the net result of the competition of causes may not be that of the difference between any two. Yet there are witnesses to the truth of this broad generalization. The nations most powerful to-day are those in whose systems of law equity prevails. The Western Civilizations have outstripped the Eastern in power. Between the Western and the Eastern Nations no deeper distinction can be drawn than that the Governments and Laws of the West are founded on Freedom and Equity, the Governments and Laws of the East are founded on Despotism and Force. The reactions of the forces involved have produced diverse effects. As a rule it is not wise to single out one cause as the true cause

where so many are at work. But, in truth, the cause we select as a most important factor—the comparative fairness of their legal institutions—is proved to be such by common assent. When we speak of a community prospering by good laws, and being injured by bad ones, we assert that laws cannot be made indifferently either way. Again, there are instances in history where acts of crowning injustice have resulted, not in the death of the social aggregate, but in the death of that portion of the social aggregate responsible for the wrongs. Tarquin and Lucrece, Claudius and Virginia, will remain monuments to emphasize this truth so long as the records of the past remain. In fact, it seems trivial to waste words proving so patent a thesis. Nor would we have done so, had it not been that some carping critic of the common law has somewhere said, that it embodied so many thousand cases all of which might have been as well decided one way as the other.¹

Thus while the fact that the Legislature can draft a law either way would seem to indicate that the principles of legal science are not subject to the same rules as the principles of other sciences, the truth is that this fact does not constitute a valid distinction. The power is more apparent than real. Let us restate the argument.

In the first place, we have shown above that a large number of actions and reactions between an individual and its environment are of an indifferent nature—and so likewise of a nation. In consequence, a large number of the laws of a nation, having no appreciable effect upon it for good or evil, may as well be made one way as the other. In this, that not all decisions have direct bearing on the good of the race, lies the scientific warrant for the common law division of Statutory and Case law—Statutory law for certainty on those matters wherein certainty is

¹ See article on "Codification," by Mr. George Hoadley, 11 Am. Bar Association Reports, 222, applying this remark to the 16 volumes of Meeson and Welsby's Reports.

more important than the result of the ruling ; Case law for those matters wherein the result of the ruling in its effects on the welfare of society is more important than its certainty. It is true that as the common law exists to-day the distinction has not been closely followed. Still, with some aberrations from true principle, the foregoing substantially expresses the result. This will be the more apparent if we refer to the fact that statutes like the Statute of Frauds, Limitations, etc., which merely reverse a common law ruling, are not true statutes in this sense. They relate to matters the results of the rulings upon which have serious effects upon the welfare of the society. That they exist in Statutory rather than in Case form is due to an original wrong departure of the case law, which could only be reversed by a higher power, viz. the Legislature.

In the second place, where the decision either way works for good or evil, we have shown above that the reaction upon the life of the aggregate thereby produced constitutes a law of the survival of the fittest, compelling the right decision to be made.

THE SCIENTIFIC WARRANT FOR THE EXISTENCE OF STATUTE AND CASE LAW—STATUTE LAW FOR INDIFFERENT CONDUCT, CASE LAW FOR ETHICAL CONDUCT

And here we find a scientific warrant for the existence in one system of Statute and Case law. Certain special phenomena of disputes arising in social life can be decided either way without disadvantage to the State ; here lies the province of Statute or Code Law. The decision of certain other special phenomena of disputes arising in social life is fraught with consequences good or evil to the future of the State ; here lies the province of Case Law. The question then is, when can a decision be made either way without disadvantage to the State. The answer is, when no special equity is involved. And when

Is a decision fraught with consequences good or evil? The answer is, when justice or injustice is involved. Having arrived at this general conclusion, we may ask if there is any method by which we may safely apply it.

THE PRACTICAL TEST

The following is a practical method. Given a special instance of a combination of facts requiring decision in one way or the other, we would ask, is it of any importance, ethically considered, which way this decision should be? If the answer is No, the rule applied to that combination and other similar combinations of fact can properly be expressed in Statutory form. If the answer is that injustice would be perpetrated in one case, and not in the other, then the rule established for that particular combination of facts should be expressed in the form of a Case.

There is one other circumstance that may help us in this test. When the result of the decision is indifferent, there is no reason *pro* or *con* for the decision. It may as well be made one way, as the other. When the result of the decision is equity or inequity, there is a reason *pro* or *con* for the result of the decision. We have seen above that the rule of construction, that when the reason ceases the law falls with it, is applied to the written law expressed in Cases, and not to the written law expressed in Statutes. It follows, therefore, that when there is no reason for a decision either way, a statute is the scientifically correct mode of expression of the rule. While, when there is a reason for a decision either way, the case law is the scientific mode of expression. To give examples. Whether a draft payable on sight should have three days' grace, or be payable at sight, was the subject of much discrepancy in the common law authorities. On investigating the subject in the light of the preceding argument, it will be seen that the question is one which should never have been a part of the case law at all, but should have been settled by a statute from the beginning.

Whether the rule of law should be, that the draft should have three days' grace, or not, is of no importance ethically considered. If the rule is once established that such a draft has no days of grace, any drawer who wishes three days of grace can draw his draft so as to be payable three days after sight without grace. It follows that there is no good reason, one way or the other, why such a draft should have grace, or should not have grace; and the leaving of such a matter to the decision of case law was an error. The bad consequences of this error were apparent in the resulting diversity of opinion, a diversity quite natural in view of the fact that neither one rule nor the other had any reason to sustain it. The certainty of such a rule is its only merit. The rule is entirely conventional, requiring a decision by force either way. Hence a statute is the proper form in which to express it.

On the other hand, contrast the difference when we take up the rules embodied in the common law of contracts in restraint of trade. Here the special facts of each special case create reasons *pro* and *con* for the adoption of the rule or its exception. As has been shown in the foregoing discussion, a difference of facts dependent merely on the limits of time or space is not the controlling factor in determining the reason of the rule. Hence this is not the controlling factor in determining whether the rule of restriction for the public benefit, or the rule of freedom of contract for the individual benefit, should apply, and decide the case. In such cases, therefore, where the shifting combinations of facts produce a moving equilibrium of facts, and reasons on the facts, shifting the rule from one side to the other, no rule can be laid down depending solely on the presence of test facts which will produce justice. No statutory rule will meet the necessities of the case, and the form of expression embodied in the case law is the only form that should be used. In such cases the code rules on the subject cannot be expressed by a mere statement

of the rules and exceptions in connection with a classification of salient facts. The reason for the rule must be stated with the facts. When so stated, uncertainty is introduced worse than that of the case law. We cut loose from the reason of the rule to the language of it, and we lose equity without a compensating gain. And again we incur a loss in certainty arising from the greater abstraction in expressing the rule.

THIS TEST AS APPLIED TO THE ENGLISH LAW

In the foregoing we have the ideal test as to when rules of a system of law should be expressed in Statutory Form, and when in the Case Law Form, to be applied to an ideal system of law. But application of this test to the common law of to-day would show that a number of provinces of law covered by case law should be covered by statutes, and some portions of statutory law should still be left to the courts. We would also find that some portions of the case law which have been usurped by the statutory law have been properly usurped, and will probably continue to be usurped in the future, owing to the imperfections of human knowledge.

Case law, involving as it does the most important questions of the sciences of sociology and ethics, is not always correctly decided when it is decided. The science of sociology and the science of ethics is each in its infancy; and hence the occasionally erroneous decisions of case law are necessary results of that condition. The peculiarity of any system of law is that a decision must be made on the problem presented, however complete or lacking may be our knowledge of what the decision ought to be. The decision necessarily represents the ethical views of the period when it is rendered. The law of *stare decisis* extends the rule thus established to subsequent times, and changed conditions. The rule becomes out of joint with the times and it is necessary

to change it. To prevent the chaos of a too frequent reversal of the rule of *stare decisis*, the higher power of statutory law must be used for this purpose. From this time a new departure begins under the new rule.

AN OBJECTION TO A SEEMING INCONSISTENCY IN THE ARGUMENT ANSWERED

And here we may pause to deal with an objection. The acute reader may say : —

You have argued for a fundamental likeness between Laws of Man and Laws of Nature, at least in so far as concerns the fact that the mode of expression of those laws must be governed by the same principles. Unless this likeness is implied, your argument of the inexpediency of codifying the laws of man drawn from the experience of men in enforcing obedience to an alleged Revealed Code of nature becomes meaningless. Yet you now say that there is a scientific reason why a portion of the laws of Man should be codified, and another portion left in the form of Case law. This because one part deals with indifferent conduct, and the other part deals with good and bad conduct. Yet as respects the individual, acting in the sphere of the forces of nature, a part of his conduct is indifferent, and a part is good or bad. If, therefore, the argument of analogy you have used above to prove, that because a Codification of Science is inexpedient, therefore a Codification of Law is inexpedient, is sound, there must be a like interaction between Science and Law, so far as concerns the indifferent portion of conduct. In the field of Law you assert that indifferent conduct should be codified. Why, then, is it not proper to codify the Laws of Nature so far as concerns indifferent conduct? The objection has apparent merit, but a further analysis will dispel the illusion.

THE DIFFERENCE BETWEEN THE NECESSITY OF CODIFYING THE RULES OF INDIFFERENT CONDUCT IN LAW AND IN OTHER SCIENCES

The laws of man comprise the science of Jurisprudence, part of the science of Sociology; while the laws of nature embrace all the sciences, including the laws of Sociology and of Jurisprudence. There is, however, a fundamental distinction between the laws of nature relating to the science of Sociology, and hence the science of Jurisprudence or laws of man; and the laws of nature relating to all other Sciences—Chemistry, Astronomy, etc. The laws of nature affecting the science of Sociology deal with the interactions of individual units on their environment, and on each other; while the laws of nature affecting all the other sciences deal with the interactions between the individual and his environment. The laws of chemistry, mechanics, physics, physiology and the other sciences instruct the individual how to govern his actions so far as concerns inanimate nature. The animal kingdom except his fellowmen are intended to be included in this. Animals have no legal personality. The laws of man instruct the individual how to govern his actions so far as concerns animate nature, the actions and reactions of his fellowmen upon him. The laws of all the other sciences, except Sociology, primarily lay down rules to guide the individual in deciding upon conduct relating to the interaction between himself and the environment. As soon as any such question becomes complicated by the recognition of the factor of the existence and interaction of other like units, that moment we enter upon the province of Sociology.

Within that province we have three recognized divisions—the domain of physical laws, of positive laws and of morals or ethics. Examples of the first are the Development Hypothesis of Darwin and Spencer, and the Law of Population elaborated by Herbert Spencer of which the Malthu-

sian doctrine was an embryo type. The second, or positive laws, embraces the laws of man, the science of Jurisprudence under discussion. The third embraces the problems of ethics. The physical laws of Sociology are of course subject to the same considerations, so far as codification is concerned, as the laws of the other sciences. The expediency of codification of the portion of them relating to indifferent conduct will depend upon whether the same portion of the other sciences should be codified. Positive law and ethics are alike in that the conduct they embody embraces the three classes of good, bad and indifferent; and alike in that they deal with the interaction of many minds, instead of the interactions of one mind and the environment; but they differ in that many good, bad and indifferent actions remain outside of positive law. That is, positive law has not attempted to enforce some rules which are ethically good or bad, and has not attempted to decide some questions between individuals which are indifferent. The truth is that the field of ethics is the raw material out of which positive law is made. Positive law encroaches upon ethics. Ethics grows in advance of positive law. And whether, when the millennium comes, the two will have coalesced by the positive law extending over the entire field, or the two will have become one, from the tacit agreement of men upon what is right, and action in accord, it is hard to say. What we may note here is, that the only necessity of deciding beforehand in either domain arises from the fact of many minds, and the clash of many wills. It follows that the fact that positive law is not coextensive with ethics, is a fact arising out of our being at some stage of a partial evolution towards a goal of a relatively perfect adjustment. That those portions of the Science of Sociology dealing with ethical action of an indifferent nature are not embodied in statutes, is an accident of our development of exact equivalence to the fact that some portions of the Science of Sociology, dealing with ethical action

intrinsically good or bad, are not included in our system of case law. In drawing our distinctions, therefore, between the rules of other sciences relating to indifferent conduct, and the rules of Sociology relating to indifferent conduct, we may properly speak only of that indifferent conduct which is in fact embraced in the present domain of Jurisprudence, positive law or laws of man.

Returning, then, to our line of argument, we are entitled to say: The laws of all the other sciences except jurisprudence primarily lay down rules to guide the individual in his conflict with inanimate nature. The laws of jurisprudence lay down rules to guide the individual in his conflict with other like units of animate nature having equal powers and duties. The rules of the other sciences affect one will. The rules of the science of jurisprudence affect many wills. In the first case, the single will may choose a course of conduct subject only to the condemnation of nature's laws, if the choice be wrong. The choice is only wrong when the conduct is bad. If the conduct is indifferent, — as the hypothesis assumes, — the result is that it makes no difference at all which way the decision on conduct is made. Nor does it make any difference whether on subsequent occasions the individual decides the same question in the same way, or reverses his decision. This because only one will is involved.

In the second case, any single will may likewise choose any course of indifferent conduct. But, as each other will has a like freedom, it follows that on the same or similar occasions, the course of indifferent conduct chosen by these many individual wills, will not be the same, they will differ; the different lines of conduct followed out by each individual will, will clash, just as two men walking into each other from opposite directions clash; and so will arise a necessity of reconciling these divergences, and bringing about a compromise resultant.

On this distinction rests the reason why certain portions of the indifferent conduct of man, embracing certain prov-

inces of the law, should be codified ; while no portion of the indifferent conduct of man, embracing spheres of influence of the other sciences, need be codified.

And yet, as hereafter shown, there are instances of indifferent conduct in the other sciences in which a customary rule — a so to speak *pro tanto* codification — may be adopted to advantage. And when we investigate these cases we find that they are adopted to cover the difficulties arising in such sciences, and also in the science of law, from the identical source — the clash of conflicting wills.

Calling attention to that great mass of indifferent conduct, — our walk, talk, dress, behavior, etc., which is not included in the province of law, although affecting in some degree those whom we meet in society, — we may note that the province of law begins where conduct, otherwise indifferent, affects others to an extent sufficient to make it proper for the law to interfere. The warrant for its interference is to preserve a like liberty in all, only restricted by the necessities of a like limitation on all. We own our bodies, and thence the right to air, and water, and standing room. And out of this has sprung the right of ownership in property, real and personal. For just as two persons cannot occupy the same space with their bodies, so they cannot both be the sole and exclusive owners of a piece of land. From these circumstances flows the fact that conduct which is entirely indifferent, when viewed in the light of the other sciences involved, becomes indifferent, or good, or bad, when the science of law becomes involved. Thus, if I walk one hundred yards east or west from a given point, my conduct may be indifferent, so far as concerns the laws of the physical nature concerned ; but if I own the land on the west over which I walk, while I do not own the land to the east over which I walk, my conduct will be indifferent or bad, in the eye of the law, according to whether I walk east or west. For if I walk east, I commit a trespass. Yet again, if I have a license from the owner of the land on the east to

walk over it, my conduct in so doing would become indifferent again. Again, each citizen has the right to the use of the highways for driving. But each other citizen has a like right. When no other is present, whether you drive on the right or left side of the road constitutes conduct entirely indifferent under all laws. But, for the guidance of persons meeting, and to prevent collisions, all countries adopt a legal rule called the "law of the road." This rule specifies that you must pass to the left, or to the right. In England you must pass to the left; in the United States to the right. So a decision as to indifferent conduct which need not be made for the individual, so far as concerns the other sciences, must be made for all individuals, so far as concerns Jurisprudence.

THE QUASI-CODIFICATION OF RULES APPLYING TO INDIFFERENT CONDUCT IN OTHER SCIENCES

And, curiously enough, where in the other arts and sciences there is any real gain to be made by the harmonizing of the clash of wills, there we find certain customs or rules of action laid down and consistently followed by all. And these conventional rules constitute a *pro tanto* codification of indifferent conduct. A well-known example in the science of Applied Mechanics may be cited for the class. Thus it is ordinarily a matter of no consequence, a matter of indifferent conduct, whether you should make a screw or nut so that it will screw up by turning in one way rather than in the other. In the fact, however, that machinery becomes rusted and needs repair, and that mechanics not employed to build the machine must be employed for this work, arises a convenience in having this indifferent action done in one way. Thus waste of labor and damage to machines are avoided. In England and the United States the rule adopted is to screw up by turning from left to right, and to unscrew by turning in the opposite direction. This rule holds good universally, except where the bolt or screw is so

placed with reference to the moving parts of the machine — as a bicycle axle — that the normal action of the moving part would tend to disengage the screw. Any mechanic can ordinarily detect at a glance from the position of the parts the existence of the exception or the rule. While, if the general rule were not adopted as a practical code rule, and followed by all manufacturers, much damage and loss of time would result.

Again, in English and American plumbing and machinery, all stop-cocks are so made that the handles are in line with the pipe when the pipe is open, and at right angles to the pipe when the pipe is closed. Yet, as showing the completely indifferent nature of the conduct embodied in the rule, may be mentioned the fact that in French plumbing and machinery the exact reverse is the rule, — the stop-cock is open when the handle is at right angles to the pipe, and is closed when the handle is in line with the pipe. As a further example of this truth, we may cite the growing tendency to have all parts of ordinary machinery — bolts, nuts, etc. — made by different manufacturers turned out according to fixed and standard sizes, so as to be mutually adjustable.

THE NECESSITY OF CODIFYING INDIFFERENT CONDUCT ARISES FROM THE CLASH OF WILLS

From this we observe the truth that the rules of the laws of man, whether covering good or bad or indifferent conduct, arise out of the necessities for rules for the interaction of individuals upon each other. The individuals, the units of a society, like the molecules of a gas, have certain orbits of motion, and their collisions or harmonious revolutions depend upon fixed laws. These laws are the unknown laws of Sociology; and our attempt to express them in Legislation or Decisions constitutes our striving after truth in that department.

When the individual acts with regard to his environment and the natural forces around him, uncomplicated

by any reference to the existence of other individuals like himself, then he is governed by the laws of nature involved in the other sciences, and his conduct — good, bad or indifferent — is determined by experience and reason. Such portion of his conduct should never be codified except in the *prima facie* conventional way above stated, for the following reasons. So far as concerns the plainly good or plainly bad, he has empirical knowledge for his guide, knowledge sufficient up to date as shown by his survival; yet knowledge that must needs be imperfect, that can and will grow naturally with his accumulated further experience, if he forbids all shackles on investigation and reason.¹

So far as concerns indifferent conduct, since, on the hypothesis, this appears to have no bearing for good or evil on the life of the individual, and has no bearing on the lives of other like units, there is no need of codification. There is no gain to be made by it, but there is a possibility of disadvantage, if further experience should discover that the indifferent action might better be done in one of two ways. And it is because, in some instances, his indifferent conduct has a bearing on the lives of other units, that, as shown above, an advantage is gained by adopting a customary rule which amounts to a codification that is *prima facie* but not conclusive on his action. The rule is one ordinarily adopted, but not inexorably binding.

On the other hand, when the individual acts not only with regard to his environment and the natural forces around him, but also with reference to the existence of other individuals like himself whom his action affects, then he is governed within a certain province of such actions by the laws of man, and the expediency of codify-

¹ See Buckle's *History of Civilization* for the proof of the difference in progress between Spain and England, having been dependent on the freedom of thought in the one, and the depressing influence of the authority of the Church in all sciences in the other.

ing his conduct will rest upon whether it is good or bad or indifferent. The portion of his conduct which is good or bad should not be codified, for the same reason why his good or bad conduct within the sphere of influence of the other sciences should not be codified. The question, however, of codifying that portion of his conduct which is indifferent rests upon a different basis. Instead of dealing with one unit, we are dealing with many. Instead of the necessity of consulting one will, we must needs bring about a compromise where other wills are involved. As, on the hypothesis, the action which the law applies to is indifferent, it follows that if individuals in society were left without rules in the premises, one would decide one way, and one the other, and at some time the law would be compelled to decide which was right. Now the case law never decides a point beforehand. A case must arise involving the same or similar facts before a system of case law gives certain deliverance of what the rule on the subject is. The consequence is that in these instances of indifferent actions, which, on the hypothesis, might as well be decided either way, a system of case law is doubly defective. Not only is it true that there is in existence no rule to guide the decision either way, but there is in existence no reason for predicting a decision either way. Hence there is absolutely no rule to guide the action of these conflicting wills until after the event. Accordingly, the decision is as unsatisfactory as would be one decided by a toss of a penny. The result is that injustice is done, both by the fact that one litigant is beaten, who might just as properly have been successful, and by the fact that a matter is left uncertain which might properly have been made sure. To state an instance. Much dispute exists in the cases as to the time limit within which an endorser, notified of the dishonor of a note, should notify the endorsers prior to him on the paper. Must he notify his prior endorsers immediately on his receipt of the intelligence? Can he

not do so at any time,—that day, or within twenty-four hours, or by the next mail of the day thereafter? These were some of the questions the case law had to decide. Again, assuming a note drawn by John Doe to the order of Tom Jones and endorsed on the back by Richard Smith, a third party, for the accommodation of the maker, is Smith an endorser of the note? a joint maker? a guarantor? or what connection has he with the paper, and how should he be held liable? In New York it has been held that he is an endorser, and he is looked upon as a second endorser.¹ In New Jersey it has been held that an endorsement under such circumstances creates no contract *per se* on which a suit will lie, and whether the person so signing shall be charged as joint maker, endorser, surety or guarantor must be proved by evidence of the circumstances and agreement.² The United States Supreme Court has held that under such circumstances Smith becomes a joint maker of the note.³ The importance of these distinctions is manifest. If you sue Smith on such a note in New Jersey, the note is no evidence of a cause of action, and you must prove the contract as being that of a joint maker, surety, guarantor, or endorser, as the case may be, outside of the note, and must prove your compliance with the conditions of such a contract, before you can recover.⁴ If you sue Smith in New York, where Smith's contract is held to be *prima facie* that of second endorser, you must prove demand and non-payment, and notice of demand and non-payment to the endorser, before you can recover.⁵ But the presumption as to the character in which he signs can be

¹ *Moore vs. Cross*, 19 N. Y. 227; *Phelps vs. Vischer*, 50 N. Y. 69; *Schafer vs. Bank*, 59 Pa. 144.

² *The Building & Loan Society of Absecom vs. Leeds*, 50 N. J. Law, 399; *Chaddock vs. Van Ness*, 35 N. J. Law (6 Vroom), 517; *Hayden vs. Weldon*, 43 N. J. Law (14 Vroom), 128.

³ *Good vs. Martin*, 95 U. S. 90.

⁴ *The Building & Loan Society of Absecom vs. Leeds*, 50 N. J. Law (21 Vroom), 399.

⁵ *Moore vs. Cross*, 19 N. Y. 227.

rebutted by parol evidence.¹ If you sue Smith in the United States Court you need not prove any demand or notice, for he is there held as a joint maker.² It will thus be seen that the courts disagree as to what is the *prima facie* legal effect of such an endorsement.

Now, within certain limits, the time within which one endorser should send notice of dishonor of the paper to another is ethically of no particular consequence. Whether fixed at a day, or two days, or three days, does not change the quality of the act from good to bad; hence the conduct in this particular is indifferent. At the same time, by reason of the fact that different wills of different men are involved, and certainty as to the rights flowing from this indifferent action is of prime importance, a matter of this kind should be covered by a statute. The same reason would govern the putting in statute form of the rule regarding the *prima facie* rights and liabilities of the parties under the form of irregular endorsement of a note above stated.

THE SAME NECESSITY DOES NOT APPLY TO CODIFYING GOOD OR BAD CONDUCT BECAUSE OF THE IMPORTANCE OF A CORRECT DECISION

To all this it may be replied, we admit the validity of your reasons for codifying indifferent conduct covered by the laws of man, but why are not these reasons equally controlling as regards good and bad conduct? Your reason for the difference of treatment you claim should exist, in expressing rules of all other sciences, and the rules of Jurisprudence, namely, the dealing with one will and with many wills, applies to the good and bad part of conduct covered by the laws of man, as well as to the

¹ *Coulter vs. Richmond*, 59 N. Y. 478-481.

² *Good vs. Martin*, 95 U. S. 90.

Of course, we assume in each instance that suit is brought in the State in which the note was made and payable. A question of conflict of laws would arise if the note made and payable in one State were sued on in another.

indifferent part of conduct covered by the laws of man. These very considerations, the necessity of making known the law, of harmonizing divergent views of different minds and of declaring the law for the guidance of men before the event, which you have urged as the warrant for codifying indifferent conduct, are the same considerations which the Code advocates have advanced with much force as compelling adhesion to their creed. Why, then, are you not consistent? Why do you not carry your argument to its logical conclusion?

In rebuttal the following may be advanced. The reason why we cannot properly carry the argument to its logical conclusion arises from a difference in the facts, the outcome of the two cases. When the conduct is indifferent, then, since a decision either way is of no importance, we may safely adopt the course which leads to certainty, by arbitrarily deciding a question which otherwise would be left in absolute uncertainty, because no reasons, or as many valid reasons, can be advanced for a decision either way. In such a case a Case law gives us a maximum of uncertainty, with no resultant equity, while a Code law gives us a maximum of certainty, with no resultant inequity. Again, if the parties do not like the Code rule, they are free to make another to suit themselves; for a decision the opposite way, based on such a contract, would run counter to no rule of law.

When the conduct is good or bad, then a decision either way is of importance to society; and it is of the greatest importance that the decision should be rightly and not wrongly made. Consequently we can no longer, by an arbitrary decision, adopt the course which leads to certainty, if, by adopting the other course, we are more likely to make a correct decision. In other words, if the source of authorship and the manner in which a code system, as compared with a case law system, is made, and amended, and construed, and applied, are, according to experience, less likely to attain a correct decision of each dispute

than a case law system, then we cannot afford to obtain certainty at the expense of equity. And this is the more true in that, as shown by Chapters V and VI, *supra*, the *precedent* certainty of a code system, viewed as a controlling authority, cannot, by reason of its generality, be compared to the *subsequent* certainty, by reason of its particularity, of a case system. The uncertainty in a case system until a question has been passed upon in a judgment, is an uncertainty only existing until such dispute has once arisen and been decided. Thereafter the decision so made covers the field of subsequent events with the greatest amount of actual certitude of which human affairs are capable; while, pending the inception of the dispute and its decision, the uncertainty is tempered by the ability to reason, from existing premises of more or less validity, to what the decision ought to be or will be.

THE DIFFERENCES BETWEEN THE CONDUCT OF THE INDIVIDUAL AND OF THE SOCIAL UNIT

We may properly conclude, therefore, that there is a difference between individual conduct and the conduct of a society, and, hence, in the manner of prescribing the rules of individual conduct and in the manner of prescribing the rules of conduct for society. And this difference arises from the fact that the conduct and the rules of conduct of an individual apply to one person, while the conduct and the rules of conduct of society apply to many persons. In both cases the conduct, whether of an individual or of society, is either indifferent or ethical. When indifferent, so far as the individual is concerned, there is no need of laying down any rule in relation to it to be strictly followed. Yet, even in this case, we find habits grow upon us to do always the same things in the same way. The old gentleman who rises at a certain hour and shaves and dresses exactly in the same order, takes his breakfast and his morning walk, reads his paper

and proceeds to his office by the same route, according to the habit of many years, is a sample of how indifferent actions, having no appreciable ethical significance, are, for convenience' sake, commonly formulated into fixed rules of conduct.

Where, however, many individuals are involved, the necessity of fixed rules as to these ethically indifferent matters amounts sometimes to a necessity, or, at any rate, is dictated by the better policy. Were every man allowed to present his case to a court in his own way, the multitude of subordinate questions of practice that would be raised would overburden the court through the necessity of deciding subordinate questions. Hence the necessity of rules of pleading and of practice. How a sheriff shall attach different kinds of property, whether he shall take it into custody, or take a receipt from the custodian, are rules of conduct important enough, but of no ethical significance. Yet convenience requires that two or three ways of doing the thing should be recognized, and so do away with the thousand and one ways in which it might be done, and each of which would require a decision to establish its validity. Hence the necessity and propriety of the statutory expression of adjective or administrative law, or at least some portions of it. But while granting so much, we do so merely in view of the suggestion contained in the next chapter as to how these matters should be codified, if at all. (See Chapter XI.) The experience of the State of New York with its Code of Civil Procedure, now in operation nearly fifty years, is not without its lesson. What that lesson is, is suggested in the next chapter.

Again, when the individual has acted and thereby expressed his rule of conduct, the judgment on the former question is at an end; it is an accomplished fact, and being of an indifferent character may be proper either way, and when the next occasion arises may be decided the other way. But when society is involved in the dis-

pute, and not the individual alone, and when two individual wills conflict as to what action should be taken, a new necessity arises. This is the necessity on the part of society of making some decision of the conflict, and a necessity that in all cases where the question arises it should be decided in the same way. Thus, even where the act is one that might as well be done either way, when it is done, and dispute arises between individuals, the question society must decide is, is it done rightly or wrongly; shall the plaintiff or defendant have judgment. This necessity of deciding these indifferent matters after the event, throws the burden upon society of enacting rules as to them before the event, so that men may know what to expect when such disputes arise.

It follows that many indifferent acts which the individual need not decide, society must decide; and must lay down a rule as to them. This, because convenience requires the adoption of one rule out of the many. It follows that matters of indifferent moment are best decided by a statute, which sets at rest the uncertainties that might arise through the necessity in each case of this answer of yes or no.

SUMMARY

The question of how far Statutory Law should encroach upon Case Law is a question whose answer depends upon two extremes. On the one hand, where certainty is the main requisite of the rule, and no ethical principle is involved, the rule should be expressed by statute. On the other hand, where equity is the chief merit of the law, and certainty is a secondary advantage, the rule should be expressed in case law. Between these extremes there may be portions of the field in which it may be extremely difficult to say whether the advantages to be derived from the one, or the other, should govern the selection. But this fact does not militate against the certain conclusion that, in no event,

should the statutory form of expression usurp the entire field. We say, in no event; we mean by this that only when man shall achieve a knowledge of all things will it be wise for him to express that knowledge in the form of a Code.

We have shown that the argument founded on the assumed certainty of statutory law is an argument which is not borne out when we descend from generalities to specific instances. We have shown that the greatest certainty possible in the law is the certainty that a case of exactly like facts, running on all fours with some former case, will be decided in like manner; that this certainty, arising from the past history, is, to a certain extent, almost absolute; and the wider and broader the basis of the decisions in any branch of the law, the greater the power of prediction in that branch as to what the law will be in future cases. The common phrase by which we say that a number of cases have settled the law on that subject, or that the decisions are not yet sufficient to settle the law in this particular matter, implies the truth here insisted upon. A code unsettles all this certainty of the past. New and old cases are affected by a like ambiguity, when referred to the abstract form in which the rule is expressed. This result is not dependent upon the skill with which the authors of the code draft it. It is dependent upon the fact that a Code is the expression of abstract rules disconnected from their concrete applications, and by the fact that if a Code is not this, it is not a Code, but the Case Law System.

So we have shown that the argument of the codifiers—that because a rule of law can be expressed by writing it in a case, it therefore can be expressed by writing it in a code—is founded upon a fundamental misconception of the intrinsic nature of the two classes of writings. This is the more remarkable as this difference in intrinsic nature is one which these very writers have else-

where pointed out. Yet they do not appear to realize the effect of this intrinsic difference on the arguments they employ.

We have, therefore, shown that there is an intrinsic difference between the expression of the rules of law in a Code and in a Case System; that out of this difference arises a completely different method of construction; that out of this difference arises a completely different method of reasoning from the past to the future—from the known to the unknown; that the Case System uses in the solution of its problems the same investigation of special phenomena, the same induction to an abstract rule, and the same deduction from the rule again to a special phenomenon, that is employed in every other science known to man.

For it must be remembered that law is a concrete science and not an abstract science; and that it deals with concrete things and not with abstractions. Herein, then, lies the superiority of the Case Law over the Code. The Common Law deals with the concrete case, and from one or more concrete cases reasons to another concrete case; while the Code deals with an abstraction, and reasons from the abstraction to the concrete case. And, when the abstraction does not cover, or incorrectly decides the concrete case, the Code is wholly at fault. There is no health left in it, no principle to guide it.

CHAPTER XI

THE PRACTICAL RESULTS—A SUGGESTION

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THE PRACTICAL RESULTS

Must we, then, go on forever piling "Ossa upon Pelion"? Is there no relief from the ever-increasing mass of Case Law, with all its bulk, contradictions and uncertainty?

We can easily imagine this despairing query from the lawyer and the layman. Yet if the argument of the preceding chapters is sound, the answer must be that there is no balm in Gilead, no Royal Road to the attainment of a perfect System of Law. After all, are we not, in the science of law, in the same position exactly as in all the other sciences known to us, and on a correct knowledge of which our property, our liberty, our rights and our happiness depend?

Can it be said that there are any more obsolete, outgrown and incorrect principles in the law than there are obsolete, outgrown and incorrect principles in each and every science?

Do the conclusions, views and principles advocated and adopted by the scientific minds of preceding centuries affect in a harmful manner the progress of science in this age to any greater or less extent than the old decisions of our earlier case law affect the decisions of cases arising to-day?

Is the chemist of to-day hampered in his investigations by the fact that a century or so ago the phlogistic theory was the accepted creed, any more or less than the judge of to-day is hampered in giving his decisions by the fact that many years ago a decision was rendered dismissing a case, because a plaintiff described a magistrate as Baron Waterpark of Waterfork, instead of Baron Waterpark of Waterpark?¹

Is not the literature of the other sciences encumbered by at least as great a mass of superabundant, forgotten and exploded learning as is the case with the science of the law?² Are not our complaints, then, against the imperfection of the common law system complaints arising from that innate longing of the human mind for an ideal perfection — a dream which can never be realized? Must we not face the problem of Code *versus* Case Law dispassionately, and acknowledge the absolute inability of either to be a perfect system? And is it not best to solve the relative question of the advisability of adopting either upon a calm restatement of the fundamental natures of each as affecting the results intended?

If the foregoing discussion has proved anything, it has proved that the Common Law division of forms of expression of rules of law into statute and case law is a division founded on good sense and sound science. If we were to criticise the distinction at all, in actual practice, we should say that the mistake that has been made has been in looking upon the two systems as mutually exclusive, and as each of them individually capable of supplanting the other throughout the whole field of law.

The truth is that the statute and the case law are complementary, in the sense in which we speak of complementary angles in geometry. Just as such angles, at the

¹ *Walters vs. Mace*, 2 Barn. & Ald. 756.

² See Luigi Cossa's Introduction to the Study of Political Economy; White's History of the Warfare of Science with Theology; Whewell's History of the Inductive Sciences.

extremities of the arc, contain space separated by the whole circumference of possible divergence, and merge by infinitesimal gradations towards a union at the radius which bounds them, so statute and case law have each their proper province of operation, separated at the extremes by the whole heaven, yet gradually approaching by imperceptible gradations a common ground at their bounding surfaces.

The two systems thus extend from extremes which should be respectively occupied by the one or the other, to a mutual ground, where, so far as concerns the practical results derived from the use of either of them, their differences and likenesses merge into one. On this view the growth of the two systems should be, in a certain sense, *pari passu*. One should never swallow up and include the field of the other. The one—the statutory form of expression—is always borrowing from and encroaching upon the other, the case law; namely, where it is necessary to reverse the rule of the case law and begin a new departure. But while this is going on, the case law is extending its principles into new and untried fields, and from the new departure working out the necessary corollaries.

The encroachment of the statutory upon case law is not always confined to its proper limits. The questions arising are often implicated with political and economic questions. These the passions, the interests or the prejudices of the people will not leave to the slow growth of judicial decisions. The people insist on deciding these questions themselves. Witness the Gold and Silver question, the Protection question and the Interstate Commerce law.

A great deal of the criticism of Austin and others upon legislation stuck patchwise upon case law is justified by statutory laws of this character. In the progress of English law the true distinction between the forms that should be used in expressing rules having equitable rea-

sons behind them, on the one hand, and rules having no reasons save convenience, or the necessity of changing erroneous rulings, on the other hand, has not been clearly seen and acted upon. Yet in large measure it has been unconsciously acted upon. We have built better than we knew. The great mass of the case law deals with questions of justice and injustice. The great mass of the statute law deals with questions of convenience and convention. Error has crept in in some cases where the attempt has been to make equities certain without regard to reason, or through the neglect to make certain that which has no foundation in reason either way.

True progress in Law Reform is, therefore, along these lines. But, you cry, this is partial codification, and partial codification is impossible, not to say inexpedient. But why is partial codification, or rather statutory expression of some rules, impossible or inexpedient? This partial codification is what we have been doing all along. We have expressed in statutory form a number of rules which ought to be so expressed, and we have left in case form a number of rules which ought to be so left. The system of law resulting from this practice is a good one. It is a system which, with all its faults, its critics esteem higher than the codes of other nations.

"Traverse," says Bentham, "the whole continent of Europe — ransack all the libraries belonging to the jurisprudential systems of the several political states — add the contents all together, you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement — in a word, in all points taken together in instructiveness — to that which may be seen to be afforded by the collection of English Reports of adjudged cases, on adding them to the abridgments and treatises by which a sort of order, such as it is, has been given to their contents."¹

If, in the past, without any clear idea of principle, we

¹ Bentham's Works, Edinburgh, 1843, Vol. IV, p. 461.

have done substantially well in partial codification ; in the future, when our efforts are guided by true insight into the conditions, we should do better.

In conclusion, therefore, we may assert broadly that there is a scientific warrant for the codification of the Laws of Man, so far as they relate to matters of indifferent conduct ; while it would be contrary to the teachings of experience to codify the Laws of Man so far as they relate to matters of good and bad conduct, *i.e.* to ethical questions. To attempt to codify the science of applied ethics would be as unscientific as to attempt to codify the science of medicine. Abstract ideas, rules and principles have their proper place and function as guides to men in all the sciences. They should never be translated from the position of Advisers to that of Rulers.

TWO PRACTICAL DIFFICULTIES—HOW MET

But here two practical difficulties arise. We may imagine them to be stated as follows. The claim is that Statute law should be confined to matters involving indifferent conduct, while the rules governing matters of ethical importance should be left to slow and careful elaboration by the Courts.

The first difficulty might now be raised in the form of a question, as follows : " Who is to decide what constitutes the limits of this indifferent conduct so properly left within the jurisdiction of the Legislature ; and what specific matters are included in it ? " The answer is, that no change is suggested to be made in the relative supremacy of the Legislative and Judicial organs of government. The Legislature must still be paramount. But if, in the past, the demarcation of proper jurisdiction between the two organs of administration has been practically observed without any clear appreciation of its existence or importance, it is not to be supposed that less attention will be paid to it by the controlling

body, when its existence and importance has been fully grasped.

The second difficulty is more serious. It may be thus stated. The statute law drawn to cover indifferent conduct will, through the imperfections of written language already pointed out, sometimes apply to cases of good and bad conduct ; and so produce inequity. And no skill in the draftsman can prevent this necessary and inevitable consequence. What, then, is the result ? Must you not therefore retreat from your position that indifferent conduct should be codified ? Because, in view of this practical difficulty, you, in effect, assume that certain ethical matters should be covered by codification ; or, accepting the other horn of the dilemma, are you not, in order to be consistent, compelled to claim that no part of the law should be codified, since in codifying the indifferent conduct you necessarily codify some portion of ethical conduct ? To this we answer that the suggested dilemma is not so complete as it seems. Aside from other modes of breaking its force,—namely, the relative volume of ethical matters covered by statutes designed to apply to indifferent conduct, and the volume of ethical matters, on the hypothesis, omitted from inclusion in any statute,—there is a suggestion to be made which goes far to remove the difficulty. This suggestion is most clearly understood in connection with a special application of it. Let us drop generalization and take up again a concrete example. In referring in Chapter X to matters of indifferent conduct best governed by statutory rule, we mentioned the special instances of the time within which notice of dishonor of protested commercial paper should be given, and the instance of irregular endorsement or guaranty mentioned. These instances wherein the nature of the rule is of comparative unimportance ethically considered, should yet be authoritatively decided once and for all before the event of their occurrence ; so that men may know their rights on such simple and ever-recurring

combinations of fact.¹ Hence a statute declaring the rule would be the proper form in which to express it. Let us take the rule requiring notice of dishonor of the note to be given to the endorser in order to hold him. Assume that the statute requires a notice to be given to the prior party on the bill by not later than the first mail of the next day after notice of dishonor is received. Assume also that the statute makes no exception for the case of an epidemic or pestilence at the place where the note is payable, or for the case where the endorser has removed or concealed his residence, or for the other special cases of excuses for failure to give notice of dishonor in time, discovered by experience and usually contained in acts concerning bills and notes.²

On the occurrence of such a new combination of facts the rule ordinarily indifferent has become ethical. The statutory rule based on the salient facts of endorsement and time of notice received, would apply to the ordinary combination of facts — namely, notice of dishonor received in the ordinary course and to be forwarded to the next prior endorser within twenty-four hours in the ordinary course — in which the rule is indifferent ; and also to the new combination of facts — notice of dishonor received, pestilence raging rendering it impracticable to carry on business and forward notice in ordinary course — in which the rule requiring notice given within twenty-four hours in order to hold the next prior endorser would work a hardship and an injustice. Note that while the acts on bills and notes usually contain mention of several instances limiting the application of the strict time limit

¹ The fact that the Law Merchant as to notes, etc., originally sprang from certain customs of merchants which were proved in the Courts by evidence of witnesses in the same way as other special trade customs are now proved, does not affect the argument. The fact is, that for many years this part of the law has been deemed to be a part of the great body of the Common Law, and its rules founded upon like authority — so much so that no custom of merchants can be alleged or proved to the contrary. Pollock, First Book of Jurisprudence, p. 269.

² See New York Act.

for giving notice, it is against human experience to suppose that these instances, the product of past experiences of unexpected hardship, are the only ones that will ever arise under these statutes. How, then, can this practical difficulty be best avoided?

A SUGGESTION

To prevent the statute drawn for an indifferent case from applying to another coming within its purview so as to produce inequity, a construction clause should be inserted. Not only should the statute state the possible exceptions where the rule would work a hardship, thus affording samples of its application and exceptions to its application from which the reasons of its enactment might be inferred; but it should add a clause something like this:—

“The foregoing rule shall apply except in cases where the special facts of the case presented shall in the opinion of the court produce a result so inequitable as to require the establishment of an exception, and in ascertaining the application of the rule or the exception the court shall be at liberty to follow out the reason of the rule and the reason for the exception on the lines of cases heretofore decided in the common law.”

In other words, your statute should recognize the common law on the same subject as a complementary part of it; and should so express itself as to show that the intention of the statute is to establish a rule of convenience not hardship, and a rule according to the common law not contrary to it; and that in all cases overruling equities should be treated as exceptional cases requiring decision according to the equity. In this way a certain working harmony could be produced between statute and case law so as to obtain as far as possible the certainty of the one and the equity of the other, at least so far as concerns border-line cases not clearly in one field or the other.

The English acts concerning negotiable paper and part-

nership are drawn somewhat on these lines. The error in them is that they do not expressly negative that rule of the Common Law, that a statute supplants the case law in all cases; and they attempt to lay down rules founded on differences of facts, when the test facts in question do not always divide the special cases correctly so as to require decisions according to the reasons for the diverse rules.

AN OBJECTION ANSWERED

To this suggestion we may easily conceive the following objection to be made. You have advocated the enactment in statutory form of rules regarding indifferent conduct because of the necessity of certainty. Yet now you advocate the incorporation in such a statute of a construction clause which would grant to the Courts a wide discretion — a discretion so wide as to destroy the certainty at which you aim. What is to prevent the Courts, under such a statute, exercising a discretion as wide and unrestricted as that in fact exercised under the glittering generalities of the French Code? The answer is that the substantial enactment by this means of a Code rule, which is *prima facie* instead of *conclusive*, affords a working certainty in all ordinary cases, while exceptional cases alone will present questions of any difficulty — raising an uncertainty it is true, but resulting in equity. The fact is that the express inclusion of such a construction clause in the statutory law would accomplish, by express authority of the Legislature, a result now achieved in some jurisdictions at the expense of all consistency, and in defiance of fundamental principles. The conflict of authority over such questions of statutory construction as those involved in the cases of *Riggs vs. Palmer* and *Shallenberger vs. Ranson*, discussed at length in Chapter VII, is an instance in point. The fundamental theory of the Common Law is that the Legislature is supreme. The rules of interpretation are technical rules invented for the purpose of “draw-

ing conclusions respecting subjects that lie beyond the direct expression of the text from elements known and given in the text.”¹ A necessary corollary is that where the meaning and application are plain, the attempt by rules of construction to avoid the effect of the language is a virtual repeal of the act, a violation of the fundamental axiom that the Legislature is supreme. Hence, it is that such decisions as *Riggs vs. Palmer*, however equitable they may be, are illogical and inconsistent. Yet the very fact that such decisions are made and approved of by good lawyers is proof of the fact that we are engaged in doing clandestinely what could be done openly if the statutory system contained such a construction clause. Had the Statute of Descents, or other statutes involved in these decisions, contained a construction clause similar to the one now advocated, it is not too much to say that there would never have been any doubt as to the decisions that would have been made by any Court on the facts involved in *Riggs vs. Palmer*, *Shallenberger vs. Ranson*, *The Carpenter Estate*, and the other cases mentioned in Chapter VII. In other words, instead of the conflict of views which has prevailed, sharply contrasting these several rulings mentioned in Chapter VII, the common sense and equity of the situation would have compelled the same equitable decision in every case. The *Riggs* case denied the axiom of the supremacy of the Legislature. An express plain statute was allowed to be overridden by a rule of case law, a maxim of equity. The only reason for doubt as to what the decision would be in that case arose out of the absence from the statute of a construction clause like that here contended for. Again, in the case of *The Carpenter Estate* the decision arrived at, however inequitable, was one dictated by logical consistency to axiomatic rules. In that case also the only doubt as to what the decision would be arose out of the absence from the statute of

¹ Francis Lieber in *Legal and Political Hermeneutics* (Boston, U. S. A., 1839).

such a construction clause. In both cases, had such a construction clause existed, the prompt ruling of both courts in favor of the equity of the situation would have been logical and consistent, and might have been predicted with certainty.

Nor would the presence of such a construction clause produce, as feared, an entire incoherency and indefiniteness in the statute law. As statutes are now written without such a construction clause, their great defect is, what we might call, their conclusive character—the inexorable necessity of their application and operation. They stand as strict and stern commands to be obeyed in all cases, unmodified by the light of reason which tempers the rules established by case law. They are looked upon as a set of principles different in kind, and often antagonistic in effect, to the system of rules developed by the case law, and incapable, in case of apparent inconsistency, of being accommodated to them. The result is that the systems of Case and Statute Law remain as antagonistic and mutually exclusive systems. Hence arises the chief defects of the common law system, both in regard to its lack of certainty and its inequity; for the case law never is inequitable save where the statute law compels it to be so. The incorporation into a statute of such a construction clause changes all this. The statute rule is no longer conclusive, no longer an inexorable necessity. It remains *prima facie* the rule to be applied. In the absence of some good reason to the contrary, the rule is as definite and certain in its application as ever. But when a reason does exist for an exception, it must be regarded. The cry of injustice must be heard—the author of the act has expressly so stated. The Case and Code systems are no longer antagonistic, but coördinate jurisdictions. The supreme statute by its express terms admits the rules, the equities of the case law system, to an even footing of authority with itself. The result is certainty, where no reason exists for any other than

the statutory rule ; and equity, where such reason does exist.

Nor is the picture here outlined of the probable interaction of case and statute law, under such conditions wholly a theoretical fancy. It happens that two great experiments in the forms of the law of procedure shed light upon the problem, and sustain the view above outlined.

THE LESSON OF EXPERIENCE

In 1848 the State of New York codified her law of procedure. In 1880 she revised and added to this Code. The result has been, as shown at large in Chapter VIII, *supra*, and as admitted by the very advocates of codification themselves, to produce the worst law of procedure in the world.

In 1873 was passed the English Judicature act, which went into operation in November, 1875. In this no serious attempt was made to codify procedure, but it was provided that the Courts might make rules to complete the system.¹ The present practice in England is under the Rules of Court of 1883, which embrace numerous provisions as to pleadings, evidence, trial, etc. — substantially the same ground covered by our Code of Procedure of 1848 and rules of practice.² It would be presumptuous for an American lawyer to pass judgment on the practical working of these rules. Nor would the writer attempt to do so. This much, however, may be said, that to all appearances they have worked satisfactorily to the Bench and to the Bar. At any rate, no such condemnation has been passed upon them by friends and foes alike, as has overtaken the New York Code of Civil Procedure.

It may be concluded, therefore, that the English Reform in procedure effected by Rules of Court has proved

¹ 38 & 39 Vict. c. 77, § 17.

² See Brown's English Supreme Court of Judicature Practice, pp. xxiii, 109 ; Whiteway's Hints on Practice ; Wilson's Judicature Acts.

more satisfactory than the New York Reform in procedure accomplished by a Code. When to this is added the fact that the reforms in New Jersey practice have been effected by short Practice Acts supplemented by Rules of Court, the major portion of procedure being still embodied in these rules and the ancient common law, and that this system has proved satisfactory, we may suspect that some fundamental reason underlies the success of these two actual experiments, and the failure of the other.

This reason is not far to seek. The difference between a Statute and a Rule of Court is a difference merely in inexorable necessity of operation. A Code section must be construed and as construed applied; the equity of the case cannot overrule its plain meaning. If the Code says "must," the Court must say "must." In these matters of indifferent conduct involving most questions of procedure, occasional equities crop up which must either be ignored, or, if recognized, produce curious and unexpected aberrations in the system. A court rule, on the contrary, is *prima facie*, not conclusive. Wherever an equity so requires, the judge need not follow the rule as laid down. The resulting elasticity and equity in the system of procedure so enacted is an unquestionable advantage. Without doubt it is this quality which has resulted in the merits of the English and New Jersey systems of procedure; and it is the absence of this quality which has resulted in the demerits of the New York Code. The Rules of Court are not superior to, but are concurrent, and coördinate with, the rules of Case Law. Hence the merit of such a system.

Now what has been accomplished in these systems of Procedure by prescribing them in the form of Rules of Court instead of in the form of Statutes, can likewise be obtained by expressly enacting, through the presence in your statute of such a construction clause, that your statutory rules shall have a *prima facie* and not a conclusive effect; and that your environment of Case Law rules

shall have an equal validity and authority. And the respective experience in systems of procedure by English-speaking people, above referred to, would seem to indicate that such a plan is based, not only on sound theory, but on the test of actual practice as well.

THE LESSON OF ANALOGY

To the objection that such a system would confer upon the judge an arbitrary discretion leading to unending confusion, contradiction and uncertainty, we answer as follows. We need not fear too great a range of arbitrary discretion in the judge, for the plan proposed would confer on a rule of law prescribed by a statute the same force as, and no more than, is now given to a rule of law enunciated in a case. The rule prescribed in a case is *prima facie* the rule for cases containing like facts, but the presence or absence of any fact rendering it equitable to change the rule is sufficient to overcome this presumption. And the decision as to what slight change in the circumstances is sufficient to produce this result, rests in the arbitrium of the judge. And so likewise with your statute so drawn. The rule therein contained would be *prima facie* the rule that should be applied, but wherever good cause could be shown to the contrary, wherever equity required a contrary decision, then the judge could openly follow the reason and not the letter of the rule. In the case system this discretion of judges in interpreting the rules prescribed by prior cases has not led to chaos and confusion, but rather to the most logical, refined, systematic and exact system of law in existence—a system of law in which the power of prediction as to what will be the decision on a given state of facts has reached the highest certitude known to any system. The reason this has been so has been due to the legal and logical training, the custom and habit of a character of legal thought which has been handed down through generations,

and which becomes a part of the mental attitude of every common lawyer, and of every common law judge. This same training and tendency of mind will have similar effect when applied to the solution of questions arising under a statute so made *prima facie*, and not conclusive. The same conservative tendency of "*Stare decisis*" (*mutatis mutandis* applying to the statute) will compel a certitude that the decision will be according to the statute, unless excellent cause exists for a contrary judgment; and the same light of reason will lead to the certitude that the decision will be according to an equitable rule, where real injustice would result from the statutory rule. To the same minds that have successfully elaborated the finest system of legal rules known to the world—rules covering the most important interests connected with society—can surely be entrusted the duty of grafting upon an ordinarily indifferent but convenient statutory rule the proper exceptions and the proper exceptions only,—so that the rule may always remain (so far as human reason can approach perfection) certain, and equitable.

CONCLUSIONS

The distinction we have insisted upon between Rules of Law applying to indifferent conduct, and Rules of Law applying to ethical conduct, as respects the expediency of Codification, is one which was first drawn, we believe, by Mr. James C. Carter in his able pamphlet on *The Proposed Codification of our Common Law*, and later insisted upon in his address to the Virginia State Bar Association in 1889. The distinction between Public and Private law drawn by many jurists is substantially the same. Professor Munroe Smith, in a luminous article on "*State Statutes and Common Law*,"¹ has drawn attention to the fact that in our American Commonwealths the encroachment of Legislative upon Judge-made Law has

¹ 2 *Political Science Quarterly*, 119, 121, 123.

practically stopped in fifty years, and suggests that we have "unconsciously drawn a logically defensible line of demarcation" between Statute and Case Law at the boundaries of Public and Private Law. Savigny expressed the same idea when he drew the distinction between what he called the Political element and the Scientific element in law.¹ Of course the fact that portions of Public law have an ethical element, as the Corn laws, Protective statutes, Usury laws, etc., is properly not contrary to the substantial identity of the two divisions; because, wherever society insists upon making rules in matters of this kind, might, taking the place of right, must needs register its decrees in statutory form.

If this essay, then, be a true interpretation of the problem, the fundamental distinction between rules of law is between law with a reason for its enactment beyond mere convenience, and law with no reason for its enactment beyond mere convenience. All the latter rules should be expressed in statutory form. All the former rules should be expressed in the common law report.

To these, two exceptions may be allowed.

First. When a former rule must be abrogated by a higher power, because erroneous.

Second. With extreme caution, say criminal law, where the rule and the reason of the rule are of such a long and complete growth that little change may or could be expected, and the peculiar powers of the jury—the trial tribunal—make the law, in practice, *prima facie* and not conclusive in exceptional cases.

And when any portion of the case law field is so usurped by statute, the statute should not attempt to define the rule so abrogated, but should adopt the common law rule by making it a part of itself, and should further clearly express its intention to substitute its rule

¹ Quoted by Professor Smith, in 2 Political Science Quarterly, 125, note.

for the common law rule only where the reason of the changed rule so requires, and should further clearly express its intention to leave the common law in full force as a part of itself with a resulting full power to alter its express provisions by the reason of the rule when the hardship of the case requires it.

The mistake has been to express and construe statute law as entirely substituted for all case law; and as necessarily abrogating all case law in the same field. The mechanics of an improved lawmaking must proceed on the conception that statute law and case law are to be construed as complementary, not substituted rules. By express language, if necessary, the statute should say, "These rules above laid down are laid down for those cases where equity does not intervene through hardship of the case to demand a contrary rule; and, when such equities intervene, the reason of the rule must still be the fundamental guide to the court."

Something of this kind has been attempted in the English Acts concerning Negotiable Paper and Partnership, but the intention to revert to a common law rule, where the statute although applying in terms to the case produces a hardship, has not been stated with that express clearness of enactment needed to bring about the best results.

In all that has been said above, it has not been intended to intimate that Statute Law should invade the field of Case Law, except in the one case mentioned where it repeals an error; and, in this last case, its interference should be by a reference to the sources of the common law rule for the rule and the reason so abrogated, rather than by an attempt at a summary restatement of the rule and its reason.

It is also implied that the Statute Law should be confined to such questions as are: first, of no ethical importance; or second, changes in ethical rules laid down by mistake; or third, questions of convenience;

and that to avoid the possible application of the general language employed to cover this province of the field to cases not intended to be so covered and thereby resulting in injustice, the Statute Law should refer to and make the Common Law, and the reason of the rule, a part of itself by express enactment.

The reason why this plan has not been adopted in the past would seem to be because it has been deemed that the reaction of such a principle upon the construction of statutory law would produce chaos and uncertainty. It would seem that this objection is not well founded, for the following reasons. The reversal of the statutory rule, because of the inequity of its application, could only occur where the inequity was plain. In all other cases the certainty of the statute would still be its merit. And the experience of English-speaking people with the divers procedures founded on Codes and Rules of Court respectively, above referred to, bears out this argument.

And so we may conclude that the growth of Statute and Case Law in the past, carried on *pari passu* with an unconscious regard to the fundamental principles prescribing the proper province for each, is unquestionably the true law of their growth for the future.

To the extent above indicated, and to that extent only, should the Statutory Form of expression safely invade the domain of the Case Law. The new and untried questions, the questions involving considerations of equity and right, should still be left open, in law, as in the other sciences, to the plea of reason — not foreclosed by the fiat of despotic authority.

Codification of the Case Law of England is the mirage of enthusiastic speculation, — a mirage which on investigation reveals to the disappointed Reformer the burning sands of the interminable desert instead of the expected oasis of shade and shelter.

Codification would be the forging of fetters on the Science of Law precluding its true development.

Codification, implying as it does the excellence of our entire system of knowledge at some one stage of an advancing intelligence, is false and untrue to nature, and to nature's laws.

Codification, presupposing infinite knowledge, is a dream.

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