THE

PROPOSED CODIFICATION

OF

OUR COMMON LAW.

A PAPER

PREPARED AT THE REQUEST OF THE COMMITTEE OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, APPOINTED TO OPPOSE THE MEASURE.

BY

JAMES C. CARTER,

A MEMBER OF THE COMMITTEE.

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RESOLUTION.

At a meeting of the Committee of the Association of the Bar of the City of New York, appointed "to urge the rejection of the proposed Civil Code," held at the House of the Association, No. 7 West Twenty-ninth street, in said City, on the thirteenth day of December, 1883, Mr. Albert Mathews offered the following resolution:

Resolved, That this Committee approve the paper prepared by Mr. James C. Carter, on the subject of the proposed codification of the Common Law of the State of New York, and that three thousand copies of it be printed and circulated among the members of the Legislature and of the Bar of this City and State, and other persons interested in the subject.

Which was unanimously adopted.

Extract from the minutes.

J. BLEECKER MILLER,
Secretary.

THE PROPOSED CODIFICATION OF OUR COMMON LAW.

Whoever glances over the varying systems of law exhibited by civilized States, will perceive that in some, as in England and with us, the great body of the rules which determine the rights of men in respect to their persons and property, have never been directly *enacted* in statutory form. They have their origin in the popular standard, or ideal, of justice as applied to human action, and the usages and practices sanctioned by it. The system, therefore, rests upon an original, but ever growing, body of custom, and the rules thus established have been, through a long succession of centuries, expounded, applied, enlarged, modified and administered by a class of experts — lawyers and judges — who are supposed to devote their lives to the study of the system and to the work of adapting it to the ever shifting phases which human affairs assume. The cultivating and perfecting, of this body of rules, which is called "*the law*," is a part, and a most important part, in

the *natural growth* of the civilization in which they are found. The means of ascertaining what these rules are—in other words, the *evidence* of what the law is — is found, in any given case, by ascertaining what the judges have determined in like cases, and by maxims and principles which, from long adoption and frequent application, have become familiar and authoritative.

In other States, however, such as most of those on the Continent of Europe, the system of law is found to be different. There, the rules which perform the same functions in society, stand, to a large extent, in the form of positive statutes, or *Codes*, enacted by the arbitrary power of the sovereign, or by the authority of a legislative assembly, where such a body exists.

It will also be observed that the system first above described is a characteristic of States of popular origin, or in which the popular element is predominant, while the latter system is a characteristic feature in those which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant. Nor is this contrast accidental. It arises necessarily from the fundamental difference in the political character of the two classes of States. In free, popular States, the law springs from, and is made by, the people; and as the process of building it up consists in applying, from time to time, to human actions the popular ideal or standard of justice, justice is the only interest consulted in the work. In despotic countries, however, even in those where a legislative body exists, the interests of the reigning dynasty are supreme; and no reigning dynasty could long be maintained in the exercise of anything like absolute power, if the making of the laws and the building up of the jurisprudence were intrusted, in any form, to the popular will. The sovereign

must be permitted at every step to say what shall be *the law*. He cannot say this by establishing a *custom*, or by interpreting popular customs. He can say it only by a positive command, and this is statutory law; and when such positive command embraces the whole system of jurisprudence it becomes a *Code*. The fundamental maxim in the jurisprudence of popular States is, that whatever is in consonance with justice as applied to human affairs, should have the force of law. "*Quod principi placuit legis habet vigorem*" (the will of the sovereign has the force of law), is the contrasted maxim of despotism. The Koran dictated by Mahomet was and is a universal Code regulating the actions and property of the followers of Islam. It was as necessary in building up the empire of the conqueror as his sword. Rome under the republic reposed upon an unwritten system of jurisprudence; Codes were devices found essential to the dominion of the emperors.[1] The Latin States founded upon the ruins of the Empire, and originally despotic, show in their laws their origin and character; but neither the Norman conquest, nor the principles of feudalism have ever been able to destroy the popular element which has marked every stage of the development of Anglo-Saxon liberty and law. The Roman emperors, and their successors among the modern Latin States, have, it is true, in improving their systems of jurisprudence, borrowed the aid of trained professional experts; but the assistance thus lent has always

[1] "It is very natural that the imperial despot, who has won his empire by the "debasement of aristocracies and all other forms of social inequality, should seek "to consolidate it by a code; and, accordingly, a code was the dream of Cæsar — "premature, for centralization was not yet completely established; a code was the "dream of Catharine, the care of Frederick, the glory of Napoleon. * * * * * "Not a single instance can be pointed out of a code which has existed for any "length of time in a nation which is at once progressive and free."— (Juridical Society Papers, vol. II., p. 231; Paper by Clement T. Swanston, Esq.)

been fettered by a subjection to the maxim that law proceeds from the pleasure of the sovereign, and not from the breasts of the people; and the structure, instead of being developed like a *growth*, has been built up upon the outside. The law of England and America has been a pure development proceeding from the constant endeavor to apply to the civil conduct of men the ever-advancing standard of justice.

We owe to this feature of our civilization many of those priceless blessings which distinguish it to its advantage from that of the continental States of Europe. The equality of all men before the law, the harmonious blending of law and liberty, the learned, independent, and uncorrupt judiciary, are all the fruits, in large measure, of the free and natural method of growth under which our jurisprudence has become what it is. Nor have these blessings been purchased by the sacrifice of other benefits. Our system has, indeed, those necessary imperfections which mark all human contrivances, and it reflects, in addition, our own peculiar failings and vices. But nowhere is there a jurisprudence more refined; none which more faithfully embodies the cultivated thought and humanity of the age. Even the common charge of *uncertainty* so often met with is just as common, and has, in general, a much better foundation under other forms of government.

It is matter for wonder that any one acquainted with the history of English jurisprudence should suggest such a total departure from the law of its growth, as is involved in the adoption of the method of codification; still more that any people of Anglo-Saxon origin should receive with favor the proposition to substitute the methods of despotic nations in the place of those through which their own system has been built up. And yet we have seen the press,

the public, and even the Bar of the State of New York, viewing with comparative unconcern the endeavor of a few men, it might almost be said, of one man, to abrogate our system of unwritten law, to discard the principles and methods from which it has sprung, and to substitute in its place a scheme of codification borrowed from the systems of despotic nations.

Two Legislatures have been found so insensible of the magnitude of the trust confided to them as to give their assent to the passage of a scheme of legislation called a "*Civil Code*," which, confessedly, few of them had even read, none had intelligently understood, and which had been proved to contain multitudinous changes in the existing law, proceeding either from ignorance or design, which never could have received their assent, had they been made the subject of separate and independent bills. The sense of duty on the part of most of the members was probably lulled into inactivity by an ingenious contrivance of the author and chief promoter of the project, which consisted in a clause introduced into the Act adopting the system, whereby it was not to go into operation until after another Session of the Legislature; and which, it was pretended, would give ample opportunity to correct any errors which might be pointed out in the proposed codification before it became operative law.

Fortunately for the people of the State on both occasions the Executive chair was occupied by men not thus to be deluded. Gov. Robinson was an educated and wise lawyer, who could foresee the mischief which would arise from this wholesale tampering with our system of jurisprudence; and Gov. Cornell, although without a professional training, possessed a solid understanding, which could not be imposed upon by the shocking fallacy that bad laws could safely be

passed, merely because they could be amended. Never was the executive veto more beneficently employed; but it has only "scotched the snake, not killed it." The attempt to procure the enactment of the so-called "*Civil Code*," has been since repeated, and will be repeated again. The same methods and influence will be employed in its favor, and the same inattention and indifference will, it is to be feared, be found yielding a blind assent. It is time that the legislators of the State should be made to see that the question of the wisdom or the folly of the scheme in question demands their most intelligent attention; and that the members of the legal profession, and especially those who lead among them, should recognize the duty imposed upon them by their training and their position, of thoroughly examining the question, and giving the public the benefit of their opinions and their influence. Nor, as I conceive, should the occupants of the Bench remain neutral or inactive. Their pursuits, more than those of the practicing lawyer, lead them to contemplate the law as a science, and to survey it as a system. They can best perceive whether the scheme of reducing our unwritten law to statutory form has any just foundation in reason, or promises anything but mischief. Their opinions are supposed to be deliberate and disinterested; and the earnest expression of them can in no way conflict with the proper discharge of their judicial function. They should not stand indifferent spectators of an attempt to eliminate from our jurisprudence those features which have made it what it is, and which distinguish it to its advantage from the systems of other nations.

It is extremely desirable in the discussion of the important questions raised by the effort to secure the adoption of this proposed *Civil Code* that matters of a personal nature should be avoided; but this is not altogether possible. It

seems necessary, in order to fully make known the nature of the forces enlisted in support of the measure, to point out that it has behind it strong personal contentions. Mr. David Dudley Field, a member of the Commission which originally reported this scheme, has long enjoyed the repute of having been its principal author, and he certainly has been for several years its chief promoter. The desire to effect an improvement in the law is, surely, in the highest degree praiseworthy; and to connect one's own name with a lasting improvement is a noble ambition. But the danger is that the gratification of the ambition or the vanity will become a motive greatly superior to the wish to effect a solid improvement—a danger to which the law has been in almost every age exposed.[1]

The cherished passion of the gentleman referred to for the enactment of a CIVIL CODE bearing his image and superscription has, it may be feared, survived his concern for the merits of the performance or its effect upon the public welfare. His superior mental powers, his activities, unimpaired in his venerable age and highly useful when exercised upon a matter less precious than the entire jurisprudence of a State, his ingenuity and influence, are all employed in the task of pressing the inattention, indifference or the good nature of the legislative bodies to yield an assent to

1 In the law, as in most of the great concerns of society, there are reformers and *reformers*. The splendid words of Gibbon point out one class: "The vain titles "of the victories of Justinian are crumbled into dust, but the name of the legislator "is inscribed on a fair and everlasting monument." (Decline and Fall of the Roman Empire, Milman's Ed., vol. iv., p. 298.)

Lord Chief Justice Hale describes the other. In an enumeration of the perils which threaten the integrity and efficiency of the law, his first specification is: "1. *Vain Glory*.—Men are fond to be enrolled in the number of legislators with "Solon, Lycurgus, Numa and others, and would be tampering on that account to "get a name." (Considerations touching the Amendment of the Laws. Hargrave's Law Tracts, p. 267.)

the adoption of his "*Civil Code*." The work has stood charged with, and convicted of, errors which if exhibited in any treatise upon the law, would confound its author; but his amazing answer is, "Adopt the Code, with "all its errors, and amend it afterwards!" If the hesitancy of some reluctant member cannot otherwise be overcome, he is ready to adopt almost any amendment, or modification, which will satisfy the scruple; and the sarcasm is not all hyperbole which has said that he would consent to strike from the proposed *Civil Code* everything but its cover, if the Legislature would enact only *that!* Unfortunately, there are many clothed with legislative functions with whom this reckless mode of urging a measure is not without success. Accustomed to yield to pressure, pressure of any sort becomes effective. With such minds argument or remonstrance is of little avail. But there are many others—it is to be hoped a majority—who cannot fail to respond to the suggestion that the endeavor to secure the passage of this measure of codification imposes upon them the duty to gain an understanding of the real character of the scheme and its probable effect upon the public welfare. With such as these it is a grateful, and may be a useful, office to endeavor to make clear what "codification" really is, in the form in which it is attempted by the scheme so persistently urged upon the Legislature; to show its inability to bring about any improvement, and to point out the mischiefs which would flow from its adoption.

The main question upon which the expediency of such "codification" as that with which we are dealing depends, is, not whether the law to which it relates should be arranged in a concise and orderly form—all of which may be accomplished by a *Digest*—but whether it should be reduced to *writing* and enacted in *statutory* form; in other words, whether it

should be *converted* from *unwritten* to *written law*. The first inquiry, therefore, should be, in what particulars these two forms of law differ, and what consequences must flow from the conversion of the former into the latter.

The whole administration of law consists in applying the national standard or ideal of justice to human affairs. That is true whether this standard is to be found in the written statutes of a Legislature, or the unwritten rules sanctioned by the courts. When we are obliged to seek for it in the latter, the inquiry is usually satisfied without difficulty, if the particular case has before happened and been considered by the courts; but if it present new features, different minds may differ concerning the rule which justice should apply, and the doubt can be resolved only by the voice of the tribunals. Until this has authoritatively spoken, it may be said to be uncertain what the rule is. *Uncertainty*, therefore, in this form, and in such instances, is one characteristic feature of unwritten law. If, however, a rule clearly embracing the particular case has been enacted in writing, no question of justice or injustice, which was the sole source of the uncertainty before spoken of, can be raised. It may be that the case is obviously one which the framers of the statute did not foresee, and did not make provision for, and, consequently, the enforcement of the rule as written, will work gross injustice. It may be that the case is so clear as a simple question of justice or injustice that all minds would agree that a different rule *ought* to be applied, and, consequently, that, were there no statute, the rule of the unwritten law would not only be just, but free even from any form of uncertainty. It would be to no purpose to urge considerations like these. The law would be enforced as it stood written and enacted.

It is thus perceived that written law offers a means

by which *certainty* may, in some cases, be better attained, though it must frequently happen at the sacrifice of *justice;* and that unwritten law offers a means by which justice may be better attained, though it must sometimes happen at the sacrifice of certainty. Now, in the constitution of human society there are many subjects, in relation to which the necessity, or the advantage, of certainty predominates over those of strict justice, and many others in relation to which the necessity or the advantage, of exact justice predominates over those of rigid certainty.

This truth cannot be too severely contemplated, or too strongly grasped; for in it lies the whole philosophy which should determine whether the law should be expressed in statutory enactments, or left unwritten. The wisdom of the statesman and the legislator finds its proper employment in considering, as to each subject of possible legislation, whether the interests of certainty on the one hand, or of justice on the other, are of principal moment. Both are in a high degree desirable; but they are often conflicting. In many instances neither can be adequately secured without a partial sacrifice of the other; and systems of legislation and law are wise or unwise, harmonious or confused, efficient or inefficient, in proportion as this truth is recognized and applied.

In stating this principle, I have designedly omitted some obvious limitations and qualifications which intelligent minds will supply without the aid of suggestion. I have spoken of rigid certainty and exact justice, meaning rigid and exact within the limitations of human infirmity. Strictly speaking, absolute certainty cannot be obtained even by written laws, nor can the flexibility of unwritten rules secure in every case absolute justice. But it should also be pointed out (as I may hereafter more fully show) that statutory law does not in all instances even tend to promote certainty. If it be extended beyond its appropriate province, and over the peculiar domain of unwritten law, it produces the very uncertainty which it was designed to avoid. If, for instance, there should be an attempt to regulate by a statute the rights and relations of men in their business affairs, there would speedily arise cases evidently not foreseen by the framers of it, and yet apparently within its terms, in which the operation of the statute would produce injustice so manifest and gross as to shock common sense. In such cases the apparent meaning of the statute would not be accepted without a struggle. The ingenuity of lawyers would be employed to show that the statute could not have been designed, and therefore should not be construed, to embrace such cases, and, though they might seem, upon a hasty and superficial interpretation, to be covered by the language employed, yet that such interpretation must be discarded in favor of one more agreeable to justice. The difficulty would be felt in the same way by the judges. They would find it hard to believe that the legislature really intended the consequences which would flow from a literal interpretation of the law; and all this means that the law is *uncertain*, and uncertain because the ill-advised step was taken of putting it in writing; for, had it been left unwritten, the rule which the courts would recognize and apply would not only be just, but clear and certain. And, correspondingly, it is true, that leaving the law unwritten does not always better secure even the interests of justice. If subjects which ought to be regulated by written law should be left to the control of unwritten rules, much inconvenience and injustice would arise. A public officer may neglect a duty of which he was ignorant, and which he

would not be likely to know unless it were in writing. A citizen might innocently commit an act which judicial decisions in former times, unknown to him, had declared to be a crime, and which decisions the courts might feel obliged to follow. A rigid application of the maxim that every man is bound at his peril to know the law, would lead to the infliction of punishment for such offenses, and this would certainly shock the sense of justice.

It should also be observed that while the provinces of written and unwritten law are, for the most part, easily distinguished and separable, there is no precise line of demarcation between them. They fall into each at the boundary by insensible gradations, and consequently there are many subjects as to which it is a matter of difficulty to determine upon which side of the line they lie; and it may be that they are in part upon each side. In these cases it is not of very much importance which system is applied. Legislative wisdom exhibits itself in adopting the form of written law so far as certainty is most desirable and practicable, leaving the rest to the operation of unwritten rules.

A full comprehension of the fundamental distinction above laid down, between written and unwritten law, and the respective advantages of each, depending upon the rival and conflicting claims of certainty on the one hand, and justice on the other, will be aided by a brief enumeration of some of the principal matters which should properly be made the subject of statutory enactment; and it will be at once recognized, that the soundness of the distinction is greatly supported, if not decisively established, by the fact that men of all nations, and all ages have unconsciously acted upon it; for no instance can be found, in which, prior to any attempt at codification, a nation has not confined its written laws, generally, to the matters thus enumerated, and left the

rest of the field of jurisprudence to the control of unwritten rules. Our attention will be here confined to popular forms of government, like our own.

1. The constitution of the government, and the separation of the legislative, executive and judicial departments; the civil division of the State into counties, cities, towns and villages; the determination of the classes and numbers of the various officers in each department, the times and modes of electing them, and the specification of their several and respective functions and duties; the methods of taxation, of taking private property for public use, and all the special regulations designed to secure the health and good order of society—in short, the whole *administrative* system of the State—must necessarily be dealt with by statutory law. In arranging these concerns, many different schemes may be adopted, each being preferred by many, and all equally consistent with *justice;* but *certainty* here is absolutely essential. An agreement must be had upon some one scheme, and its particulars must be precisely pointed out, and clearly this can be done only by statutory law.

2. The *penal law* is also a proper subject of written enactment. There are, indeed, a large number of the graver crimes—*mala in se*, as distinguished from *mala prohibita*—which might safely enough be left to be dealt with by unwritten law. Men do not innocently commit such offenses; but there is a large class of actions which are made offenses only upon grounds of expediency, and all such should be precisely defined *beforehand*. It is true that under this method the really guilty will often escape punishment, in consequence of the unskillful framing of statutes, and *justice* be often defeated; but this is preferable to the punishment of men for the commission of crimes, of which they had poor means of knowing the existence. The

familiar maxim that it is better that ten guilty men should escape, rather than that one innocent man should be made to suffer, is but another form of asserting the pre-eminent need of *certainty* in the penal law.

3. There are many questions affecting the social and political condition of society which cannot be, or, at all events, are not reduced, like jurisprudence, to a science. They are so intricate and complex, and so interwoven with the passions, and prejudices, and interests of men, that *agreement* is well nigh impossible, even among those who give to them deliberate study. Most of these questions are met with in national politics. These divide the great political parties. But some are found which relate to the concerns of the particular States of our Union. Upon such questions, when they arise, no man will yield his opinion voluntarily. One side or the other must prevail. But all must accept the result of superior power manifested through the law; and an enforced agreement is brought about by the enactment of a statute. All mere *social* and *political questions* must, therefore, be dealt with by written law.

4. A further occasion for written law is to be found in the need which occasionally arises in the progress of society of making *sharp changes* in the *unwritten law*. Rules necessary at one period of time, and which have been firmly established, become outgrown, and others are needed better accommodated to existing wants. These occasions are not frequent, for the reason that the inherent flexibility of our unwritten jurisprudence naturally shapes and accommodates it by insensible gradations to the corresponding insensible gradations in the progress and change of human affairs; but sometimes a rule becomes established which is rigid in its nature and courts are not at

liberty to directly supersede it. The legislative function must here be interposed, and the requisite change be brought about through the instrumentality of a statute. But this legislative interference should properly be confined to the making of the precise change which the courts are incompetent to effect.

5. Another subject lies very near the boundary line between the two provinces, so that it may be deemed a fair question, in which of the two it more properly belongs. This is the matter of the *procedure* of courts of justice. It is important that this should be regulated by written rules framed *beforehand*; and yet the existence of such rules, if they have the rigidity of statutory law, becomes the fruitful source of mischief. Cases will continually arise not foreseen by the framers of the written rules, and consequently inadequately provided for. The true wisdom in relation to this subject is to deal with it in a way which affords the advantages of statutory law without its evils; and that is to entrust it to the courts to frame rules for its regulation. The experience of those who are daily called upon to guide and moderate the proceedings of the tribunals can best devise the necessary rules, and such regulations, not being strictly laws, are subject to the control of the courts, and any evil or hardship which their strict enforcement might occasion, may be mitigated and relieved according to the circumstances of the case. It is, however, conceivable enough, that a really good system of procedure might be devised and enacted into written law; but if any one wishes for an example of the mischief and confusion which may be created by a bad system of procedure created by statute, let him survey the ponderous volumes of statutory law, and the enormous accumulation of gloss, comment and adjudica-

tion which it has necessitated, with which the practicing lawyer of New York is now bewildered and confounded.

6. There is still another class of questions which lie near the boundary line between the two provinces, and which may, without serious mischief, and sometimes possibly with advantage, be dealt with by written statutes. I refer to those branches of the law in which there is a necessity for rigid and unyielding technical rules, as in much of the law relating to Real Property, and to Promissory Notes and Bills of Exchange. It will be perceived that in these cases the interests of certainty predominate over those of exact justice. Where *formalities* are necessary, it is not of vital importance what precise shape they assume; but it is quite needful that they should be *very* clearly prescribed, so that they may be precisely known beforehand. There has long existed in this State a practice of dealing with such matters, to a limited extent, by written law.

The appropriate province of *unwritten law* may be described, sufficiently for the present purpose, as embracing the rights, obligations and duties in respect both of person and property which arise from the ordinary dealings and relations of men with each other, so far as it is not expedient for the considerations above stated to make them the subject of statutory enactment. This immense field covers the general law both of contracts and torts, the law of sales, of partnership, of agencies, of corporations, of bills and notes, of shipping, insurance, and admiralty; the law governing the rights and duties springing out of particular employments, occupations, relations and engagements, as the law of carriers, of bailees, of master and servant, of husband and wife, of telegraphs, and the principal body of the law affecting the ownership and transfer of property, real or personal.

The grounds and reasons which render statutory law inadequate to deal with these subjects in the infinite variety of the conditions which different cases present need not here be pointed out. This is one of the main questions which arise upon the proposed *Civil Code*, and will hereafter be deliberately considered. It is enough for the present to say, that in our law as it now stands, and in any really scientific system of jurisprudence, these topics are left under the dominion of unwritten law. It will thus be perceived that all subjects connected with the *public administration* of a State, or which are of predominating *public interest*, fall, for the most part, within the province of *written law*; while those which more immediately relate to *private* interests and business belong, with few exceptions, to the domain of *unwritten law*. The Roman writers designated the law embracing the former class of subjects by the short and appropriate term *public law*; and that embracing the latter class by the corresponding term *private law*; and these terms will, for convenience and brevity, be adopted in this discussion.

The foregoing general sketch of the respective provinces of statutory and unwritten rules as they stand in our juridical system will be sufficient to lead to a just comprehension of the nature of Mr. Field's undertaking as it is developed in his proposed *Civil Code*. It may be useful first to point out what this proposed *Civil Code* is *not*. It does not deal in a very considerable degree with statutory law. It is evident that the progress and changes of time must necessitate changes in or additions to statutory law, and such changes can be effected only by legislation. Every successive Legislature finds occasion to engage in this work. The changes and additions are made, sometimes ignorantly, sometimes negligently, sometimes to accomplish some private and unworthy

end; and the consequence is that the statutory system becomes deranged and confused. From time to time a thorough work of revisal and amendment must be performed. Errors must be corrected, redundancies eliminated, deficiencies supplied, conflicts reconciled, obscurities dispelled, and the confused mass rearranged and reduced to an orderly and harmonious system and re-enacted as a unit. This is a most useful, and, at times, a very necessary work. It is more correctly designated by the term *revision*. It may without much impropriety be styled, as it sometimes is, a codification; but it is not the "codification" to which objection is made by this paper, nor is it the task which Mr. Field has attempted in his *Civil Code*.

It should scarcely be necessary to interpose a caution against confounding a codification with a *Digest* of the law; but the author of this proposed *Civil Code* is in the habit of arguing as if codification were necessary to supply the needs for which Digests are designed. If a Code were necessary, it should be all that the best Digest can be; but it aspires, also, to be something more and very different. A Digest asks no aid or sanction from the Legislature. It does not assume to *make* the law. It purports to be simply a concise statement of what has been adjudged to be the law, arranged in a compendious and orderly form. If the author of it fall into errors, as the wisest must, the faults have no other effect than to impair proportionately the value of the work. They do not become incorporated into the law. But Mr. Field demands by his *Civil Code* that his statement of the law, in every instance, right or wrong, be *made* the law, so that upon its enactment it shall supersede the existing law, and itself become the last arbiter over the rights, duties and property of men. Thereafter no appeal can be taken from it to the decisions of courts, however illustrious, nor can the rules of right reason or the venerable name of Justice herself be invoked against it. And, although it may have the formal, yet it will not have the *real* sanction, even of the Legislature. Confessedly, the Legislature does not and will not comprehend it. Mr. Field does not ask that it should. He has frequently asserted, and the assertion is true, that the Legislature "can no more make a Code than it can paint a picture." He asks that the Legislature *accept* it upon the authority of the two names subscribed to it. If accepted and adopted, the laws under which we live will be those ascertained, declared —*made*—by Messrs. D. D. Field and A. W. Bradford, and mainly, as I suppose it would not be invidious or incorrect to say, by the gentleman first named.

The true character of this measure, in the aspect in which I design to consider it, is now developed. Its principal feature consists in an attempt to *extend the province* of *statutory* law over that department of jurisprudence which embraces the rights, duties and obligations of men in respect both to person and property, in their ordinary dealings and relations with each other, that is to say, over the whole field of *private* law; to clothe the hasty *dicta* of a codifier with that authority which has heretofore been accorded only to the assembled wisdom of a tribunal of last resort. It is an abrogation of our present and immemorial system of jurisprudence, and an abandonment of the methods by which that jurisprudence has grown and become improved and perfected to a degree which is, at least, not excelled by that of any other nation.

If such a revolution were necessary, if the acceptance of some form of codification were inevitable, it would yet be possible to greatly reduce and mitigate the unavoidable evils which would flow from it by the employment of

methods which would secure as complete and perfect a codification as the wit of man could contrive. The talents and learning which cannot be found in one man, or three men, might be enlisted in the work. The masters in each of the different branches of the law might be called to the task. The combined result of their labors might be submitted to the judges elected by the people for their suggestions and criticism; and a small, selected number of the wisest and best might be appointed for the task of final review and completion. A work might thus be produced, not, indeed, worthy to replace our present system (for that, as I believe, is impossible); but one in the presence of which the crude compendium now urged for adoption would be left in the obscurity and forgetfulness from which it is now sought to rescue it. I design at a subsequent page to call attention to some features of this performance which should lead to its particular condemnation, but the present objection is to any scheme, even the best possible, for the codification of our unwritten law. My object is to show that such an attempt to subject the growth and development of popular institutions to forms borrowed from countries despotic in present character, or historical origin, is unscientific in theory, a false move in practical statesmanship, and sure to produce, if successful, the gravest evils. Points which I have heretofore had occasion barely to touch upon, I shall endeavor now to develop with more fulness and precision.

1. My purpose is first to show that the scheme of codification, assuming, as it does, to reduce into statutory forms the rights, duties, and obligations of men in their ordinary relations and dealings with each other, *is unscientific in theory*.

The advocates of codification either directly assert, or tacitly assume, that the rules of law pronounced by courts in their opinions are so pronounced as being absolutely and under all circumstances true; and they must stand upon this proposition, for without it "codification," in the sense in which we are dealing with it, cannot be safely attempted. In the Introduction to the proposed *Civil Code*, understood to have been written by Mr. Field himself, this position is clearly taken. It is there said (p. XIV.): "All that we know "of the law we know from written records. To make a "Code is therefore but to make a complete, analytical "and authoritative compilation from these records. The "records of the common law are in the reports of the "decisions of the tribunals; the records of the statute law "are in the volumes of the legislative acts." And in the Report made by the Commission to the Legislature in 1865, understood to have been penned by the same hand, and which accompanied the original measure, it is said (p. viii.): "Whatever is known to the judge or 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 sys-"tematic Code."

The fallacy (and it is a gross one), wrapped up in these plausible assertions that whatever is known can be written, and that if a rule of law can be written by a judge in an opinion, it can be written and enacted in a Code, consists in the false assumption that courts lay down rules *absolutely*, whereas, they lay them down *provisionally* only. They do not, indeed, declare in terms that the rules pronounced are to be taken in reference to the facts which have elicited the opinions, but this is always understood; and whenever a case arises presenting different aspects, the rule is subject to modification and adaptation as justice or ex-

pediency may dictate. This, of course, cannot be done with a rule enacted in a statute. All such rules are rigid and absolute, and cannot be modified and shaped to suit the varying aspects which different cases may exhibit. If a codifier should correctly state any rule laid down by the court he would attach to it the limitation which is always understood in connection with such rules. In stating it without such limitation he omits a most essential element always belonging to it. The facts with which codification assumes to deal, and out of which it seeks to build its system, are the opinions of the courts. Whence does it derive its authority to omit, in arranging these facts, one of their most essential features?

This line of thought should be pursued a step further back, in order that we may understand the philosophical reason why the opinions of courts are, and must always be, *provisional;* for it is this which makes codification impracticable. All unwritten law consists of rules by which the standard of justice is applied to *known* facts and conditions. Apart from, and independent of, *known facts*, there is no such thing, in human apprehension, as *law*, except the broad and empty generalization that *justice must be done*. On the morning of creation the obligation of this precept was felt by the first man. It is the only one we can now truly feel in relation to the unknown facts and conditions which are to arise in the future, and which may present aspects different from any which have been exhibited in the past. Everything which has occurred may be made the subject of judicial contemplation, and the rule of justice in respect to it may be declared; and the declaration may be fitly applied to all like cases which may arise in the future. But here human power finds its absolute limit. There is One Infinite Mind to whom the future is already present,

and whose omniscience alone can prescribe its laws. The attempt of the codifier to imitate this attribute is as futile and miserable as the effort of the scenic artist to mimic the thunder of Jove:

> "Demens! qui nimbos et non imitabile fulmen
> * * * * * * simularat" * *

Our unwritten jurisprudence acknowledges and accepts this necessary limitation of the human faculties. The judge never undertakes to decide anything more than the precise case brought before him for judgment. He considers the facts of *that case*, and, with the aid of such precedents, analogies and familiar rules as the deliberate and accumulated wisdom of the past furnishes, he pronounces judgment, and there stops. He does not even declare, at least not as a necessary part of his function, what the law is. He is not bound to write an opinion. He usually does write one, stating his views upon the legal questions. But this is of no binding force. The strictest doctrine of *stare decisis* requires subordinate tribunals to follow, not the opinion, but the *judgment*, and the obligation is of no force in a future case presenting materially different aspects. If the court in its opinion lays down rules in general terms which *might* embrace cases differing from the one decided, such declaration of rules is *provisional* only, and subject to modification in any future case presenting materially different features. The temptation to judges, in committing their opinions to writing, to lay down a rule calculated to cover future cases which may possibly differ from the one before them, is often yielded to, and this practice is the one principal source of the error which often creeps into the unwritten law. Such rules, not necessarily called for by the actual case, are called "*dicta*"—things *said*, not things *adjudged;* but other courts are often inclined to accept them; subordinate ones, from a

partial sense of obligation, others, from a sentiment of respect, and because of the authority which may justly belong to the talents and learning of those who pronounced them. In this manner many an erroneous doctrine has found its way into the law and held its place until its mischievous fruits have compelled it to be challenged. There is no practice which the greatest and best judges of England and America have more thoroughly united in denouncing as a pernicious source of error, than that which leads to the attempt by courts to decide other and future cases, instead of limiting their decision to the *known facts* before them. And yet *this is precisely what Codification consists in doing.*

Mr. Field's assertion that whatever is *known* can be stated in words, is true; but it is true only of what is fully and absolutely known. His assumption, of which he is apparently the innocent victim, and which he seeks to impose upon others, that unwritten law is *thus known*, and that the memorials of it lie in the opinions of the courts, is false and delusive. All that is truly known is, that certain actually occurring instances have been decided in certain ways. These are the facts and the only facts. The judges had no function to do anything more, and if they went further and undertook to pronounce a rule which was to apply to any other case than one known to be like it, what they said was mere *opinion*, of no more authority than the opinion of any private individual equally learned. No intelligent judge ever yet professed to *know* the law applicable to a *future* and *unknown* case. That is a thing beyond the reach of the human faculties. Whenever a case arises in the courts presenting features different from any which have been made the subject of judicial decision, the business of a judge is to consider these new features, and determine whether they are *material;* in other words, whether the case,

differing as it does in some of its circumstances, is, or is not, the same in point of *principle*. If it be the same in such a sense, it is the same for all *his* purposes, and the law governing it is *known*. He must apply the same rule as has been applied in the like cases. But if it be not the same in such a sense, if the differences are material, it is a case theretofore *unknown*, and there is no rule truly "*known*" which governs it. Nevertheless, the judge must decide the case, and he does so by the exercise of that *capacity* for making a just decision in a novel instance, which his studies and training have created in him. By the light of reason, and with the aid of analogies afforded by *similar* instances, he applies to the case the standard of justice; and when this is done by a tribunal of last resort, the law governing such cases may, for the first time, be truly said to be *known*. It may be said—is often said—that law not *known* is the same as law not existing, and that consequently the function of the judge, as we have described it, is not to interpret and declare already existing law, but to *make* law where none before existed, and that this is *legislation*; and hence our unwritten Common Law is sometimes styled (and is derisively styled by the partisans of codification) *judge-made law*. If all this were true it would not, of itself, amount to an argument against unwritten law; for if the law thus made is the best, it matters not by whom it is made. But it is not true. It is a shallow view which regards law thus declared by the courts as *made* by them. The function of *making* law supposes in the body which exercises it freedom of action. Existing rules are of no binding force upon it. It can follow or disregard them according to its own views of policy and wisdom. But the judge is never thus *free*. He is bound, in declaring the law of a new case, by established rules just as much as in deciding a case which

has been decided a hundred times before. The law of a new case can be determined by him only by building upon the foundation of law already known and declared. His office is to apply the existing *standard of justice* to the new exhibition of fact, and to do this by ascertaining the conclusion to which right reason, aided by rules already established, leads. There is no arbitrary power in him; and any exercise of it by him would form clear ground for his impeachment. Nor can any discordance be found between this theory and the fact. The jurisprudence of England and America may be searched in vain for an instance in which any respectable tribunal, in determining the unwritten law of a new case, has assumed to exercise the will of a legislator, or to do anything more than to acknowledge the binding force of law already made and declared, and accommodate it to the new conditions of fact.

The force of this objection to codification has, in some measure, been felt by the author of the Report and Introduction already referred to, and he has made an effort to meet it. His method of avoiding it is to admit that a Code cannot provide for future cases, and then to assert that his proposed *Civil Code* does not profess to provide for them. It seems to be his view that the positive enactment by the Legislature of a rule of law can produce no larger or other effect than the declaration of the same rule of law in a judicial decision; and that when new and unforeseen cases occur, they will simply *not be reached* by the Code, and may therefore be in some manner decided as they are now. It is said in this "Introduction" (pp. XVII.–XIX.): "It may, therefore, be safely "affirmed that there is but one of the five Codes, that is to "say, the Civil Code, to which, with any semblance of justice, it may be made an objection that it cannot provide "for all future cases. This Code is undoubtedly the most "important and difficult of all; and of this it is true, that it "cannot provide for all possible cases which the future "may disclose. It does not profess to provide for them, " * * * * * and if new cases arise, as "they will, which have not been foreseen, they may be "decided, if decided at all, precisely as they would now be "decided, that is to say, by analogy to some rule in the "Code, or to some rule omitted from the Code, and, there-"fore, still existing, or by the dictates of natural justice."

But what manner of reasoning is this? A statute not applicable to an unforeseen case, even if the case fall within its terms! In the interpretation and application of the law of *judicial decisions*, the maxim that the decision is to be understood as imperative only in respect to cases substantially the same as that in which it was declared, is ever present, and makes it easy to determine what an *unforeseen* case is; but who is to say, and how is it to be ascertained, what cases the Legislature, in enacting a statute, did or did not have in view? In cases of *ambiguity* in the *language* of statutes, it is indeed a common practice in arguing for one interpretation or another, to consider what cases the Legislature probably had in view; but who does not know that where the language is clear, the statute must have its effect in all cases falling under its scope, foreseen or unforeseen, and whether the results are just or unjust? Mr. Field must admit that his proposed *Civil Code* consists of *definitions* and *rules*, and that it is of the essence of a definition or rule that it creates, or supposes, a *class* of instances to which it is to be applied. The class may be narrowly and cautiously limited; but within its scope it embraces future and unknown, as well as present and known cases.

The essential nature of classification consists in *selecting* qualities of objects, and declaring that all which possess such qualities, whatever others they may exhibit, belong to the class. When, therefore, any case arises for disposition under a Code, if it present the features belonging to a class created by it, it must be dealt with the same as other instances in that class, no matter what additional and theretofore unknown features it may present, which ought to subject, and would have subjected, it to a wholly different disposition, had the new features been present to the mind of the codifier. The proposed *Civil Code* does, therefore, deal with the future and the unknown, precisely the same as with the present and known. No *rule* whatever can be framed which will not do this; or, at least, there is only one way of stating a rule by which it may be rendered inoperative upon new and unknown cases, and that is by *expressly* excluding from it all such cases. This could be done by one general clause to the effect that the Code should not be deemed applicable to any future cases, unless they should turn out to be like in all material respects some case or cases which had already been made the subject of judicial decision! Such a provision would indeed be ridiculous; but it would be necessary in order to render the assertion true that the proposed codification does not declare the law for future and unknown cases.

We repeat, therefore, for the truth is a vital and fundamental one upon which the main question of codification in large measure depends, that all *just* law, all law which consists in applying directly the standard of justice to human conduct, consists in applying that standard to *known* facts, and can have, in human apprehension, no existence apart from the facts. Until the *facts* come into existence, the *questions* arising upon such facts cannot be known, and

surely cannot be decided. The *law*, therefore, in respect to *future and unknown* cases is and must be *unknown;* and if it be not, and cannot be known, it cannot be codified. Codification, however, consists in enacting rules, and such rules must, as we have seen, from their very nature, cover future and unknown, as well as past and known cases; and so far as it covers future and unknown cases, it is no law that deserves the name. It does not embody justice; it is a mere *jump in the dark;* it is a *violent* framing of rules without reference to justice, which may or may not rightly dispose of the cases which may fall under them. It is a habit common to pretenders in every science to fail to observe the necessary limitations of the human faculties; they assert an ability to know the unknowable, and to do the impossible. Humility is a lesson which the true man of science finds early occasion to learn. "*Magna, immo maxima, pars sapientiæ est, quædam æquo animo nescire velle.*"

The objection may here occur, even to intelligent and candid minds, that if the proposition above insisted upon is true, it would seem to disprove the expediency and even the feasibility of any statute law whatever. But it must be remembered that it was shown in the beginning of this paper that there was an appropriate province for written law, as well as one for unwritten law, and that the above arguments designed to show the impracticability of laying down a rule which shall embrace future cases, is limited in its scope to those subjects which properly belong to the province of unwritten law, or in other words, to those subjects as to which it is of predominating importance that the rules should be *just;* and it will also be remembered that this department of jurisprudence was also described as being that which embraces the law governing the conduct of men in their ordinary pursuits and relations with each other,

or of what may properly be called *private law*. But I purpose to further answer this objection, inasmuch as it will enable me to present additional reasons and illustrations in support of the main proposition.

In statute law, when limited to its proper subjects and kept within its appropriate boundaries, there is no attempt to make rules for *unknown* conditions of fact. These conditions are, indeed, to arise in the future, but they are, nevertheless, *known*, or, which is the same thing, *contemplated* as known, for they are, as it were, *created* by the statute, and particularly specified in it. If a case arise presenting those conditions, it is disposed of by a statute which was passed in full contemplation of such a state of things. If any case arise which does not present the specified conditions, it does not fall within the operation of the statute, and is not decided by the statute. Not so, however, with the unwritten law. *It* must deal with every case which falls within its general province; it is all-embracing; it must apply the standard of justice *in every instance*. If a man commit what seems to be a wrong action, the statute law must be consulted to learn whether the act is made a crime. If it be not, although the deed may have been one of great moral enormity, justly demanding punishment, it must go unavenged and justice remain unexecuted. This is the evil which society must suffer as the price of that *certainty* which can be secured only by statutory law. But if a controversy arise between two men concerning the ownership of property, and there be no statute upon the subject, the unwritten law *must*, nevertheless, decide it. No matter how novel the question, it must be determined. It would not be endurable that one man should hold unchallenged possession of property to which another honestly laid claim, for the reason that the case was so novel as to render it difficult to determine to whom it

justly belonged. Society may leave a criminal unpunished; private citizens do not feel an additional burden on this ground; but it cannot leave private controversies undecided, or to be decided by force.

It is true there is a possibility that when a class of cases is created by the terms of a statute for the operation of a statutory rule, a case may arise exhibiting the prescribed conditions, and thus falling within the class, but at the same time exhibiting other *unforeseen* conditions which render the operation of the statute unjust. This is the evil, as we have before shown, inseparable from written law; but it is reduced to a small and endurable *minimum* when this law is confined to its true province, namely, to that department of the civil administration in which certainty, more than strict justice, is of predominating importance. Thus in the whole public administrative system, such as embraces the times and modes of elections, the duties of officers, the imposition of taxes, the taking of private property for public use, &c., &c., it can be easily seen that the cases likely to arise are few in respect to variety, are in the main simply repetitions of each other, and are, for the most part, *created*, as it were, by the statute itself. They are, therefore, *known* to such an extent as to enable the skillful legislator to successfully deal with them *beforehand*, through the instrumentality of statutory law; but even here it is not infrequently found that the statute in many respects is ill suited to the cases which arise under it. The true source of the difficulty in such cases is always to be found in the fact that the framers of the statute did not well *foresee* the conditions under which it would operate. This may be for the reason that they were ignorant or negligent, and the statute, consequently, unskillfully framed, or for the reason that the subject of legislation was one so full of *variety* in the cases likely to arise

under it, that no ordinary sagacity or care could anticipate them. When this is the case it is an infallible proof that the true boundaries which limit the province of written law have been overstepped.

Turning to the appropriate province of unwritten law, that embracing the rights and obligations of men in respect to person and property in their ordinary dealings with each other, where every case which arises *must* be decided, and it is of predominating importance that the decision be in accordance with *justice*, it will easily be perceived that the ever-varying conditions of the future *cannot* be *foreseen*, and consequently cannot be dealt with beforehand by *written* law. The general fact of the variety of new conditions incessantly arising in human affairs will readily be admitted; but few have attentively considered—*none* can adequately comprehend—the infinite number of the diversities. In the State of New York, each successive day witnesses acts, millions in number, each one of which may, by possibility, become the source of dispute, and call for judicial decision, and no two of them be alike! When we reflect that this number is to be multiplied by the days and years during which a written law is designed to be operative, we must agree that no finite wisdom can provide beforehand for such infinite and unknown variety and complexity.

Some, perhaps, while admitting that no written law can be devised for this province of jurisprudence which would not fail in a vast number of instances to secure justice between man and man, may still ask, whether it may not be expedient to sacrifice justice, even in a large number of particular instances, for the sake of the great general benefits which might be supposed to flow from the *certainty* of written law. The first answer to this inquiry is that such a policy would not only be inexpedient, but impossible. The necessity of enforcing *justice* in particular instances, in that field of human action of which we are speaking, is imperative, and can be subordinated to no other object. Whether elections are held at one particular time, and in one manner rather than another, what duties may be imposed upon this or that public officer, are matters, comparatively speaking, of indifference. The written law may determine these things in any one of a variety of ways. But that men should receive the just rewards of their labor and skill, that they should be maintained in the peaceful enjoyment of their property, that craft and cupidity should be restrained, are matters which society must, first of all things, secure for its members. It is for this end that governments exist. Without it peace and order would be impossible. And it must be secured in all cases; with those few exceptions only which, all can see, must, in consequence of human infirmity, occasionally arise under the best devised institutions. The unwritten law, bound by no rigid form of words, in dealing with any novel conditions of fact which the variety of human affairs present, can address itself without embarrassment to the simple office of applying the standard of justice to the particular case. All men count and rely upon this. They engage in their transactions without the aid of a professional expert, without knowing or caring to inquire what the rules of law may be, with no other guide than honest intention and ordinary prudence; but in the full confidence that the rules of law which would govern their transactions, should they ever be challenged, would be the simple dictates of justice and common sense intelligently ascertained and applied.

The second answer is, that all such endeavors to secure certainty in this province of jurisprudence at the cost of justice, would overreach and defeat themselves. Whenever

a statute is found to work injustice in consequence of the failure of its framers to suitably provide for cases which they could not foresee, an opposition arises against the operation of the law. If the injustice be gross, the moral sense is shocked. The injured party exclaims against the wrong. The courts recoil from the office of enforcing the law. Doubts are entertained concerning the *meaning* of the statute. The plain sense of the words is insisted upon by one side, the improbability that such injustice could have been intended, by the other. The difficulty is usually resolved by the employment of the subtle arts of interpretation, and the obvious meaning of the language is *expounded* away in favor of the interests of justice. Who does not know that of all the manifold sources of *uncertainty* in the law none is so fruitful as the attempt to apply a statute to a case falling within its terms, but which, not having been foreseen by its framers, does not fall within its spirit?

In dealing with the question of codification, as I have thus far done upon grounds of principle, I have sought to give emphasis to the distinction between *public* and *private* law, a distinction which has not hitherto, so far as I am aware, been dwelt upon in the discussions upon this subject, and to show that while statutory forms are necessary to the former, they are, with a few easily recognized exceptions heretofore indicated, worse than out of place in relation to the latter. Systems of mere administration are mechanisms *created by men*, and men may, therefore, prescribe for them any desired modes of action; but human society is itself a vast and complex mechanism *not* created by men, and moving according to its own inexorable laws. It is the humble office of man reverently to ascertain these as from time to time they reveal themselves. The presumption of undertaking

to substitute his own wretched devices in place of them, will carry with it its sure punishment. The only effect of it will be to bring about discord and confusion, the evils of which he alone will be compelled to bear, and the only escape from which will be found in a penitential return to the path which nature herself has pointed out.

The thought last suggested, that of the *impossibility* of the ultimate success of any effort to permanently supersede the unwritten law by statutory enactments, should be further pressed upon the attention. We hear from the partisans of codification much derisive reference to the unwritten law, as "*judge-made law*," as law drawn from the "*inner consciousness* of the judge;" and this is often declared to be only another name for the whim, the prejudice or caprice of the judge. The writings of Jeremy Bentham, the great apostle of codification, teem with this form of detraction. All this is unworthy the name of argument. The only important thing for society is that it should be governed by the *best* law. If the judges really assumed to *make* the law, it would be no ground for objection, provided the law made by them was the best which society could obtain. If, in fact, they do make better law upon the subjects with which they deal than legislatures or codifiers, their services should be retained, and that of others dispensed with. An unworthy judge may, indeed, act from prejudice or caprice, and as no men are perfect, all may be to some extent under the influence of such motives. But what can be more unjust, untrue and unphilosophical than to convert the exception into the rule, and assert all law declared by judges to be but the conclusions of arbitrary will or caprice, because it may, by possibility, be so in some instances? Those who make these random and reckless assertions usually contradict them by their own conduct.

Mr. Field, for instance, after liberally indulging in this form of detraction against unwritten law, proceeds to discredit his assertions by proposing a Code, ninety-nine hundredths of which consist of attempts, often, indeed, unsuccessful, to declare and adopt the very law which he condemns. As it comes from the judges, it is arbitrary and capricious; as declared and sanctioned by the codifier, it is scientific, true and worthy the acceptance of a State! What quality is it which this "law" has gained in its passage through his intellectual crucible?

It is important to firmly grasp the truth that the work of declaring or making law, whether committed to the hands of a judge, a legislature or a codifier, is substantially the same. It is the task of applying the national standard or ideal of justice to human affairs. This may be thought to be an obscure phrase; but there is no obscurity about it which is not found in all language that deals with fundamental ideas. In pushing our inquiries back to the original elements of any moral science, we finally reach a point at which our conceptions become so dim and shadowy that it is not easy to represent them to others, or even to ourselves, in clear and intelligible forms of speech. But in employing the above phrase, we keep a safe distance within the boundary of intelligible thought. That there is a *standard* by which the excellence of laws may be tested is proved by the simple fact that judges and legislators intelligently discuss the question what the law ought to be, and are able to convince each other. The work of the legislator, like that of the judge, is criticised by the public and condemned or applauded. This could not be, unless there were some generally recognized standard with which such work could be compared. Were the legislator asked what his ultimate object was in voting

to enact any law, he would answer, to secure justice or utility, or expediency, or to conform to his sense of right; and if the judge, when declaring the law in a novel instance, were asked the corresponding question, his answer would be to the same effect. And so, also, with the codifier, when authorized, like Mr. Field, to formulate improvements of the law. From what source does Mr. Field draw the numerous rules contained in his *Civil Code* which he proposes as amendments or *improvements* of the existing law, but that "inner consciousness" which he affects to deride? He suggests these rules because they accord with his conceptions of justice and expediency, and these are shaped and moulded by the influences which have surrounded and still surround him, and therefore accord, or should accord, if he be a competent legislator, with the general standard of the intelligent part of the society in which he lives. Who does not know that the ultimate support upon which all laws must rest is *public opinion?* And what is this but saying that law, in order to be obeyed and enforced, must accord with the public standard or conception of justice? All well conceived efforts to make, or to declare, law, are, therefore, efforts to apply this public, or, as we have styled it, national, standard of justice to human conduct. This national standard, more particularly stated, is the final result of the moral and intellectual life and culture of a nation, the product of all the influences, public and private, which tend to cultivate and develop men's conceptions of what is just, expedient and useful, and which is unconsciously perceived and felt by every individual member of society by reason of the fact that he is such a member, and exposed to like influences with his fellows.[1]

[1] The Vocation of our Age for Legislation. By Savigny, 1814. Translated by Haywood.

Now, inasmuch as the essential function of making or declaring the law for new cases is the same, whether the work be done by the Legislature, or the judges, consisting, in each instance, in applying the national standard of justice, the question, whether it should be done by the Legislature, or by the courts, must be determined by the answer to the question, which will do it best, and this has already been indicated. Where it is of prime importance and practicable, that it should be done *beforehand*, the Legislature is the proper body, in other cases, the courts; that is to say, all matters of civil administration, and questions of mere politics, in other words, *public law*, should be dealt with by the Legislature, and all matters relating to the ordinary conduct of men in their personal and business relations with each other, in other words, *private law*, should be left to be dealt with by the courts.

These are the dictates of science. This is the natural order; and all attempts to contravene it, while certain to be fruitful in mischief, will as certainly fail of success. If the Legislature undertake to make rules *beforehand* for the government of the ordinary relations of men with each other, its work will not stand whenever it is found not to accord with the demand of justice. That voice cannot be silenced, unless it is satisfied. It speaks with all the might of public opinion. It urges its demands in all places in and out of courts, and submission to it is inevitable. It may compel an interpretation of the statute in accordance with its demands, even against the written letter of the enactment. By successive judicial decisions, harmony may be enforced between the written law and the standard of justice; and in this way the unwritten law reassert its natural and exclusive sovereignty over that province of jurisprudence which embraces the rights and duties of men in their

ordinary relations with each other. But this violent process necessarily carries with it a grave mischief. It cannot be accomplished without overriding, in some measure, those settled rules of interpretation which are the chief means of securing stability in the administration of justice.

Whoever follows with attention the line of reasoning I have thus far pursued, will, at some point, ask how it happens, if all attempts to subject the principal department of jurisprudence to the operation of written law be, as I have endeavored to show, unscientific, inexpedient, and, indeed, in a certain sense wholly impracticable, that some of the most cultivated nations of ancient and modern times have persistently acted upon a contrary policy, and made general Codes covering every province of the law the basis of their jurisprudence. This inquiry is indeed most pertinent; for if it be true that such nations have subjected the whole matter of private law to written enactment and still maintained a judicial administration which will stand without disadvantage in comparison with our own, the foregoing reasonings should receive further scrutiny, or at all events, circumstances should be pointed out which might explain this apparent incongruity between the teachings of theory and experience.

The first observation to be made upon this possible objection is, that it assumes what is not true. It is not true that any nation, ancient or modern, has successfully undertaken to subject the whole body of private law to statutory forms; and it is true that, so far as any such attempt has been made, it has, in every instance, been attended by the confusion and mischief which have been pointed out as the inevitable consequences of such a policy. I therefore gladly welcome this opportunity to fortify the views I have

endeavored to establish, by a reference to the actual experience of other nations.

Attention should be called, at the outset, to the exceedingly loose reasoning which marks most of the common arguments by which the expediency of codification is sought to be supported by the teachings of actual experience. The examples of Rome, of France, of Prussia, or of Louisiana, are frequently cited as proofs that Codes of private law should everywhere be adopted. Such arguments can have no force unless coupled with proof of two things; *first*, that the judicial administration of private law in the countries referred to has actually been under the control of written Codes; and *second*, that such judicial administration is superior to our own. But such proof is not even attempted. It would be impossible to make it; the argument, however, tacitly and falsely assumes the fact.

The example first to be considered is that of Rome. This is the one most frequently urged, we will not say by the few learned, temperate and prudent advocates of codification, for there are such, but by the noisy dogmatists, who employ clamor in the place of reason. They seem to have a notion that the jurisprudence of Rome, until the time of Justinian, was in a state of utter confusion and uncertainty, and that by the composition of a Code embracing all departments of the law, that Emperor succeeded in bringing order out of chaos, and established a system which, in its actual operation, secured to the people over which it was extended the blessings, not theretofore enjoyed, of a scientific, certain and harmonious administration of justice. Mr. Field, himself, in his defense of the policy of codification contained in the Introduction to his proposed *Civil Code*, makes, as his first argument, an appeal to the example of Rome. He says (p. xv.): "It" [the feasibility of a complete codification of the

law] "was fully proven by what had been done in respect "to the law of other countries. The law of Rome in the "time of Justinian was, to say the least, as difficult of reduc- "tion into a Code as is our own law at the present day. Yet "it was thus reduced, though, no doubt to the disgust and "dismay of many a lawyer of that period. The concurring "judgment of thirteen centuries since has, however, pro- "nounced the Code of Justinian one of the noblest benefac- "tions to the human race, as it was one of the greatest "achievements of human genius." These sounding phrases must excite the smile of the civilians. The Code of Justinian is but a *revision* and consolidation of the imperial constitutions, which correspond with our *statutes*, and which, taken together, constituted what may be called the *statutory law* of the Empire, and which, for the most part, related to the organism of the State, the forms of its institutions, its officers and their duties, in other words, covering the same matter which our statute law covers, and which, as we have repeatedly said, is the appropriate province of written law. Instead of being one of the "highest achievements of human genius," it is a work certainly not superior to any one of a hundred similar ones which have been executed from time to time in other nations, our own State included, and instead of being properly described as "one of the noblest benefactions to the human race," it is something which very few individuals of the human race know or care, or need to know or care, anything about.[1]

[1] "The Code contains the decrees of the Emperors, from Constantine to Justinian, and has the least reputation of Justinian's works. In respect of Latinity, it is inferior to the Digest and Institutes; as regards style, it is bombastic and inflated. Its arrangement is not superior to that of the Pandects, while in respect of esoteric merit it is contradictory and sometimes even unintelligible. Professors fear to attempt its explanation; students shrink from it, while commentators only use it to explain passages in the Digest." (Juridical Society Papers, vol. I., p. 487, by Patrick MacChombaich (Colquhoun.)

The eulogy often expended upon the Roman law by its admirers, and which Mr. Field has borrowed and applied with somewhat ludicrous effect to the CODE, belongs to another part of the work of Justinian, the DIGEST, or PANDECTS, which consisted of a digest of the treatises of the most illustrious writers, selected from a preceding and purer age of Roman jurisprudence. This work covered the domain of *private* law, that which relates to the rights and obligations of men in their ordinary dealings with each other, and which we have so often insisted upon as being the appropriate and peculiar province of *unwritten* law. It was an attempt to gather together, to consecrate, and by consecrating to preserve those priceless contributions to jurisprudence which the blended thought and experience—the unwritten law—of a thousand years had made, and which a declining age was no longer able to enlarge and was beginning to forget. The design was noble, although the execution was exceedingly imperfect; but it would be the gravest of errors to seize upon the glory which belongs to the authors of this system of law and transfer it to Tribonian and his colleagues who abridged it, or to their imperial master, who made it statutory.

In order to ascertain the true import of the lesson taught by the history of Roman law and the work of Justinian, we must consider with some precision what the sources of that law were, its condition when it engaged the attention of that Emperor, and his dealings with it. A very hasty sketch is all our limits permit.

Political motives led to the adoption in Rome, at a very early period, of a system of written law, covering, it seems probable, to a greater or less degree, that domain of jurisprudence which we have insisted upon as being the peculiar province of unwritten law. A fierce dispute had arisen

between the plebeian and patrician classes, turning upon questions concerning their respective rights, and the dispute was resolvable only by the incorporation into written statutes of the opinions of the victorious party. This was the history of the origin of the law of the Twelve Tables, which was the work of a Commission styled the Decemviri, created about the year 450 B. C. Of this law, in its original form, fragments only remain; but it seems probable that its framers extended their work over a larger area than the points in dispute, and attempted to reduce to written forms the main body of the pre-existing law. The Twelve Tables, therefore, were in the nature of a general Code, which attempted to provide for future cases. What must happen in every such case to the end of time, happened here. In the practical work of administering justice, or, as we have before expressed it, of applying the national standard of justice to the ordinary business and relations of men, the Twelve Tables were found to be an obstacle; the rigid letter of the law was constantly found not to be suited to the new and unforeseen cases, arising in endless succession. One of two things was necessary; either that the letter of the law should be departed from, or the right administration of justice be sacrificed. In such a contest there can be but one result. It is the letter of the law which must yield; and this was accomplished in Rome, as in like cases it has been accomplished everywhere else, by the arts of subtle *exposition*, and the invention and employment of *fictions*, and other devices by which the law is apparently obeyed, but really evaded.

One agency by which this result was accomplished came through the action of the judicial tribunals. The Roman *prætors*, whose office most nearly resembled that of our judges, found continual occasion to supplement or evade the

rigid and ill-adapted language of the Tables; and in order that the public might know beforehand the extent to which this discretionary power of the Prætor would be carried, it became the custom for each of these magistrates before entering upon his judicial functions to draw up and promulgate what was styled an *edict*, in which the rules were laid down by which he avowed that he would be guided in his official action. This edict, however, not being strictly law, was itself interpreted and applied with as much latitude as it exhibited towards the rigid Code it was designed to supplement; and as the Prætor's term of office embraced a year only, the successive prætorian edicts effected those gradual and almost insensible changes in the administration of private law which constitute what is very properly termed its development or *growth*. Each Prætor took the edict of his predecessor and adopted it so far as it had stood the test of actual experience, supplementing and amending it in those particulars where it had proved defective. The Roman Prætor, however, was not a master of the science which he affected to expound. He was not, as with us, selected from the class of experts in the law, by reason of his supposed prominence among his fellows, and called upon to devote himself for successive years to judicial duties. He was an aspiring politician, passing through the various grades of official dignity on his way to the consulship, and discharging for a single year the duties of judicial office. It was impossible that the great function of administering justice in a civilized state could be performed by the unassisted labors of these fleeting officials. Jurisprudence is a science, and the office of applying it is one of the most difficult of arts. As in all other sciences or arts, society demands the genius and skill of experts; and in some form, direct or indirect, this demand must be supplied; and this

introduces me to the *second* and principal agency by which the national standard of justice in the Roman State was at the same time cultivated, developed, and applied to the actual business of life.

This was the class of *jurisconsults*—private citizens, whose highest ambition was satisfied by the employment of studying the science of jurisprudence and bestowing the benefit of their labors upon the public or their clients. To them the Prætor resorted for aid in the composition of his annual edict, the private citizen for advice, and the principal officers of State, and the Emperors themselves, for guidance in the discharge of legislative and executive duties. Never in any society, ancient or modern, was the office of the jurist more respectable, or more gloriously filled. The classic age of the jurisprudence of Rome, coinciding with the period of her renown in arts and arms, and extending from the birth of Cicero to the reign of Alexander Severus, is full of illustrious names, whose lives were devoted to the task of developing the science of jurisprudence and adapting it to the ever-shifting phases of human affairs. The prætorian edicts were, as we have seen, largely their own work, and even those, after the annual revisions and corrections of six centuries had brought them to the highest attainable perfection as practical systems of law, were subjected to the authoritative criticism and comment of these confessed masters of the art of applying the standard of justice to the ordinary relations and business of men.[1]

[1] Gibbon has sketched in a few master strokes this peculiar feature of Roman policy by which the *unwritten law* became supreme in the administration of private justice. The shining paradox which closes the citation, compresses into a line what might be expanded into pages: "A more liberal art was cultivated, however, "by the sages of Rome, who, in a stricter sense, may be considered as the authors of "the civil law. The alteration of the idiom and manners of the Romans rendered "the style of the Twelve Tables less familiar to each rising generation, and the

The public opinion of Rome demanded that the judges should obey the concurring voices of these oracles of jurisprudence, and their *responses* to questions submitted to their determination thus silently acquired the force of law. Augustus gave to this established usage the full sanction of an imperial command; but he attempted to control it in the interest of the sovereign by restricting this privilege of private citizens to declare the law, to such as the imperial favor should select. Adrian repealed this restriction, but the inevitable discordancy of opinion, where the counsellors were numerous, compelled its restoration. "The conscience "of the judge was perplexed by the number and weight of "discordant testimonies, and every sentence that his passion "or interest might pronounce was justified by the sanction "of some venerable name. An indulgent edict of the "younger Theodosius excused him from the labor of com- "paring and weighing these arguments. Five civilians— "Caius, Papinian, Paul, Ulpian, and Modestinus—were "established as the oracles of jurisprudence; but if their "opinions were equally divided, a casting vote was ascribed "to the superior wisdom of Papinian.[1]"

The development and growth of Roman jurisprudence, as thus sketched, continued until the reign of the Emperor

"doubtful passages were imperfectly explained by the study of legal antiquarians. "To define the ambiguities, to circumscribe the latitude, to apply the principles, to "extend the consequences, to reconcile the real or apparent contradictions, was a "much nobler and more important task, and the province of legislation was silently "invaded by the expounders of ancient statutes. Their subtle interpretations con- "curred with the equity of the Prætor to reform the tyranny of the darker ages. "However strange or intricate the means, it was the aim of artifical jurisprudence to "restore the simple dictates of nature and reason, and the skill of private citizens "was usefully employed to undermine the public institutions of their country." (Gibbon's Decline and Fall, Milman's Ed., vol. iv., p. 319.)

[1] Milman's Gibbon, Vol. IV., p. 327.

Adrian; and during this long period the just boundary between the provinces of written and unwritten law was preserved. The public administration of the State was regulated by the former, and the field of private rights and duties was occupied by the latter. The emperors had, indeed, long been invested with absolute power; but it was sparingly exercised in the province of private law, the great mass of which still remained substantially unwritten.

The Empire was now verging towards its fall. Rome began to feel more and more the arbitrary hand of her master. The decadence was marked by a corresponding decline in jurisprudence, and the extension of the province of legislation over the proper domain of the unwritten law was one of the principal features.[1] Whether this extension of legislative power over the domain of private law was the cause, or the consequence, or simply an accompaniment of the decline in the juristic literature, we will not undertake to pronounce; but upon either view, the fact is significant.

It was, indeed, impossible for the noble jurisprudence of Rome, which had its origin under the free influences of the Republic, to preserve its integrity amid the general decay of morals, arts, letters and arms which marked the decline of the Empire, but two circumstances tended greatly

[1] "Adrian appears to have been the first who assumed, without disguise, the "plenitude of absolute power. And this innovation, so agreeable to his active mind, "was countenanced by the patience of the times and his long absence from the seat "of government. The same policy was embraced by succeeding monarchs, and, "according to the harsh metaphor of Tertullian, 'the gloomy and intricate forest "of ancient laws was cleared away by the axe of royal mandates and *constitutions*.' "During four centuries from Adrian to Justinian, the public and private jurispru- "dence was moulded by the will of the sovereign; and few institutions, either "human or divine, were permitted to stand on their former basis." (Milman's Gibbon, Vol. IV, p. 313.)

to hasten the march of its degeneracy. In the first place the changes in human affairs were continually rendering much of the works of the classic jurists obsolete, and requiring new adaptations and changes of the law. In the next place, before the art of printing was known, the cost of the materials of writing was so great that the works of a past age could not be perpetuated and multiplied at a price which would enable any but the very rich to possess them. They gradually disappeared and perished under the decay of time, except so much of them as were preserved in the treatises and commentaries of succeeding jurists; and the genuineness of these fragments was the subject of frequent, and sometimes insoluble, dispute.[1]

Such was the condition in which Justinian found the Roman law. It may be briefly summed up as follows:

FIRST.—The *statutory law* was embodied in the earlier collections known as the Gregorian, the Hermogenian and Theodosian Codes, and in the subseqent Constitutions of the later emperors, and was encumbered with the superfluities and contradictions which necessarily result from successive enactments relating to the same subjects through a long period of time. It required a thorough *revision.*

SECOND.—The *unwritten* law, the authoritative sources of

[1] "The books of jurisprudence were interesting to few, and entertaining to none; "their value was connected with present use, and they sunk forever as soon as that "use was superseded by the innovations of fashion, superior merit, or public au- "thority. In the age of peace and learning, between Cicero and the last of the "Antonines, many losses had been already sustained, and some luminaries of the "school or forum were known only to the curious by tradition and report. Three "hundred and sixty (succeeding) years of disorder and decay had accelerated the "progress of oblivion; and it may fairly be presumed that of the writings which "Justinian is accused of neglecting, many were no longer to be found in the libra- "ries of the East." (Milman's Gibbon, Vol. IV., p. 335.)

which for a thousand years had been the writings of private jurisconsults, was in still greater confusion. The works of the universally recognized masters of the science had first become in part superseded, and finally lost. Their successors were an ignoble multitude "of Syrians, Greeks and "Africans, who flocked to the Imperial court to study "Latin as a foreign tongue and jurisprudence as a lucrative "profession." There was a want of that instrumentality, indispensable in the administration of unwritten law, namely, *universally recognized authorities* to which appeal could be made.

We are now in a situation to understand and appreciate the nature of Justinian's work. It embraced three principal features: (1.) To reduce to one compact and consolidated body the whole mass of statutory law, and republish it, so that it should completely supersede the former Codes and the subsequent imperial Constitutions. (2.) To make an *authorized Digest* of the whole mass of the juristic literature, embracing, as it did, the entire province of the unwritten private law of the Empire, which should supersede the Twelve Tables and all commentaries thereon, the prætorian edicts, and the writings of all subsequent jurists. (3.) The composition of a treatise or manual for the instruction of students and magistrates in the elementary principles of this legal system.

The *first* part of this scheme was carried out by the execution and publication as law of what is called "THE CODE," which is confined, for the most part, to the proper province of written law, the law relating to the public administration of the Empire, and fills much the same place in the Roman law of this period as is occupied by the Revised Statutes in the legal system of New York. We may dismiss this from further notice as being a work of comparatively little interest

to succeeding ages, and throwing no light upon the main question we are dealing with.[1]

The *third* part of Justinian's work was accomplished by the composition of what is called "THE INSTITUTES," and this also merits little attention here. It was in no respect a Code of law, but a manual for the instruction of students in a knowledge of the law.

It is the *second* part of this imperial scheme which especially demands our attention; for it is this which is really intended when the work of Justinian is appealed to as supporting an argument in favor of codification. It consisted in a digested abridgment of all that was supposed to be true and of present utility in the treatises of the Roman jurists. Rejecting the feeble and degenerate productions of the later lawyers, he went back to the time of the perfecting of the Perpetual Edict by Salvius Julianus, and selected some forty treatises composed within the century succeeding that work. These were condensed, digested and

[1] "In general it may be said that the Codex consists, to a much greater extent "than the Digest, of *public* law in all its departments; that is the law which pre- "scribes and regulates the organism of the State, with all State institutions, "whether civil or ecclesiastical. Here belongs all that relates to forms of govern- "ment, modes of administration, duties of public officers, and the like. Under public "law is included also *criminal* law, the law of crime and punishment—a crime "being a wrong action viewed as affecting the rights, not of individuals, but of "society, as a violation of public peace and order, as an offense against the State. "On the other hand, *private* law is occupied with the rights of individuals, with "the modes by which individuals may acquire such rights or transfer them to "others, and the ways in which individuals may obtain personal redress when these "rights are impaired by fraud or violence. Now, the fact which I wish to em- "phasize is this: that the Digest is composed of private law in a far larger propor- "tion than the Codex. This is a fact which gives to the Digest something of the "superior interest and importance which belongs to it. It is mainly by reason of "the private law which it embodies that the Corpus Juris has exerted its immense "influence on jurisprudence and justice in Modern Europe." (Hadley's Introduction to Roman Law, p. 14.)

arranged in fifty books, and the completed work was published and declared as authoritative law.

But the important thing to be here observed is that this work bore little resemblance to ordinary written law, or to a Code in the sense in which we are considering that term. It did not speak, as a statute speaks, in the shape of simple rules or commands. Composed from scientific treatises, it preserved many of the features of a scientific treatise. It was a statement of the principles of the science of the law in the language of the authors whose works were selected, accompanied with argument, explanation and illustration, and naming the jurists whose language was adopted. The stamp of imperial recognition added no new element to the authority of the writers whose works were thus abridged. They possessed the authority of law before. The effect of the codification was simply to make the Digest the only book in which these precepts could be sought. The law in this form had, in large measure, the attributes of *unwritten* law. It was still a law of *principles* more than a law of *words*. It was plastic, susceptible of interpretation and application which would suit the infinite variety of aspects exhibited by human affairs.

It was, indeed, no part of the design of Justinian to change in any respect the essential nature of Roman jurisprudence as a system of unwritten law. The idea of a Code in the modern sense, as a legislative republication of the whole system of law in the imperative form of a statute, was not present to the minds of Justinian and his advisers. That idea is of modern origin altogether.[1] His scheme was in strict accordance with the historical development of Roman law. It recognized the fact that private, as distinguished from public law, was the product of the learning and labors

[1] Austin's Jurisprudence (Campbell's Ed.), vol. 2, 920.

of the jurisconsults; that after a degeneracy of three centuries the age no longer produced any of those great examples of original and independent genius which had illumined the golden era of jurisprudence; and that it was no longer possible to find among the living oracles of the law any voices which commanded that reverence and obedience which are at all times absolutely essential to the administration of private justice between man and man. He sought to correct this evil; and his method was to gather together the authentic remains of the earlier and better jurists, to attach to them selections from later writers which were necessary to accommodate them to the practical needs of the present time, and to add to the whole work his imperial declaration that it alone should be appealed to as authoritative.

Had the judicial system of Rome provided that its judges should be selected from the ranks of the best lawyers, and the maxim of *stare decisis* been recognized, and the art of printing known, there would have been no occasion for a work like "THE PANDECTS." The judges would then, as with us, have been the real *experts* and true oracles, and their recorded opinions would have supplied the sources and the standards from which the law was to be sought, and by which it was to be tested. But ambitious politicians, tarrying for a single year in judicial office, on their way to the consulship, could not become authorities in jurisprudence. These will ever be sought, where alone they can be found, among those who devote their lives to the cultivation of the science.

Whatever merit is to be ascribed to the Pandects does not proceed from any *codification* by them effected of the Roman law. They imparted no new value or efficacy to the law which they embraced. The glory which belongs

to the compilers of this work, and it is a high renown, is that they *preserved* from the decay of time a system of private jurisprudence which had been carefully elaborated by a long succession of acknowledged masters of the art, so that it could be transmitted to after ages for the benefit of the human race.

It should perhaps be admitted that the mere designation by the supreme *legislative* power of such a work as the Pandects, as containing an authoritative statement of the whole law, has *some tendency* to impart to the doctrines and precepts set forth in it an authority and sanction different from that which attached to the same doctrines and precepts as they came from the original authors of them, and that this tendency is in the direction of a *conversion* of unwritten into written law, and is, to that extent, a *codification*, in the modern sense; and, so far as this is true, any faults arising from ignorance or negligence in the composition of the various works of Justinian could only be corrected by an exercise of his legislative power; and the freedom which is usually practiced by the magistrate and the jurist in dealing with unwritten law was doubtless very much restricted by the fear of the penalty of *forgery* which Justinian sternly denounced against those who should dare to misinterpret these authoritative declarations of his legislative will. But the advocates of codification will scarcely be able to draw from these circumstances any support for their favorite scheme. Never was the futility of all attempts to confine the principles of justice within the forms of positive written law more completely demonstrated. The imperfections of the Pandects could only be remedied by additions to, or amendments of, the Code, and notwithstanding the fact that both of these works were compiled by two numerous bodies, composed of the first civilians of the Empire, the whole

scheme, Code, Pandects and Institutes, proved, so far as respected their practical efficiency for governing the affairs of the Empire, an utter failure. Scarcely had they been completed before necessities for amendment revealed themselves. Change succeeded change, and the whole system seems in a comparatively short period to have become either superseded or ignored.[1]

The foregoing sketch of the work of Justinian shows that no support can be drawn from that example in favor of any conversion of our unwritten private law unto written statutory forms; for, to briefly summarise the material points which this sketch exhibits, it appears:

1. The Code of Justinian was, for the most part, but a

[1] "But the Emperor was unable to fix his own inconstancy; and, while he "boasted of renewing the exchange of Diomede, of transmuting brass into gold, "discovered the necessity of purifying his gold from the mixture of baser "alloy. Six years had not elapsed from the publication of the Code before he "condemned the imperfect attempt by a new and more accurate edition of the "same work, which he enriched with two hundred of his own laws, and fifty de- "cisions of the darkest and most intricate points of jurisprudence. Every year, "or, according to Procupius, each day, of his long reign, was marked by some "legal innovation" (Gibbon's Decline and Fall, Milman's Ed., vol. IV., p. 337).

"The great law-book of Justinian seems to have gained no very wide currency "among those for whom it was intended. It was, to a great extent, superseded "in practice by paraphrases and abridgments of the whole or particular parts. "An inquirer, two or three centuries later, looking at the fate of this Justinian "legislation, might have said that it was a splendid and elaborate failure. In the "reign of Leo the Isaurian (717-741) the books of the Corpus Juris were hardly "used at all in their original form; and even the paraphrases and abridgments "founded on it were so ill-adapted to the existing state of the law, that this Emperor "thought it necessary to issue a compendious Code of his own. This was the "state of things in the Eastern Empire. In Western Europe the Corpus Juris "had never found currency, except in Italy; and here in some parts and cities of "the peninsula it still enjoyed an obscure and precarious influence" (Hadley's Introduction to Roman Law, p. 24).

revision and consolidation of the existing statutory law of the Empire relating mainly to the public administration, and not dealing with the general body of private law;

2. The Pandects, which do contain the private jurisprudence of the Romans, was not *strictly* a codification, or conversion unto written statutory forms of such private law, but preserved, in large measure, the plastic character of unwritten law, and left it susceptible of modification and adaptation to the exigencies of human society;

3. The limited extent to which the imperial sanction of Justinian did give the rigidity of a statute to the doctrines and precepts of this private jurisprudence, was an error which quickly manifested itself in the necessity for multitudinous changes and amendments;

4. The compilation of the Corpus Juris was of little, if any, practical advantage to the people and age for which it was designed, and the principal glory which truly belongs to the Pandects is that they were the means of preserving and transmitting to modern times an elaborate system of jurisprudence which attained its perfection without the aid of legislation, as a body of purely unwritten law, three centuries before Justinian's time;

5. The pure and classic age of Roman law was the period which embraces the time of the Republic and the earlier part of the Empire, during which it was little subjected to the exercise of legislative power; and its decline was marked by the frequent extension of statutory law over the field of private jurisprudence.

The principal modern European States whose example

may be appealed to by the advocates of codification, are France and Prussia. Indeed, it may be said that a Code, in the modern sense of that word, was for the first time adopted in Prussia. The measure was initiated in 1751 by Frederick the Great. It was at first styled the "*Gesetzbuch*," but has become since developed into what is now called the "*Landrecht*." Concerning this Code two observations are to be made.

1. It originally grew out of no general popular or professional demand, but was forced upon the nation by Frederick as an instrumentality for the execution of his ambitious designs for fusing together and consolidating into a political and social unity the heterogeneous States, which by war and policy had been subjected to the dominion of the House of Brandenburg. In other words, the measure had its origin in political and dynastic motives. It is no doubt desirable where different States, with discordant legal systems, are consolidated under a single government, that the union should be made as complete as possible, and this cannot easily be brought about until uniform laws are extended over all the constituent elements of the State. Such an end can be effected by statutory law alone, and a general reduction to unity may be most completely accomplished by a codification of the whole law. This, of course, proves only that codification may be useful for attaining political or dynastic objects; it has no tendency to show that it is an improvement of the law.

2. The merits of this legal system are to be estimated by its actual results; and upon this point there can hardly be any question. Its utter inability to answer the multiform needs of civilized society is confessed by the extent to which it has become loaded with declaratory laws passed to explain its obscurities, to correct its errors and to supply

its deficiencies. Indeed, there are none among the intelligent advocates of codification who would point to its results as a vindication of the expediency of this form of a legal system.

The example of France is frequently appealed to, and by Mr. Field himself, as a proof of the success and utility of a general reduction of private unwritten law to statutory forms. But none of the strictly scientific supporters of codification have ventured to employ so unfortunate an illustration. There are indeed many reasons why codification should have been successful and useful in that nation if it could be so anywhere. The basis of its jurisprudence was the Roman law, a system in which the principles and rules had been evolved from the experience of a thousand years of the life of a great State, and reduced to a precision and exactitude of statement which has nowhere else been attained. Moreover, the natural development of the law of France had, for many centuries, in some degree followed the direction of codification. The process was more in accordance with the law of its growth than could be the case with any nation inheriting the methods of the English Common Law. But there are two observations to be made upon the Code Napoleon, the truth of which cannot be disputed.

1. As in the case of Frederick, the leading motive with the Emperor Napoleon was political and dynastic. France was composed of States originally independent of each other, and still maintaining their several and discordant legal systems. It was the ambition of the Emperor to consolidate these different elements into one harmonious State, and to strengthen his dynasty by the consequences which would flow from such an achievement.

2. But looking to what the Code Napoleon may have

accomplished in the way of establishing a system of law certain, easy to be learned, and easy to be administered, it must be pronounced a failure. In neither of these respects will it bear comparison with the system of our Common Law. Upon this point the testimony, not of an enemy, but of a distinguished supporter, of the theory of codification may be invoked. "It is well known, for instance, that the "set of French Codes, which in time became the most com- "prehensive and self-dependent of all, have been com- "pletely overridden by the interpretations of successive "and voluminous commentators, as well as by the con- "stantly 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 prede- "cessors, 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 aber- "rations, when compared with what a French advocate "has to prepare himself for when called upon to advise a "client."[1]

And we may also call as a witness a still more distinguished jurist, who was a thorough believer in the feasibility and expediency of codification, although he confesses his inability to find anywhere in human experience a successful example of it. We refer to the late John Austin. "In "France the Code is buried under a heap of subsequent "enactments, and of judiciary law subsequently introduced "by the tribunals. In Prussia the mass of new laws and "authoritative interpretations which have been introduced

[1] An English Code, by Sheldon Amos, M. A., &c., &c., p. 125.

"subsequently to the promulgation of the Code, is many "times the size of the Code itself."[1]

The two distinguished authors last referred to have the candor to acknowledge that all experiments in codification, hitherto attempted, have proved to be failures; and they do not pretend that any nation, in which the law is embodied in Codes, possesses a jurisprudence so exact and excellent as that which has been developed under the methods of the English Common Law. This testimony should be well nigh decisive with practical minds. It should be said, however, that these authors themselves protest that the failure of all attempts at codification, hitherto made, does not, of itself, disprove the feasibility, or the expediency, of that policy; and they labor to show that the particular Codes referred to —those of France and Prussia, as well as the Pandects of Justinian—failed by reason of defects peculiar to those particular works.

I cannot but think that the teachings of actual experience are undervalued by these distinguished men. It is indeed a common failing of those whose knowledge of any science is gained by studies in the closet, and has never been corrected by an acquaintance with its practical application, to insist upon the conclusions of their theories, against the evidence of facts. The true course in such cases is to reconsider the theory, with the view of ascertaining whether some material factors in the problem have not been overlooked, or some error committed in weighing the value of those which have been taken into account. If the work of Justinian, the fruit of the devoted labors for a series of years of a score of the first civilians of the Empire, was an utter failure, so far as it was designed to be a written "Code" superseding unwritten

[1] Lectures on Jurisprudence (Edited by Campbell), Vol. 2, p. 121.

law, if the Code Napoleon, composed by the most eminent lawyers of France, dealing with a jurisprudence, the development of which had always been far more than that of England, in the direction of written, statutory law, and who had, moreover, to aid them, the labors in a like direction of a succession of men such as D'Aguesseau and Pothier, wholly failed to secure any of the fancied benefits which codification seemed theoretically to promise, surely it follows with a certainty which should satisfy all practical minds, that there is some error in the theory which views such an enterprise as feasible and expedient.

I have elsewhere pointed out what I suppose that error to be, and again, for the sake of emphasis, call attention to the boundary line heretofore drawn between the just provinces of written and unwritten law, and to the reasons which make it forever impossible that private law can be adequately dealt with and embraced under written statutory forms. These theoretic views readily explain the failure of all practical attempts in the way of codification; and it seems quite remarkable that the distinction referred to seems never to have occurred to the eminent advocates of codification to whom reference is above made. They seem to perceive no difference, so far as respects feasibility or expediency, between an attempt to define and regulate by statute the duties of public magistrates, and an attempt to embrace in the same form the law of agency or insurance. Because some things can be, and are, adequately dealt with by statutory law, they hastily infer that it is *possible* that all law may thus be expressed.

A brief reference must be made to the example of Louisiana, where, as is well known, a Code, professing to embrace the principal subjects of private law, has been for many

years in force. The following observations are to be made concerning this piece of codification.

1. There was a political necessity for an extension of the province of legislation over the field of private law, arising from the circumstance that Spanish, French and American law in many cases competed with each other for supremacy.

2. The Code actually adopted was substantially borrowed from the Code Napoleon, and is, so far, subject to the same criticism as has been visited upon that work by the advocates of codification.

3. The defects so strikingly characteristic of French jurisprudence would have been repeated here, but for the practical good sense which has been exhibited by the Bench and Bar of that State. Largely imbued with the principles and methods of the English Common Law, they have looked to that body of jurisprudence, so far as the Code permitted them, as containing the real sources of the law, and have fully adopted its maxim of *stare decisis*. Nothing is more observable than the extent to which the English and American reports and text books are cited as authoritative in that State. It would seem that the courts, except when there is some provision of the Code directly in point, and except in those cases where the Civil Law, which lies at the basis of the legal system of Louisiana, notoriously differs from the Common Law, seek the rule in any given case in the same quarters from which it is sought by us, and then inquire, if occasion arises, whether there is anything in the Code inconsistent with the rule thus found.

4. But a most impressive testimony against the expediency of codification is found in the deliberate criticism upon this

Code pronounced by one of the most distinguished of the judges who have administered its provisions. It contains definitions of the principal technical terms which it employs; and it must be admitted that no Code can otherwise well be constructed. Full, complete and accurate *definitions* are insisted upon by the scientific advocates of codification as the first requirement for such work. Such definitions are not more numerous in the Louisiana Code than in that of France, upon which it is based, and yet Austin declares that the paucity of such definitions is the most glaring deficiency in the French Code. Now, the very existence of these definitions in the Louisiana Code was found to be one of the greatest difficulties in administering it. Says Mr. Justice Yost, in giving the opinion of the court in Egerton *v.* The Third Municipality of New Orleans (1 La. An., 437): "Definitions are at best unsafe guides in "the administration of justice, and their frequent recur- "rence in the Louisiana Code is the greatest defect in that "body of laws." This is an emphatic condemnation of all codification, in the modern sense, for every one must agree that such a work necessarily involves full and complete definition of all terms and phrases as to the meaning of which there is the least probability of question.

The extent to which this difficulty is lost sight of by the advocates of codification is indeed marvelous. It would seem as if the ordinary experience of every lawyer would be enough to convince him of the hopelessness of any attempt to contrive definitions of terms which would answer the unknown exigencies of the future. How can that be defined which is not known and cannot even be imagined? It must turn out that the new phases and aspects of human affairs as they arise will continually prove contrary to all expectation, and will be found, on the one

hand, to have been caught up and carried by an ill-advised definition into a class to which they do not belong, or that no definition has been framed to suit them, and they are thus left wholly unprovided for. The great jurists of Rome, unquestionably the most complete masters in the accurate use of language, after a thousand years of effort, gave up the task in that maxim of despair, "*omnis definitio in jure civili periculosa.*"[1] It has been repeated a thousand times since by succeeding jurists of every age; and yet it is still argued that the whole system of private law can be successfully embodied in written language, although accurate and infallible definition is an essential requisite at every step of the process!

Of the so-called Codes recently compiled for the British possessions in India, we need only say:

1. That the utter confusion existing in those countries in respect even to native law, without mentioning the competition between that and British law, rendered a resort to statutory enactments a necessity;

2. Mr. Sheldon Amos, already referred to, in his plea in behalf of an English Code, deprecates any resort to the example of the Indian Codes for light in relation to the problem of codifying the laws of civilized nations;[2]

California adopted, some ten years or more since, substantially the same *Civil Code* as that which has been so often pressed upon the Legislature of New York. That Commonwealth is of too recent a growth, too limited in population and in variety of pursuits to furnish within so short a period any striking test of the merits or defects of the system. But so far as the experiment affords any instruc-

[1] Dig. 50, 17, 202.

[2] An English Code, p. 36, *et seq.*

tion, it is of the same character as that derived from the other examples already commented upon, and justifies the following observations.

1. Even less than in the State of Louisiana do either the Bench or Bar look to it for the true sources of the law. These are still sought, for the most part, as elsewhere in communities inheriting the traditions and methods of the Common Law, in the reported decisions of that and other States, and in authoritative text-books; and the Code seems to be brought into consideration only, or chiefly, when a question arises whether its provisions have changed the law.

2. The volume of litigation, so far as may be inferred from the number of reported controversies, has certainly not been diminished. There is no evidence whatever that it has had any sensible effect in lessening the magnitude of libraries requisite for obtaining an adequate knowledge of the law, or diminishing the labor of professional study. In short, no one practical advantage can be pointed out as having been gained by this experiment in legislation.

3. But the defects of the system have already manifested themselves in the most mischievous form. The Legislature at each Session is assailed with projects for its amendment. Some of these are well founded, and others, doubtless, are destitute of merit. The evil in either case is great. It is miserable to live under imperfect or erroneous law. It is scarcely less miserable to live under law which is liable to annual change.

I have now completed that part of my endeavor which

was designed as an answer to the inquiry whether, notwithstanding the arguments adduced to show the falsity of the theory upon which the scheme of codification is based, it had not been found to answer some useful purposes in the actual experience of States where it has been adopted. It has been shown that nowhere can any benefit be pointed out which has arisen from the conversion of unwritten private law into statutory forms; and that in those great European nations which have adopted the system of codification for a century and upwards, the uncertainty of the law, as evidenced by the conflict of decisions and inability of the legal profession to discharge its great function of giving trustworthy advice, is such as would be unendurable in England and the older and better established American States. Indeed, it has been shown that the scientific and well informed advocates of codification concede that no support can be gathered in favor of their theory from any actual experience of any government, ancient or modern. Their defense of codification is based upon theoretic grounds alone. Practical men should certainly regard it as little short of madness to venture upon so momentous and hazardous a step as to exchange a system of jurisprudence which has become what it is in virtue of the natural growth and development of free institutions through centuries of time, for that of foreign and monarchical States, originally adopted from political and dynastic reasons, and which in its practical operation falls far short, in point of excellence, of their own.

It may be asked why, if the facts really be as thus shown, should any learned and scientific jurists be found to advocate the policy of codification. It would be a sufficient answer to this question to say that it is not a matter of material importance if a few able men should be found entertaining

erroneous opinions. This is a familiar phenomenon in every science. So far as we are to be moved merely by the opinion of others, we must yield to the opinion of the great majority of such as are best capable of forming one, if such a majority is to be found; and there can be no question upon which side of this question of codification the great mass of intelligent opinion has arrayed itself. But instead of resting upon this short answer it may be well to explain how it is that a certain small number of able men have cherished some illusions upon this question.

Jeremy Bentham was, in fact, the first Englishman of note who advocated the expediency of a Code in the modern sense, that is, a legislative publication in statutory form of the whole body of the law so as to supersede all unwritten law. He was a man of pre-eminent intellectual ability, but not an experienced lawyer, or a safe guide upon any subject. His fundamental error consisted in his inability to conceive that the law of any people, savage or civilized, is, and of necessity must be, a gradual and slow evolution—a growth —proceeding from their original nature acting upon, and acted upon by, the circumstances with which they are surrounded. He imagined that a system of law could be created *per saltum* by spinning out through purely logical processes the consequences of a series of original intellectual conceptions. No sane man of intelligence can at the present day be found who would sanction his wild and extravagant schemes for reforming the jurisprudence of the world. He seriously sought by letters addressed to the Emperor of Russia, to the President of the United States, and to the Governor of Pennsylvania, to construct, out of his own brain, complete Codes, or systems of law for those countries and States. His particular antipathy was against unwritten law. He fancied that he could compose a Code

in language so clear that it would never require interpretation, or admit of dispute or argument. In his own words, "All plain reading; no guesswork; no argumentation; your "rule of action—your lot under it—lies before you." And he exhorted the American people to shut their ports against the Common Law as they would shut them against the plague! He undoubtedly rendered great service in his day by the vigor and ability with which he attacked many mischievous errors; but his constructive schemes proceed in such utter disregard of the facts both of history and human nature, that they have never secured any considerable favor from practical minds.

There have been since Bentham's time, among thoroughly educated lawyers, but few advocates, comparatively speaking, for codification. Of these the late John Austin, Sheldon Amos and Sir James Fitzjames Stephens, are the best representatives. Great respect is properly due to the deliberate opinions of such men as these; but there are some circumstances which must be kept in mind in estimating the value which should be attached to their opinions upon the subject of codification.

1. They do not pretend that the law of any nation has been carried to a higher degree of perfection than the Common Law of England and America. Indeed, they (or the two first named) admit that the Common Law of England is superior, in point of refinement, of scientific excellence and certainty, to that of any nation where codification has been adopted. They admit that no argument in favor of codification can be found in the practical experience of any nation. They admit that the experiment is a hazardous one, and can succeed only by securing for the difficult task the devotion of the highest legal ability in the several branches

of the law which the Profession can supply. They are not guilty of the absurdity of asserting that the scheme, even if successfully carried out, would simplify the law, so as to enable unprofessional persons to understand it, or even to make the acquisition of a knowledge of it an easy labor, even to professed students, or settle any questions of doubt or difficulty in the application of it.

2. What they complain of in the present condition of the law in England, for it is of England that they speak, is that the Common Law is destitute of *system;* that it cannot be found set down in any book in *orderly and scientific form*, but must be gathered piece-meal from a vast mass of judicial decisions upon particular cases; and this defect they think codification would tend to cure. Their views, as just stated, reveal at once the point of observation from which they look upon the subject. They are the views of professors of law, whose lives are devoted, not like those of lawyers and judges, to the practical administration of the law, but to teaching it, and lecturing about it. Minds thus engaged naturally desire to see their science set down in books in the arranged and orderly forms in which other sciences are found; and the want of such an arrangement is regarded by them as a serious defect. Some brief observations should be made concerning opinions such as these.

In the first place, the defect thus suggested is, in a practical point of view, of but a moderate degree of importance. If justice is, in fact, in any nation well administered, if the affairs of men are regulated by a wise and cultivated body of legal rules, and if these can be learned by the professional class with such certainty as to enable it to furnish trustworthy advice and guidance, the mere circumstance that such rules cannot be found set down in words and arranged in orderly and systematic form, is not, of itself, a very serious matter.

In the next place, the objection raised is, properly speaking, not to the *law*, but rather to the *treatises upon* the law, in other words, to the *literature* of the law; and it would be wholly removed, if some competent hand, or hands, should be found who would compose a correct treatise upon the whole body of the law, in which all the knowledge relating to it should be arranged in a concise, scientific and orderly form. But this is a work which does not require legislation; indeed, it is one in which legislation is wholly out of place. It would be deemed by every one supremely absurd for the Legislature to provide for the publication of an authoritative treatise upon chemistry, or any other science; but, in truth, it is no more absurd than to make a like provision for a scientific arrangement of the present sum of knowledge concerning the law.

The class of advocates for codification of which we are now speaking is one which pays great attention to the Roman Law, and their views are doubtless largely affected by their studies in that field of jurisprudence. They find there that *system*, the want of which they lament in the Common Law. They are, by means of this system, the excellence of which is willingly admitted, easily able to view the domain of the law as a *whole*, and the particular subjects and topics as parts and divisions of this general field, and are thus enabled the more readily to comprehend the relation of the several parts to the whole system.

But what these writers do not seem to perceive is, that this excellence of the literature of the Roman Law—this perfection of systematic arrangement—sprang out of a great weakness in the Roman State. It arose from the fact that the Roman judges were not themselves experts in the law,

but, as already pointed out, ambitious politicians, running through the course of public honors, which ended in the consulship. They were not, as the judges are with us, the real students and authoritative expounders of the law; and as these must necessarily exist somewhere in every civilized State, they were supplied in Rome by a class of professional jurisconsults, who made such work their occupation, their ambition and their road to renown. It was to them that the magistrates of the Roman State had recourse for the instruction requisite to enable them to pronounce their judgments. We have said that this was a political weakness. Most certainly it was. What comparison in point of political excellence can be instituted between the system in which the magistrate, who is to pronounce the judgment, is the man who actually possesses the requisite skill and learning, and that in which ignorance sits upon the Bench and feebly shines by a borrowed light? The actual and practical administration of justice in Rome was far inferior to what it is with us; but, at the same time, a body of *private* jurisconsults—of scientific lawyers—(not the advocates on the forum, for these, Cicero himself not excepted, were but second rate lawyers), was produced probably superior to any which can be found in any other age or nation. Had the Scævolas, or Papinian or Ulpian, actually sat to administer justice, the condition of the Roman State would have been greatly improved, though the world might have lost the benefit of their laborious treatises.

Another thing, which the advocates of codification thus affected by the literary excellence of the Roman jurisprudence do not seem to perceive, is that this excellence did not in any sense, or degree, proceed from *legislation*. The Roman jurists *never asked for their treatises the sanction of a statute* These works stood or fell upon their own merits

or defects. Their authors, like all real masters in any science, appealed for their support to the general intelligence of their age. All that has ever been done in the way of reducing the body of our own law to a concise, scientific and orderly system has been accomplished, not by legislative intervention, but by individual genius and labor. All that ever shall be achieved in this direction will be the fruit of the same species of effort. All that has ever been ascertained and found to be true in the law forever stands; not because of the binding force of any judgment or declaration, but by reason of the inherent power of truth itself when once clearly exposed to intellectual recognition. What can be more palpably true than that he who asks for a legislative sanction for a particular reduction of unwritten law to written statutory form, confesses by that very act the inferiority of his work? The purpose of seeking the legislative sanction is to preclude denial, question and controversy, by converting the written into actual law. It is to bind the native freedom of the mind. But if the written reduction be true, it needs no such aid from legislation. It will stand, as all scientific truth stands, the more firmly in the face of assault. If the written reduction be not true, surely it ought not to stand, and ought not to receive an unmerited support from legislative authority. If the admirers of the Roman law think that system has merits which it is desirable to reproduce in England or America, they must remember that this result can be accomplished only by imitating the methods of the authors of that jurisprudence. *They* would have scorned to defend their conclusions from behind the ramparts of a statute, or to ask for them any other reception than fair treatment in the arena of unfettered reason.

It should also be remembered that it is quite possible to exaggerate the advantages furnished by the fine systematic

forms in which the Roman law is exhibited to us. No great lawyer was ever yet made by the study, however profound, of such forms. What lawyer has not had frequent occasion to feel that the abstract statements of teachers and text-books, even the best, make little impression upon the mind, and that his attention does not become really fixed, nor does his understanding firmly grasp the subject upon which he is engaged, until he turns to the actual *cases* as recorded in the Reports, and finds in them the *living* law as it has been actually developed by the real transactions of men.

But the opinions in favor of codification are completely overborne by those which are opposed to it. We have no space to present anything more than a selection from the latter. In England the subject has been many times and in many forms, within the last thirty years, pressed upon the attention of Parliament and the Profession, and the opinions which such efforts have drawn from the judges, lawyers, and statesmen of that country are instructive.

In 1853, Lord Cranworth, since that time Lord Chancellor of England, submitted to the whole body of the judges of the superior courts a bill designed to consolidate in one statute, in other words, to codify, the whole of the criminal law, written and unwritten, and sought from them their deliberate opinions, whether such a measure would be likely to produce benefit in the administration of criminal justice, or the reverse. Now, if there be any department of unwritten law which can safely be subjected to codification it is that which relates to the punishment of crimes; for as has been already pointed out, a large part of this branch of jurisprudence appropriately falls within the just province of written law. If, therefore, the conversion of unwritten into

written law be not expedient so far as relates to this subject, it cannot be expedient in reference to any other.

The answers of the judges to the questions submitted to them are separately given, and extend to forty-four pages of a Parliamentary paper; but they all unite in condemning the codification of the unwritten law even to the limited extent proposed. The views of Mr. Justice Coleridge are expressed with great clearness:

"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 dis- "tinguishes 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 gradu- "ally 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 Mr. Justice Talfourd says: "To reduce the *statute* "*law* into a narrow compass is an object entirely free from

"objection, and which, if accomplished with care can pro-
"duce 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.

"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 construc-
"tion of the words of the same statutes will arise, unfore-
"seen 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 de-
"cisions."[1]

These deliberate opinions representing the unanimous judgment of the English Bench at that time settled the question of codification in England for a long period, but it was again indirectly brought before Parliament in a great speech delivered in the House of Lords in 1863 by Lord Westbury, then Lord Chancellor, in which he unfolded his plans of law reform.

This great lawyer will certainly not be accused of excessive conservatism or attachment to present institutions. His tendencies were strongly in the opposite direction. Indeed, he inclined to the view that a Code should be the object ultimately arrived at; but he admitted that the Common Law at present was by no means ripe for such a measure. In pursuance of a movement which Lord Westbury may be

[1] British Parl. Papers, 1854, Vol. LIII., 303.

said to have initiated in the speech above referred to, a royal Commission was issued in 1866 to Lords Cranworth, Westbury and Cairns, Sir T. P. Wilde (since Lord Penzance), Mr. Lowe (since Lord Sherbrooke), Vice-Chancellor Wood (since Lord Hatherly), Sir George Bowyer, Sir Roundell Palmer (since Lord Selborne), Sir J. G. Lefevre, Sir T. Erskine May, Mr. Daniel, Mr. Thring and Mr. Reilly "to "inquire into the expediency of a digest of the law and the "best means of accomplishing that object, and of otherwise "exhibiting in a compendious and accessible form the law "as embodied in judicial decisions."

Certainly, all must agree that the consideration of the questions of law reform could not be committed to an assemblage of abilities superior to that exhibited by the above array of distinguished names. And although the question directly submitted to them concerned the expediency of a *Digest* of the law, yet the language of the Commission was quite broad enough to require them to consider the best form in which the law should be embodied and expressed; and if in their opinion a Code would be such best form, they could not well report in favor of a Digest. These eminent men reached no conclusion in favor of a Code. They recommended an attempt to compile a Digest only, but this recommendation seems never to have been acted upon.

Several efforts have since been made in England, mainly proceeding, it would appear, from Sir J. F. Stephens, to induce Parliament to take some steps toward a codification of particular departments of the law. The fate of these attempts is quite instructive in forming an estimate of the nature of the opinions of those who advocate codification. Sir J. F. Stephens is one of the most distinguished of these, and there is not among them, probably, a single hand more capable of constructing a Code. What he cannot do in this

direction may better be let alone as an impracticable endeavor. Now, it happens that all such measures in England find their first close examination before a Select Committee of the House of Commons, which generally embraces a good representation of legal and legislative ability, and whose deliberate opinion that House seldom overrules. In 1874, a bill for the codification of the English law of homicide, drawn by Sir J. F. Stephens, was introduced into Parliament, and referred to a Select Committee; but the scrutiny of that body soon revealed such fatal defects as to wholly condemn it.

In 1878 a Royal Commission was issued to Lord Blackburn, Mr. Justice Barry (of the Irish Bench), Mr. Justice Lush and Sir J. F. Stephens, to consider the expediency of a Draft Code relating to indictable offenses which had been prepared for the purpose of submission to Parliament. This Commission reported in 1879, and submitted a proposed Code embracing the Criminal Law, which was drawn principally, we may suppose, by Sir James. But this was an extremely modified form of codification, inasmuch as it did not purport to supersede the Common Law except so far as its own specific provisions went. And even this did not successfully pass the scrutiny of the Select Committee.

What deserves notice in connection with this last effort is the irreconcilable difference of opinion among the advocates of codification concerning the most important questions. The scheme had reference, not to the whole body of the Common Law, but only to the criminal law, concerning which, as we have already said, codification is not encumbered with so many difficulties. But even here the supporters of the measure (including Sir James himself) thought it not safe to cut altogether loose from the unwritten law. The late Lord Chief Justice Cockburn, however,

wrote a powerful letter opposing the entire measure, and, while he professed himself in favor of the codification of the Common Law, declared that this particular scheme, for the very reason that it sought to retain all of the unwritten law which it did not expressly do away with, would only "make confusion worse confounded." What reliance is to be placed upon the opinions of the supporters of a scheme, when they differ so widely as to what the nature of the project should be, and denounce each other's attempts to carry it into effect?

In speaking of codification in England, I should not omit to notice a class of recent statutes in which parts of some particular branches of private law have been reduced to statutory form. Of these the Act passed in 1882, relating to Bills of Exchange and Promissory Notes, is the most conspicuous instance. How far this statute may serve any useful purpose can of course be determined only after a sufficient experience of the effects of its operation shall enable a judgment to be formed. But should this judgment be favorable, it would prove nothing in support of *general* codification such as is attempted in the proposed *Civil Code;* and this for two reasons: in the first place, it deals with a chapter of the law which consists, for the most part, of formal technical rules, such (as has been already pointed out) as may with some propriety be made the subject of written law; and, in the second place, it does not purport to codify the *whole* of that law. It does not aim to exclude the unwritten Common Law, but expressly retains it, by a provision that such law shall continue in force wherever it is not inconsistent with the statute.

What particular advantage can be expected from this enactment is not manifest. The law upon the points covered by it was already well settled; and if this reduction of

it were presented in the shape of a *Digest*, it would have furnished to the public and the Profession all the aid which can now be derived from it.

I here conclude the discussion of the question whether any codification of our unwritten private law is expedient; and if I have been at all successful in the task, that question must be answered in the negative for:

Firstly.—The scheme of codification is condemned on scientific principles;

Secondly.—It is condemned by the teachings of actual experience; and,

Thirdly.—It is condemned by a preponderating weight of the opinions of jurists, judges and statesmen.

I should not, however, leave this subject without setting down, in concise and orderly form, a statement of the evils which would flow from its adoption. These, or some of them, have necessarily been touched upon in the course of the preceding observations.

1. *The necessary introduction into the law of a great mass of error.*—As has been shown, a rule enunciated by a statute must be applied to all cases which fall within its scope, according to a fair interpretation of its language. Let it be supposed that language employed in it is used with the utmost accuracy, it is still impossible that its framers should *intelligently* provide for unforeseen cases. But the statutory provisions, by reason of their generality, *must* unavoidably embrace such cases, and the result necessarily is that such cases must be disposed of by a statute framed without reference to them, and consequently such disposition is as likely to be wrong as right, depending as it does wholly upon chance.

2. *A great increase of uncertainty in the administration of the law.*—The sources of this uncertainty are twofold. *Firstly*, human language is, at the best, so inaccurate an instrument, there being often numerous different senses in which the same word is understood that there are, and always will be, a multitude of doubts concerning the meaning of the best drawn statutes. And all such doubts would be pure additions to those which now arise from other sources. *This* source of doubt does not exist in unwritten law. *Secondly*, whenever statutory law, in its application to an unknown case, is found to work injustice in consequence of the case not having been foreseen, the effort and the tendency always is to impose violently upon the statute an interpretation not in harmony with the natural meaning of its language. In every such case, it is highly *uncertain* whether the effort would succeed. And this is a source of uncertainty unknown to unwritten law.

3. *Incessant, frequent, sharp and often ill-conceived changes in the law.*—Next to absolute *right*, stability is the chief excellence in jurisprudence. This virtue never was, and never can be, secured in any high degree in the field of private law when such law is reduced to statutory form. Whenever a statute is found to work injustice, it must be changed. Society never has endured, and never will endure, except in trivial matters, any dealing by the courts with private rights not in accordance with the popular standard of justice. So, also, when uncertainty is found to exist, amendments of the statutory law must be made to remove the doubts. To effect such changes, the Legislature must be appealed to. The appeals will and must be frequent. The habit of changing the law necessarily tends to destroy that sense of the necessity of stability which is now (although unfortunately diminishing) one of the greatest safeguards for prop-

erty, business and liberty. Besides, these changes are to be effected by a numerous body, for the most part wholly unskilled in the delicate science with which they are thus called upon to deal.

We have a most convincing proof of the reality of this danger in the history of our Code of Civil Procedure. This is a branch of law which may not inappropriately be reduced to statutory form; although, as I conceive, those forms should consist of *rules* framed by the courts who are to administer the procedure. That Code, although at one time made, by cautious and careful amendment, to adequately answer its purpose, has been so incessantly changed by legislation that even its principal author disowns and contemns it, and few pretend to understand it. It is to-day more embarrassing to the practitioner than it was in its originally imperfect state; and what with its present condition and the multitudinous changes which are hereafter likely to be made in it, the majority of lawyers justly hold all time expended in the study of it, beyond what the exigencies of the moment require, to be misspent. Since its enactment in 1848, more than six thousand *reported* decisions have been made of disputes concerning its meaning, and the unreported controversies and decisions have been vastly larger. The public expenditure which has been occasioned in interpreting and amending it is incalculable. It is safe, however, to say that it has involved an expenditure of time by lawyers, judges and legislators (for all of which the people have been made to pay) tenfold greater than that employed on the law of procedure during our whole preceding history; and this, too, after making all just allowances for the increase in recent times of population, business and wealth. The thought that our whole body of private law may be subjected to the like changes and

hazards, as it certainly would be if converted into statutory forms, is in the highest degree alarming.

But in relation to substantive law the danger is infinitely greater. It is the first necessity with a Code that its language should be to the last degree accurate and precise, and, especially its principal terms, be always used *in the same sense*. Doubt and confusion without end must be the result unless this requirement is fulfilled. Hence, the most cautious advocates of codification insist that while a Code should contain the work of many minds, it should be subject to the final revision of *one* mind, and after its adoption should be exempted from interference by way of amendment, except at stated intervals separated by long periods and then only by a permanent Commission charged with the duty of supervising its practical operation. In the case of the proposed *Civil Code*, no such caution in relation to amendments is suggested, nor is it with us practicable. Each Session of the Legislature would pour forth its quota of amendments, drawn by hands unfamiliar with the Code itself, drawn sometimes by laymen, drawn in haste, drawn in ignorance of the true meaning of the Code itself. What limit can be imagined to the confusion and uncertainty which must arise after a few years of such legislative experience?

4. *The substitution in forensic debate of controversies concerning words in place of controversies concerning principles.*—This would be a certain and serious evil. At present, when any doubt arises in any particular case as to what the true rule of the unwritten law is, it is at once assumed that the rule most in accordance with justice and sound policy is the one which must be declared to be the law. The search is for that rule. The appeal is squarely made to the highest considerations of morality and justice. These are the rally-

ing points of the struggle. The contention is ennobling and beneficial to the advocates, to the judges, to the parties, to the auditors, and so indirectly to the whole community. The decision then made records another step in the advance of human reason towards that perfection after which it forever aspires. But when the law is conceded to be written down in a statute, and the only question is what the statute means, a contention unspeakably inferior is substituted. The dispute is about *words*. The question of what is right or wrong, just or unjust, is irrelevant and out of place. The only question is what has been written. What a wretched exchange for the manly encounter upon the elevated plane of principle!

5. *The arrest of the self-development of private law—its true method of growth.*—This is, as I conceive, perhaps the gravest mischief with which codification is pregnant. It cannot too often be repeated that the practical business of administering private law consists in the application by the courts of the national standard of justice to the business and dealings of men. This national standard of justice is something which cannot be embodied in written rules, or set down in any form of words. It is the product of the combined operation of the thought, the morality, the intellectual and moral culture of the time. Under our present unwritten system of law it is ascertained and made effective by the judges, who know it and feel it because they are a part of the community. They cannot but recognize it and yield to it, because their judgments are subject to the instant and close scrutiny of keen professional observers, not to mention the oversight of the press and the general public. This national standard or ideal of justice grows and develops with the moral and intellectual growth of the community, and through the

operation of judicial decision is transferred to the province of the law. Hence a gradual change, unperceived and unfelt in its progress, is continually going on in the jurisprudence of every progressive State. The natural agency through which this healthy progress is effected is that of the devoted students and authoritative interpreters of the law. In Rome it was the private jurisconsults. In England and with us it is the judiciary. The question is, shall this growth, development and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the work, or be transferred to a numerous legislative body, disqualified by the nature of their duties for the discharge of this supreme function? There ought not, as I conceive, to be a difference of opinion among men who are willing to give this consideration the attention it deserves.[1]

[1] We gladly borrow here the well chosen language of a very able and very temperate writer, who felt that this consideration called for a surrender of the advantages which at one time he believed codification might furnish. We refer to the late J. A. Dixon, a distinguished lawyer of Glasgow. "This slow and gradual "evolution or spontaneous growth from judicial decision, and the slow operation "of custom in determining organic changes in all the departments of the law, "explain how it is that there is a continuous process of refinement going on in "the Common Law of a country in all ages. As institutions undergo a silent "modification, as morality progresses, as new needs and new modes of satisfying "needs come to the surface, and as the countervailing facts of new modes of fraud, "oppression, and of crime also present themselves, a demand for suitable laws or "modifications applicable to the ever new circumstances makes itself felt on every "side, and is instinctively responded to by the judges, at once the sharers and "regulators of public sentiment. The change in laws so brought about is so "exceedingly minute from day to day, that it will only be noticed by comparing "classes of decisions made at tolerably long intervals of time, on the same states "of fact, and when no positive legislation has intervened. You see whole sections "of law silently transformed, you see new regions arising and others disappearing, "not by violent revolutions, but by the astonishing operation of some slowly-"working causes whose existence becomes visible, and whose effects are to be

The point now under notice can be summed up in a very narrow compass, and I cannot help thinking that it is decisive of the whole question of codification.

(1.) It is agreed on all hands that private jurisprudence is a science; whence it follows that it can be cultivated, developed and advanced only by the masters of that science.

(2.) It is also agreed that a legislative body consisting

"measured only by generations or centuries—like the stupendous geological "changes—that continuous formation and destruction of strata—the submersion of "ancient continents—the upheaval of new—not by cataclysms and earthquakes; "but as the result of forces which are in active operation around us day by day, "and which produce so little disturbance that their very existence is unperceived "till we contemplate their vast results over epochs of time.

"What has been the great factor in the creation of the Mercantile Law? Not "legislative intervention—our Mercantile Law has been the product almost "entirely of custom and judicial decision, and in the various stages of its history "it has moulded and adjusted itself with the most remarkable sensitiveness to the "progress of commerce and civilization. The progress in this particular depart- "ment of law is perhaps nowhere better observed than in such a book as Mr. "Langdell's collection of Cases on Contracts from the earliest period of English "Law down to the present day. Another great region or tract of law which has "undergone in a very remarkable manner this process of silent and imperceptible "change, is the whole region of doctrines pertaining to Trusts and Fraud—the "prominent matters of equity jurisdiction in England. The whole doctrines of "equity, both as avowedly administered in the equity courts, and as they have in "a less obtrusive way crept into and pervaded the decisions of the Courts of "Common Law, all these doctrines have involved themselves into the state of high "moral refinement in which they at present exist, not so much by the special "moral elevation of particular judges, as by the concurrent onward impetus of the "whole community, which all the judges have shared and felt the influence of. "The history of the analogous Prætorian jurisdiction, and of the Prætorian "doctrines in Roman law, is another instance—particularly in questions of *bona* "*fides*, *culpa*, *dolus*, *fidei commissa*—of the same process by which the unwritten "law of a country absorbs into itself the whole gradual refinement and elevation "of advancing civilization; how, with the general advance in moral sensitiveness "on the part of the community, there comes a demand in matters of contract and

principally of laymen, possesses no single qualification which enables it to prosecute the cultivation and improvement of this science, and its adaptation to human affairs.

(3.) The mode of effecting the improvement of private law and adapting it to the ever-varying wants of men, which the recent advocates in England of codification suggest, is the creation by the Legislature of a Commission composed of eminent jurists, whose duty it shall be to observe the operation of

"ownership, and legal duty, for fine and still finer shades of faithfulness, for "absolute purity of intention, for the repression of all indirectness of aim and "duplicity of purpose, for what has been called a superior refinement of moral "scrutiny into the duties which the law will enforce, the negligences which it will "punish, the frauds which it will defeat. The Prætorian Jurisprudence and the "Equity Law of England developed themselves under widely different auspices, "and I think the growth of both systems in gradual niceness and delicacy of "perception of the subtlest shades of legal and moral distinctions, is a proof that "an unfettered, unwritten law grows with a nation's growth, and refines itself "with the national refinement. The writings of the Roman lawyers and the "history of English Equity jurisdiction alike exhibit the exquisite accuracy and "balanced moderation with which, in the hands of competent lawyers, an "unwritten law succeeds in doing, by the slow process of adjustment and "refinement of which I have been speaking, what no legislative effort ever could "accomplish—I mean the work of reducing into scientific form, of fixing, circum- "scribing, limiting, getting into practicable shape as instruments of justice, the "apparently indefinite and indefinable principles of morality—of seizing, appro- "priating, and applying, day by day, and year by year, the insensible increment "and product of the deepening moral sense and conscience of the nation. This is "what Savigny means when he says, in his remarkable Treatise on the Vocation "of our Age for Legislation, that the largest portion of the unwritten law of every "nation is the exact product and measure of the national character and temper—a "reflex of its life and progress. This also explains the immense importance, even "in the case of a codified law, of not overlooking the difference between a process "of codification that has gone on, as that of France, simultaneously, as it were, "with the development of the law, and a Code to be framed at one stroke, and "made absolute and final, such as ours might be." (Journal of Jurisprudence, 1874, p. 312, *et seq.*)

the Code, and to report at intervals—say, of ten years—what improvements, changes and additions should be made. But what comparison can such a mode of amending, improving and adapting the law bear to that which is now in actual operation, in which the whole machinery of administering justice, embracing, upon the Bench, tenfold the ability and learning which could be arrayed upon a Commission, and all the ability of the Bar, is silently, slowly, and without violent change, performing, as a subsidiary function, this very task? How poor the aids and advantages possessed by a Board of Commissioners for ascertaining the true rules which justice and sound policy should apply to human affairs, compared with those enjoyed by a Bench of judges, who have before them the *living* conditions of fact, and the aid of animated debate by the highest ability which either ambition, the love of applause, or the love of money, can tempt into the service? The immense machinery of the judicial establishment is moved only at an enormous public expense, and even this is a small item when compared with the private expenditure which it involves, and its sole function is to ascertain and declare *truth*—truth in the realm of fact, and truth in the realm of science. What could surpass, or parallel, the folly of discarding the aid of this prodigious instrumentality furnished ready for use, and replacing it with an additionally expensive contrivance in the shape of a Commission representing but a small fraction of the ability, and enjoying none of the pre-eminent advantages possessed by that which is thus abandoned?

6. *The loss of another distinct instrumentality for the improvement of the law*, viz.: *that furnished by the writings of private jurists.*—As has already been shown, it was from this source that the Roman law drew its principal nutriment; and who will undertake to estimate the value of the contributions

which the jurisprudence of England and America has from time to time received from the private labors of Coke, Hale, Blackstone, Hargrave, Sugden, Kent and Story?

Such minds will lend their efforts only while the law remains, as now, a science unimprisoned in the rigid language of a statute, and susceptible of development, cultivation and improvement in the same manner as other sciences. The flower of genius and eloquence may flourish under the "gladsome light of jurisprudence," but would wither and die under the dull shadow of a Code. Bold intellects will enlist with ardor in the strife, if the contest is to turn upon the weight of reason and argument, but abandon it with contempt, if it is to be decided by vote of a Legislature or a Board of Commissioners.

7. *The enforced abandonment of all hope of bringing the private law of all English speaking States to a unity.*—Few will question the extreme importance of this object. That a private transaction between men in New Jersey or Ohio should be governed by a different law from that which would rule the same transaction in New York, must be a great evil. The popular standards of justice in different States and nations, though in most particulars alike, are yet in many respects different, and lead to the adoption of different rules. Right, reason and justice are, however, everywhere the same; and in proportion as the popular standards are cultivated and made to approach perfection, they are brought more and more into unison. The progress of civilization acting upon the courts under our present system is continually aiding this approach to unity. The opinions of the courts appealing, as they now appeal, to the same principles, are not only cited as authorities in the jurisdictions where they are pronounced, but are listened to with respect in all others. Truth is welcomed, from whatever quarter it may

proceed, and in the conflict with error will eventually everywhere prevail. This reciprocal influence of the intellectual and legal culture of independent States which thus tends to bring all private law to a unity, must of necessity cease when the courts, instead of founding their judgments upon principles which must be everywhere the same, are obliged to base them upon the language of statutes which may everywhere be different. What more desirable condition, what more impressive spectacle can there be, than that of fifty States of a great continent, and Empires beyond the seas, all appealing to the same law, and aiming to drown all dissent in one concurring voice? And what more mischievous condition than that all these States and nations should have Codes, each differing from every other, without any conceivable agency for bringing them into unison; but gravitating, by a law of their being, into infinite diversity?

Nor is there any advantage which codification can afford by way of recompense for the mischiefs thus enumerated which are inseparable from its adoption? I will not stop to answer the insincere assertion that if the law be written in a Code laymen can comprehend it and become their own lawyers. The sober advocates of codification never make this claim, and even Bentham himself expressed a contempt for this *ad captandum* pretense. What lawyer does not know that the points upon which he is now most frequently applied to for advice are those which are governed by statutory law, and that the native sense of justice existing in the breasts of all men gives them a better knowledge of unwritten law than they can ever attain of statutes by the most diligent perusal? The assertion that a Code enables a professional man to certify himself concerning the law without having recourse to the extensive libraries which are at present necessary or useful, has as little foundation. No lawyer can truly possess himself of what is justly termed a *knowledge* of the law without understanding the reasons and philosophy upon which it is founded, and the history of its development; and for this purpose libraries equally extensive will be required with, as without, a Code. And if there were any advantage in this particular, a *Digest* would furnish it as adequately as a Code, and such a work is the proper fruit of private labor and enterprise, and requires no legislative sanction.

In this discussion I have thus far said little concerning the merits or defects of the particular specimen of codification which has been so repeatedly pressed, and will, doubtless, be again pressed, upon the attention of the Legislature of New York. I have endeavored to show that any attempt at the codification of the unwritten law, with whatever skill prosecuted, proceeds upon a false theory, and is an erroneous move in legislation. But it would be vain to expect that all who may bestow upon these pages the honor of their attention will concur in these conclusions; and many may believe that it is possible to convert the unwritten law into such concise statutory form as to secure great public benefits. To such minds the question of the merits of this particular performance will be a matter of interest, and candid ones will not yield their assent to a scheme which, by reason of its own peculiar defects, would serve only to add further confusion, uncertainty and perplexity to the administration of justice. The attention of such is invited to the following considerations, which seem to make it very plain that, even if some scheme of codification were expedient, *this*, at least, should be peremptorily condemned.

The proposed *Civil Code* had its origin in one of the pro-

visions of the State Constitution of 1846. The purpose of this provision was to make an *experiment*, with the view of ascertaining whether a codification of the law, in whole or in part, could be accomplished which would promise a public benefit sufficient to justify the Legislature in adopting it. This, of course, could not be determined except upon an examination of the finished work; and the provision contemplated the creation of a Commission, which should be charged with the duty of making a Draft Code and reporting it to the Legislature for the action of that body. The responsible duty of determining the momentous question, whether it would be expedient to supersede the existing law, in whole or in part, by such a Code, would necessarily rest upon the judgment and discretion of the Legislature.

Under this provision the present proposed *Civil Code* was reported to the Legislature in 1865; it was printed and very widely distributed throughout the State. The Commissioners appointed (although the work has the sanction of two only of their names) were Messrs. William Curtis Noyes, A. W. Bradford, and D. D. Field; but the gentleman last named is understood to have had far the largest share in its preparation. Mr. Noyes died, greatly lamented, before the work was reported. Each of these gentlemen enjoyed a high repute for intellectual ability and professional skill. Mr. Noyes and Mr. Field had, during their professional lives, been actively employed in a very varied and general practice of the law. Such absorbing occupations scarcely afford the leisure which enables a man to attain a thorough scientific knowledge of any branch of the law. Mr. Bradford filled with distinction the important judicial office of Surrogate of the City and County of New York, and had acquired an unusual mastery of the law relating to wills and the administration of decedents' estates. His attainments in other

branches of the law were not extraordinary. Neither of these gentlemen abandoned his ordinary occupation to devote himself to the work of preparing this Code. It is the fruit of such hours as they could rescue from other engrossing demands. The scientific advocates of codification would smile at the suggestion that such men, with such opportunities, could produce a general Code worthy even of the name. Their notion of such a work includes the devotion, to the exclusion of all other occupations, of *many* minds, embracing the special masters of each branch of the law, during many years, and the expenditure for the purpose of securing such exclusive devotion—of at least a million of dollars. And their view is, that unless the men fully qualified for the task can be found, and their services secured, the enterprise should not be undertaken.[1] These observations are made in justice to the authors of the work; for it would be no impeachment of their *abilities*, if the performance should be found to be inadequate. The submission, however, of a grossly imperfect work would necessarily reflect unfavorably upon their *qualifications* for the task, and the trustworthiness of their recommendations.

[1] Austin, notwithstanding his belief in the feasibility of a general Code, if men competent to the task of producing one could be found, discourages the endeavor, unless this prime condition can be satisfied.

"But taking the question in the concrete, or with the view to the expediency "of codification in this or that community, a doubt may arise. For here we "must contrast the existing law—not with the beau ideal of possible Codes—but "with that particular Code which an attempt to codify would then and there "engender. And that particular and practical question, as Herr von Lavigny "has rightly judged, will turn mainly on the answer which must be given to "another; namely, Are there men then and there competent to the difficult task "of successful codification?—of producing a Code which, on the whole, would "more than compensate the evil which must necessarily attend the change?" (Austin's Jurisprudence, Campbell's Ed., vol. 2, p. 132.)

These Commissioners, in reporting their Draft for a proposed Code, prefaced it with an "Introduction," in which they narrate their labors, and discuss some of the questions concerning codification. It is understood to have been penned by Mr. Field, and it contains their, or at least his, ideal of what a Code should be: This shall be given in his own language. "The records of the common law are in "the reports of the decisions of the tribunals; the records of "the statute law are in the volumes of legislative acts. That "these records are susceptible of collation, analysis and "arrangement, might have been assumed beforehand, even "if we had not the proof in our libraries, in digest upon "digest, more or less perfect, to which we daily resort for "convenience and instruction. The more perfect a digest "becomes, the more nearly it approaches the Code contem-"plated by the Constitution. In other words, a complete "digest of our existing law, common and statute, dissected "and analyzed, avoiding repetitions and rejecting contra-"dictions, moulded into distinct propositions, and arranged "in scientific order, with proper amendments, and in this "form sanctioned by the Legislature, is the Code which the "organic law commanded [*sic*] to be made for the people of "this State." (Introduction, p. xv.)

Without stopping to inquire whether this language well describes what a Code should be, all must agree that it describes a *Digest*, which, if it existed, or could be created, would be of priceless value to the world. A book containing a statement in the manner of a Digest, and in analytical and systematic form of the whole unwritten law, expressed in accurate, scientific language, is indeed a thing which the legal profession has yearned after:

"Prophets and kings desired it long,
And died without the sight."

Such a work would not, indeed, supersede the treatises and reports, or diminish the necessary size of libraries; but it would, by facilitating, *save* labor. It would refresh the failing memory, reproduce in the mind its forgotten acquisitions, exhibit the body of the law, so as to enable a view to be had of the whole, and of the relation of the several parts, and tend to establish and make familiar a uniform nomenclature. Such a work, well executed, would be the *vade mecum* of every lawyer and every judge. It would be the one indispensable tool of his art. Fortune and fame sufficient to satisfy any measure of avarice or ambition would be the sure reward of the man, or the men, who should succeed in conferring such a boon upon his fellows. Such a work would not, indeed, in our view, be suitable to be *enacted* as the positive law, for even *it* would be found to wholly fail in its operation upon new and unforeseen cases; but statutory enactment would not, in any degree, be necessary to its value. It could proudly dispense with any legislative sanction whatever.

We are able to pronounce whether the actual performance has in this instance corresponded in any reasonable degree to this high ideal. All will agree that its actual reception by the profession must be an infallible test of this question. We are simply, therefore, to ask, is this work, having been published for nearly twenty years, at the elbow of every lawyer and judge, and like Kent and Blackstone, in the hands of every student? Do the presses of the country groan under the labor of producing copies sufficient to meet the demand? On the contrary, although thousands of copies of it were distributed, no use was ever made of them, and they speedily found their way among those collections of bibliographical rubbish which time accumulates in every law library. The Legislature to which it was reported failed to take favorable action upon it, indeed,

scarcely took notice of it, and the lawyers found it to contain nothing which would even aid them in their labors. It confessed its own intrinsic worthlessness by sinking without observation into oblivion. It is now gravely proposed to draw this useless product from merited obscurity, to fix upon it by statute an approval which neither the Bench nor the Bar ever gave, and make it the positive law of the imperial State of New York!

Some may think, however, that the test above applied to determine the character of this work is not the most satisfactory, and that the performance is entitled to an examination upon its own merits. Any desire for a close inspection of the character of the work should, of course, be welcomed; but it will not be expected that this whole *Civil Code* should be made the subject of examination within the limits of a review even so extended as the present. It is, however, possible to select some part, presumably as well executed as any, and subject *that* to a scrutiny. The writer has already had occasion to make such an examination of a single Article for the purpose of supporting a remonstrance against the measure addressed to Committees of the Legislature, and it may be well to incorporate in this place the results of that labor. The Article referred to is the Fifth of Chap. III. Title VII., Part III. of the Draft Code reported as above mentioned in 1865. It consists of eight sections only, and contains all there is in this proposed *Civil Code* relating to the law of General Average. The Part thus selected for scrutiny was originally taken at random; but it happens to be an Article exceedingly well adapted for the purpose of testing the merits of the performance, for the reason that it is an instance of the attempted codification of a piece of purely unwritten law. If this portion should be found, upon a close examination, to be grossly defective, it would not indeed necessarily follow that the rest was equally bad, but

it would follow that no other part could safely be accepted *upon trust;* and that none of it should be enacted as law, until its accuracy had been demonstrated by a critical examination of the whole.

The law of General Average is not of statutory origin, but rests simply upon the dictates of natural justice and the usages of the commercial world. In maritime adventures, when the ship and cargo are involved in a peril which threatens the whole, the *voluntary sacrifice of a part* may have the effect of rescuing the residue from otherwise inevitable destruction. If such sacrifice be made and safety secured, justice requires that the loss of this part should not fall wholly upon its owner, but that it should be equally distributed among the owners of all property at risk in proportion to the values of their several interests. Sometimes, also, it is necessary to *incur expense* to relieve a ship from a peril in which she is involved, as for the hiring of tugs and lighters in the case of a stranding, and, inasmuch as there is no reason why one of the parties in interest should incur such an expense rather than another, it is simple equity to treat it as the common burden of all, to be discharged by a ratable contribution.

The Sections of the Code referred to are as follows:

"ARTICLE V.

GENERAL AVERAGE.

Section 1124. Jettison and general average; what.
1125. Order of jettison.
1126. By whom made.
1127. Loss; how borne.
1128. General average loss; how adjusted.
1129. Values; how ascertained.
1130. Things stowed on deck.
1131. Application of the foregoing rules.

be made by a codifier, that is to say, whether he ought to prosecute his work beyond the statement of general principles, is not relevant to the present purpose; but the conclusion must be manifest to every one that until such a work is done, until the substance of the numerous decisions which have been made concerning the application of the general principles is extracted and reduced into the form of rules, the decisions themselves will be in no respect superseded.

The *first* claim, therefore, advanced by the promoter of this *Civil Code*, to the effect that it will supersede the necessity for consulting the present multitude of decisions and commentaries, is wholly unfounded. There is not a judicial opinion, treatise, digest or text-book now necessary or useful to the lawyer or the judge in ascertaining what the law of general average is for any particular case, which would not remain just as necessary or useful after the adoption of this *Civil Code* as before. And it is entirely safe to say that the Code itself in such a case would never be consulted, or, if consulted at all, it would be only for the purpose of ascertaining whether it contained anything *inconsistent* with the law as derived from other sources. For the purpose of gaining instruction as to what the law absolutely was, it would be wholly valueless.

The *second* ground upon which this proposed *Civil Code* is defended and recommended is its alleged resolution and settlement of questions now involved in doubt. From what has already been said it may easily be seen that this argument is without foundation, for these eight Sections are occupied wholly with a statement of rules of the most general character, concerning which there is not, and for half a century has not been, either doubt or question.

But, more than this. It so happens that in this department of the law there have been, and still are, many interesting questions, some of which have arisen and all of which are likely to arise in practice, concerning which courts and jurists are still at variance. Some of these may be stated:

1. Where the ship is lost by the very peril sought to be escaped by the jettison or other sacrifice, but the cargo, or part of it, is saved, should what is saved be made to contribute for what is lost?

2. Where part of the cargo is sold in a port of distress in order to procure means wherewith to pay expenses, which are themselves the subject of a general average contribution, should the loss by such sale be treated as in the case of a jettison, or the case of expenditure? That is to say, is the owner of the goods entitled to contribution, if the whole adventure subsequently perish?

3. How are general average losses to be adjusted where they arise, partly from jettison, and partly from expenditure, and a subsequent disaster has happened which is the subject of a *particular* average only?

4. What rules are to be applied in valuing the contributory interests in the case of successive distinct general average losses, where the cargo was sound at the time of the first loss, but became damaged before the second?

5. Are the wages and provisions of the crew during the delay at a port of distress for repairs, which are themselves the subject of a general average, to be included in the adjustment?

6. Is the jettison of provender for animals on board to be contributed for?

of the master to act, for his disability is already mentioned; and yet it can hardly be an overruling necessity *to make a jettison*, for no jettison by the master even would be justifiable, except in such a case.

But again, is it true that in case of the disability of the master, the whole crew and passengers may join in making a jettison at their own discretion? It is not enough to say in answer that by another Section of this *Civil Code*, in another place, it is declared that in case of the disability of the master, the *mate* is to fill his place. *Strict and rigid accuracy* is the first requirement in the statutory declaration of a rule of law. If this be wanting, it should be rejected *for that reason*. But the answer would not otherwise be sufficient. The *mate*, in the case supposed, does not become the *master*, he remains the *mate*. But, suppose the disability of the mate also, may passengers and crew then undertake the work, while a competent second-mate is on board? Surely this important function can be exercised only by him who is in actual command.

Section 1128 (the *fifth* of the Article) declares that "an adjustment made at the end of the voyage, if valid there, is valid everywhere." Well, in what cases is it valid *there?* This is the important matter. Does this mean that adjustments made at an *intermediate* port, if valid there, are not valid everywhere? The truth is that there is one *proper* place, although it may be different in different cases, where the adjustment should be made, and an adjustment made at such place is, so far as the matter of place is concerned, valid everywhere. No semblance of a rule is here given where the adjustment *should* be made; although the law is clear upon this subject, and the rule actually laid down is pregnant with an hypothesis which deprives it of any value and suggests implications which lead directly to error.

Section 1129 (the *sixth* of the Article) declares that "in estimating the values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge.

We have here laid down by *implication* two things, nowhere expressly stated: *First*. That the adjustment must be made as at the *end of the voyage*, because it is required that the values should be taken as at that place. *Second*. That unless something then remains of the adventure, no general average contribution can be had. As I shall presently show, both these implications are erroneous. At present I call attention to the vice of conveying by *implication* only what ought to be expressed in unambiguous language.

SECOND.—*Positive Error*. It is declared by Section 1131 (the *eighth* of the Article) that "the rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, *or expense* necessarily incurred for the preservation of the ship and cargo from extraordinary perils."

This is the first and only intimation given us in the whole Article relating to general average that an *expense* incurred for the common safety must be reimbursed by a general contribution; and yet such expenses constitute as common a subject of general average as jettisons. There is one marked distinction, however, between the two cases. A *jettison* or *sacrifice* is contributed for only in case something *is eventually saved*. *Expenses incurred* must be reimbursed *in any event*. *The contrary of this latter proposition is in this Code distinctly asserted.*

Again. It is asserted in this Code (Section 1129) that the

"cur expenses for such purpose. Throwing property over-"board for such purpose is called jettison, and the loss "caused thereby, or by any other sacrifice made, or expense "incurred, is called a general average loss, and is the sub-"ject of a general average. Whatever produces a general "average loss is called a general average act."

Now, it is a familiar principle of this branch of the law that any *expense* made necessary in the course of the voyage for the repair of damage done to the ship by the mere violence of the elements, must be borne by the ship alone. Damage *voluntarily* inflicted by *human* agency is alone that which constitutes a general average loss; and this distinction may be said to be the fundamental and most familiar one in that branch of the law. But in the above Section we have distinctly laid down the extraordinary proposition that *any expense* incurred for the safety of the adventure is the subject of a general average contribution! Consequently, if a ship becomes strained by the violence of the winds and waves so as to open her seams and spring a leak, making it necessary that she should seek a port of refuge and be recalked, the expense is a *common burden* and must be borne by the cargo as well as the ship! It is safe to say that nowhere in written or unwritten law, or law-books, save in this proposed *Civil Code*, is such a proposition to be found.[1]

In the course of arguments heretofore delivered before

[1] The adjusters of marine averages, in large maritime cities, acquire, as is well known, a very familiar, practical acquaintance with the law of general average. They are obliged to make use of it at every step in their daily business; and in some instances, as in the case of the gentleman about to be referred to, they gain a scientific knowledge of the subject which a professed lawyer might envy. What such minds think concerning any written statement of that law deserves very respectful attention. The Article in question was submitted by the writer to A. Foster Higgins, Esq., of New York, one of the most eminent adjusters, for his opinion. His response is contained in the following letter:

the legislative Committees upon the supposed merits or demerits of this proposed *Civil Code*, the novel ground has been taken by its author that it is a sufficient answer to most of the criticisms made upon his favorite scheme to point out that they proceed from those who are enemies to codification itself! It is not likely that this view will be accepted by candid minds. They will probably agree that the weight of arguments must depend upon their intrinsic value, rather than upon the supposed motives of those from whom they proceed. At the same time, so far as matter of mere *opinion* goes, it is undoubtedly true that, other things being equal, particular attention should be paid to opinions adverse to any particular specimen of codification, formed and uttered by those who support the general theory. Especial deference should therefore be accorded to the views of one of the most distinguished of the supporters of codification in England, Mr. Sheldon Amos, pronounced concerning the work now under consideration, and apparently after a very thorough examination, he says: "The New York Civil Code may be de-

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NEW YORK, April 11, 1882.

JAMES C. CARTER, Esq.:

Dear Sir,—I have examined, at your request, the eight Sections of the proposed Civil Code, which relate to the law of General Average, and I suppose an experience of more than thirty years in the City of New York as an average adjuster of Marine Averages enables me to form a competent opinion concerning the practical operation of such sections, should they be enacted as law.

I find in those eight Sections obscurities, novelties, and positive and gross error sufficient to throw the whole administration of this highly important branch of the law into confusion.

It would be alarming to the maritime interests of this city were it probable that these Sections should be declared the law of this State. You are at liberty to use this letter before the Committee of the Senate if you think it would serve a useful purpose.

Yours very truly,

A. FOSTER HIGGINS.

private interests have found places in the sacred seat of judgment, the origin of a very large share of the *curable* mischiefs in judicial administration is disclosed. It need not be said how absolutely essential it is to the operation of the best systems of law that there should be competent judges to administer it. We cannot, indeed, quite say that as between rival systems:

"Whate'er is best administered is best,"

but this line expresses a large measure of truth.

The *second* of the causes above alluded to is found in the still more marked decline in the character of our legislators. To what purpose is it to labor in the courts for the attainment of excellence and certainty in the administration of our laws when each succeeding Legislature pours forth a volume of ill-conceived and pernicious changes and additions both to substantive law and to judicial procedure? There was a time, and that within not very distant memory, when our Senate and Assembly could easily find among their members, and took good care to place on their Judiciary Committees, professional men of established character for learning and abilities, who kept a more jealous watch over the integrity and harmony of our laws than has of late been always preserved, men who made more close scrutiny into the nature and effect of any proposed changes in the rules to which the business, the property and the security of the people are subjected, who allowed no pernicious measure to pass from their hands without condemnation, and whose advice their respective bodies were extremely slow to disregard. There are some present signs of improvement in this direction; and when that improvement shall have further progressed, it will give good ground for the hope of a decisive correction of one of the principal mischiefs which afflict the administration of the law.

For the evils thus pointed out the only remedy lies in direct action against the causes of them. Codification, surely, is no remedy. It will not place a better man in the seat of judgment. And when we consider that the greater part of the uncertainty, confusion and litigation under which we suffer proceeds directly from the gross imperfections of our *written* law, we must perceive that all these evils will be aggravated beyond measure by converting the whole body of our unwritten law into statutory forms.