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THE DAKOTA CIVIL CODE: MORE NOTES FOR AN UNCELEBRATED CENTENNIAL

WILLIAM B. FISCH*

In an earlier article in this journal,¹ I sketched and discussed the Dakota Civil Code as originally drafted for New York by David Dudley Field, the historical and conceptual background into which the work was cast, and some of the departures made in the Code from what appear to have been then generally accepted common law classifications, terminology and substantive rules. In this sequel I propose to consider the history of the Code after its completion in 1865 by Field's commission, concentrating on three jurisdictions: New York, where it was rejected after twenty-five years of wearying debate, amendment, parliamentary maneuver, and gubernatorial veto; California, where it was adopted in 1872 and where by virtue of a larger population, varied economy, and fairly high volume of litigation it was put to the severest test; and the Dakotas, where it was first adopted in 1866, periodically revised, and eventually dissolved into a consolidated code covering all subjects in an alphabetically arranged key-word format.² The jurisdictions are taken in that order, so as to enable the story in each to add to the background against which the next can be discussed and evaluated. Because New York never got beyond the proposal stage, its discussion is in more abstract terms concerning the merits of codification and of the peculiar characteristics of the proposal on paper. Because California was a larger and more demanding state, it took the lead over the Dakotas in dealing with the Code, influencing the latter in subsequent amendments, though without by any means dictating an entire approach. The Dakota experience, then, in which we are ultimately interested, can be best understood in the light of that of our more prominent colleagues.³ We begin, however, with a brief sketch of the reception given the Code in the common law world at large.

The decade or so following the completion of the New York Code was a period of considerable activity in the Anglo-American

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1. Fisch, *The Dakota Civil Code: Notes for an Uncelebrated Centennial*, 43 N. D. L. REV. 485 (1967).

2. N.D. CODE OF 1943; S.D. CODE OF 1939.

3. The other jurisdictions which adopted the Code, Montana (part of Dakota until 1872), 1895; Idaho, 1887; and Oklahoma (Indian Territory), parts of the Code in 1890; will be mentioned only in passing if at all.

movement toward codification of the substantive private law, even apart from the adoption of the Code by Dakota and California. The Canadian province of Quebec, belatedly joining Louisiana and the continent of Europe, adopted a Civil Code in 1865, just prior to confederation, based on the Napoleonic, no doubt to some extent influenced by the Louisiana code but more importantly reflecting Quebec's own independent development of pre-revolutionary French customary law. Here a major stimulus to codification doubtless was the prospect of confederation with the English-speaking colonies, and a felt need to testify to their cultural identity in the main area of the law which had not been anglicized in a century of British rule.

In the British colony of India, various portions of the private law were codified, though ultimately without being completed and consolidated into a single Civil Code. In this case the main stimulus appears to have been the need for modernization and unification of a colonial legal system of great variety and complexity.⁴

In the United States one other general codification of the common law (public and private) was completed and adopted in Georgia in 1861, and was revised extensively in 1872 to eliminate the institution of slavery and its ramifications in the law of persons, property, etc. The Georgia code, based largely on an 1858 digest by T. R. R. Cobb and having the appearance of a statutory rendition of standard common law text-books, found no resonance in other jurisdictions.⁵ In the remainder of the United States most of the activity took the form of more or less systematic compilations of existing statutes, on the model of the Revised Statutes of New York (1830) and the Revised Statutes of Massachusetts (1836).

In England the movement was still able to command the attention of some prominent minds, and the government as well. In 1866, a Royal Digest Commission was established with the task of digesting the entire law of England, which many supposed would be a preliminary to general codification.⁶ The digest would be systematic and complete in all detail, but completely descriptive; a code would be a distillation of at least the general principles manifested by the digested law. In response to this Commission several substantial works were produced. Sheldon Amos in 1867⁷

4. In 1879, when most of the codifying was done, Sir James Fitzjames Stephen described the purpose of codification in India: to provide "a body of law for the government of the country so expressed that it may be readily understood and administered by English and native government servants without extrinsic help from English law libraries." As quoted by Ilbert, *Indian Codification*, 5 L. Q. REV. 347, 359 (1889).

5. See generally, Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930). It has suffered the same fate as the Dakota Code, in that it was eventually transcribed into the alphabetical key-word format.

6. See 2 AM. L. REV. 361 (1867) for the Commission's first report.

7. AMOS, CODIFICATION OF PRIVATE LAW IN ENGLAND AND THE STATE OF NEW YORK (1867).

and T. E. Holland in 1869⁸ published extensive analyses of the question of codification in the Anglo-American system, both generally favoring the project, and Amos followed in 1879⁹ with a comprehensive set of guidelines for digesting and codifying English law, on "the practical assumption that the preparation of an English Code has been definitely resolved upon."¹⁰ In fact neither the Code nor the Digest ever arrived; the Digest Commission concluded that their task would require several hundred volumes, and that it was beyond their capacity, and they disbanded perhaps as early as 1870.¹¹ Some of the work done for or in sympathy with the Commission, however, was quite successful. For example, Sir Frederick Pollock's *Digest of the Law of Partnership*, which first appeared in 1874, became a standard work, formed the basis of a codified Partnership Act in 1890, and turned into a commentary on the statute code it had spawned.¹² In New York David Dudley Field took note of the failure of the Commission as indicative of the impracticability of the merely descriptive task of the digest, and the necessity and superiority of the creative work of codification, the crystallization of general principles in statutory form.¹³

In the course of this activity, frequent notice was taken of the completed New York Code, and the judgment passed was at best mixed. Portions of the draft Code were used as models in the preparation of some of the Indian codifications such as the Contract Act and the Specific Relief Act.¹⁴ Holland in his essay noted that New York "has at length caused to be compiled one of the best codes of modern times," referring to the entire body of five codes. With respect to the civil code he asserted:

Faults might easily be pointed out in the arrangement of the work, which is doubtless also somewhat more roughly put together than would be approved of in England, but it will afford much help and encouragement to our own efforts in the same direction.¹⁵

Amos's evaluation of the New York Code as a model for English efforts was rather harsher though with similar import. In his *An English Code*, he introduced an extensive discussion of specific defects of the New York Code with some contempt:

8. HOLLAND, *Codification in ESSAYS ON THE FORM OF THE LAW* (1870), first published in 1869 as an article in the *EDINBURGH REVIEW*, No. 288.

9. *AN ENGLISH CODE* (1873).

10. *Id.* at VIII.

11. See 3 *ALBANY L. J.* 231 (1873).

12. See POLLOCK, *DIGEST OF THE LAW OF PARTNERSHIP* (10th ed. 1915).

13. *Codification of the Law*, in 1 SPRAGUE, *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD*, 349, 350 (1884).

14. GLEDHILL, *India, 6 THE BRITISH COMMONWEALTH: THE DEVELOPMENT OF LAWS AND CONSTITUTIONS* 291, 294 (2d ed. 1964). See also Gooderson, *Restraint of Trade in the Field Code*, 79 *L. Q. REV.* 410 (1963).

15. HOLLAND, *supra* note 8, at 45.

The New York Civil Code may be described rather as a Codification of Text-books on the English Common Law, than as a Codification of English Common Law itself. Apart from occasional scraps of terminology and arrangement borrowed from Justinian's Institutes and the *Code Napoleon*, the whole work reproduces, in an utterly undigested form, the notions and the very phraseology in which the English Law is clothed in the most hastily compiled text-books.¹⁶

And he concluded this discussion on a somewhat condescending note, attempting to explain why such a code might be useful in New York but definitely not in England:

The peculiar state of Society in a new and undeveloped country makes the kind of demand very different there from what it is here. Accessibility and verbal simplicity in Law may be of far greater importance to a restlessly energetic and commercial community than precision and accuracy of expression. In England, on the contrary, — with its antiquated institutions, so fondly cherished by the mass of the community; with its constitutional system so repulsive of change and so jealously, as well as tenderly, watched; — with its conservative sentiment which is strong in politics, and all but omnipotent at the Bar,—a Code, which in every line of it violates a familiar principle or introduces a novel terminology, and yet is consistent in doing neither, would never hold up its head for so much as the first hour's debate upon its acceptance in the House of Commons.¹⁷

In the United States, Oliver Wendell Holmes, Jr., taking up the editorship of the *American Law Review* in 1870, devoted his first major article as editor to the subject of codification.¹⁸ In this article Holmes took little note of the New York Code as such choosing to make his own proposals concerning the basic structure of a proper code rather than to dwell on the qualities of other works. He did charge the draftsmen of the New York Code, however with the mistake of supposing that one of the primary targets of a code is the layman, and that therefore the code should be short and readable and accessible to the untrained mind. Rather, asserted Holmes, a code should try to provide the professional with a "philosophically arranged *corpus juris*," and function in effect as a training tool for the lawyer.

The perfect lawyer is he who commands all the ties between a given case and all others. But few lawyers are perfect, and all have to learn their business. A well-arranged body of the law would not only train the mind of the student to a sound legal habit of thought, but would remove

16. AN ENGLISH CODE, *supra* note 9 at 99.

17. *Id.* at 107-8.

18. *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

obstacles from his path which he now only overcomes after years of experience and reflection.¹⁹

Though he doesn't say so, it is clear from the article that he did not consider Field's code satisfactory in this regard. His contemporaneous review of Holland's *Essays upon the Form of the Law*²⁰ indicates that he sees the English codifiers of his day as seeking essentially the same thing, namely, a more useful form into which to cast a legal system whose substance is at least generally settled. It perhaps goes without saying that Holmes never succeeded in finding that form, although he appears to have supposed that his essay provided a framework on which someone else, with a reasonable diligence, might have built a suitable code.

There is little doubt that Field drafted his code, as Holmes suggested, with a view toward communicating to some degree with the untrained mind. To some extent, perhaps, he had in mind the student of law, however inadequately as Holmes saw it; but primarily he intended the Code to be intelligible to the layman. This purpose is betrayed already in the Ninth Report of the Commissioners, to which the 1865 draft was attached:

There are those who argue that an unwritten law is more favorable to liberty than a written one. The contrary would seem to be more consonant with reason. It can scarcely be thought favorable to the liberty of the citizen that he should be governed by laws of which he is ignorant, and it can as little be thought that his knowledge of the laws is promoted by their being kept from print or from authentic statement in a written form.²¹

In a letter to the California bar concerning the Code, written in 1870, Field was even more explicit in his assertion that one of the purposes of codification is to make the law accessible to the layman:

. . . [A code] would reduce the laws of the land to an accessible and intelligible form, and thus bring within the reach of the people, who are to regulate their own conduct by them, and who should be able, in great measure, to judge for themselves of their legal rights and duties.²²

A similar sentiment was expressed by Field in argument before the New York legislature in 1873,²³ and it is echoed at least once by the editors of the *Albany Law Journal* in 1884:

19. *Id.* at 3.

20. 5 AM. L. REV. 114 (1870).

21. REPORT, at VII.

22. SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 13 at 352.

23. *Reasons for the Adoption of the Codes*, at 361, 372.

Laws, we repeat, are not made solely or mainly for the eleven thousand lawyers of this State, but mainly for the other five millions of unlearned people, who are entitled to a book of laws, so that they may know what and where the law is.²⁴

The Code itself shows unmistakable signs of this purpose. The inclusion of a chapter of Maxims of Jurisprudence, "to aid in the just interpretation" of the law, would be justified primarily by the use to which a layman might put it — a well trained lawyer of the time would probably have been able to recite many more than are included in this obviously non-exhaustive list. The insertion of sections two and three of the draft, the one defining law²⁵ and the other listing the sources of the law,²⁶ appears also primarily to be for the layman, although there are purposes for which a judge might wish to have an exhaustive list of sources of the law, to know what other sources to ignore. The section defining "land" as

. . . the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance [Field, *Civil Code of New York* §164 (1865)]

and the section defining "that which is affixed to land" (being real property along with the land itself):

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of nails, bolts or screws [Field, *Civil Code of New York* §165 (1865)]

appear to be designed, by their high level of generality and the use of examples to supplement definition, to communicate with the layman. The Division on Obligations begins with a definition of obligation which is too general and simple to be for professional use,²⁷ as does the subheading "Contract";²⁸ and the definition of

24. 29 ALBANY L. J. 81 (1884). See also, Yeaman, *Codification*, 29 ALBANY L. J. 26 (1884).

25. § 2: "Law is a rule of property and of conduct prescribed by the sovereign power of the state." FIELD, *CIVIL CODE OF NEW YORK* 1 (1865).

26. § 3: "The will of the sovereign power is expressed:

1. By the constitution, which is the organic act of the people;
2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;
3. By the judgments of the tribunals enforcing those rules which, though not enacted, form what is known as customary or common law." *Id.* at 1-2.

27. "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." FIELD, *CIVIL CODE OF NEW YORK* § 670 (1865).

28. "A contract is an agreement to do or not to do a certain thing." FIELD, *CIVIL CODE OF NEW YORK* § 744 (1865).

“detriment”,²⁹ the key concept in the provisions on “Relief” in Division IV, is likewise too general for the trained eye.

Similarly, there was a real attempt to achieve the simplicity of style which characterized the French *code civil* — simple, direct, short sentences, common-sense terms rather than technical, clear divisions between basic ideas, uncrowded paragraphs — although it was not an entirely successful one and, as the critics pointed out, often confused rather than clarified. Two sections from the title on Contracts will perhaps suffice to show the style at its best, the first consciously modeled on the comparable provision of the French code, the other apparently original:

[Section 745]. It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration.

[Section 750]. The consent of the parties to a contract must be:

1. Free;
2. Mutual; and
3. Communicated by each other.

THE CODE IN NEW YORK

The ninth and final report of Field's Code Commission was submitted to the New York Legislature on February 13, 1865. The Commission thereupon dissolved, according to the statute establishing it, and the Code spent the next fourteen years under the legislative rug.³⁰ Field apparently made annual journeys to Albany to push for its adoption, a few bills were introduced in one house or the other of the legislature providing for adoption, and the legislature went so far in 1875 as to authorize a Law Revision Commission which it had established in 1870 to incorporate the Code or portions of it into their final report; but nothing was done.³¹ In this period surprisingly little discussion of the Code appears in the periodical literature. An unsigned article in the *Albany Law Review* of 1870, entitled “The Civil Code of the State of New York,”³² discusses broadly the desirability of a code and especially of the supposed distinction between a code and a digest,³³ but has rela-

29. “Detriment is a loss or harm suffered in person or property.” FIELD, CIVIL CODE OF NEW YORK § 1833 (1865).

30. See Muus, *The Origin of the North Dakota Civil Code*, 4 DAK. L. REV. 103, 116-17 (1932).

31. *Id.*

32. 2 ALBANY L. J. 385, 408, 450, 505 (1870).

33. Cf. AMOS, *supra* note 9.

tively little to say about the content of the New York Code ("our code"). This little is, however, revealing:

The civil code recently completed by Messrs. David Dudley Field and Alexander W. Bradford is . . . as much a digest as a code, and has been designated by the latter title, probably, only because the mere abstract is the nobler element, and also because it proposes some changes in the law. Its province as a reformer of the Law, however, is *dehors* the proper function of a code. A code or digest, as such, is merely a new mode of expressing existing and undeniable rules. . . .

Possibly, the delay that has occurred in enacting the code is owing to the fact that it deals with reforms the utility of which is not universally admitted. . . . [W]e think it would be far better to eliminate from the first edition of the code all extraneous matter and proposed changes in the law, and to have the code enacted as merely a new form and authoritative compilation of existing rules. This will insure the code an instant adoption.³⁴

The journal continued to mention the codes from time to time, complaining of the lack of attention given by the legislature, and noting their reception elsewhere, but it appears to have been a desultory business.³⁵

The real obstacle in the way of codification, . . . as we, in this State, have, by experience, found out, is not in the preparation, the drafting, but in the adoption. The legislative body wants to discuss and amend and patch the work when propounded, as they discuss and amend and patch other bills. Mrs. Stephens [Sir James Fitzjames Stephen] very forcibly says: 'A popular assembly might as well try to paint a picture.'³⁶

The persistence of Field and the other proponents of the Code finally promised to bear fruit in 1879 when both houses of the legislature passed bills adopting the Code, and the issue burst out into the open again. However, the Governor vetoed the measure, complaining chiefly of the fact that the Code changed long-standing legal rules in several respects while professing to be friendly toward the basic purposes of codification.³⁷ The editor of the *Albany Law Review* angrily dismissed the governor as "an opponent of codification" and called for the legislature to override the veto,³⁸ to no avail. By the time the Code got through both houses of the legislature again in 1882, the Association of the Bar of the City of New

34. 2 ALBANY L. J. 385 (1870).

35. 4 ALBANY L. J. 169 (1871); 5 ALBANY L. J. 69 (1872).

36. 6 ALBANY L. J. 398 (1872).

37. Muus, *supra* note 30 at 117.

38. 19 ALBANY L. J. 348 (1879).

York, which had apparently previously relied on the individual efforts of its members, had established its Special Committee To Urge the Rejection of the Proposed Civil Code, members of which regularly appeared before the legislature and joined public battle.

The Association's position rested ostensibly on two premises: first, that the proposed Code was a bad piece of work, inaccurate in detail and inept in arrangement; and second, that codification of the private law is undesirable in any case. It may be supposed that the first argument carried the greatest weight with the legislature and the executive and the bar generally; judging from the manner in which the arguments were presented, however, it seems likely that the second proposition was the one the Association believed in and proceeded from. The argument was presented in a series of pamphlets and articles, spanning the decade of the 1880's, remarkable for a polemical style more typical of an advocate's brief than a scholarly, "scientific" discussion.

First and perhaps foremost, the Association complained of the fact that the draft Code proposed to change the law in material respects. Here the criticisms had a marked socio-economic flavor, for the changes most heavily criticized were attempts to liberalize some of what we would now generally agree were the inequities and rigidities of the common law of that day. The first report in early 1881 of the Association's Committee on Amendment of the Law, chaired by Clifford A. Hand, is largely devoted to these aspects of the Code. Challenged as "dangerous" and "objectionable" for example, were section 61, which made condonation, as a defense to an action for divorce, conditional upon continued marital kindness on the part of the guilty party; section 77, which limited the husband's right to subject his wife's separate assets to his support until his own assets were exhausted; section 88, which permitted only the husband or wife or their descendants to complain of the illegitimacy of any child born in wedlock; and section 116, making any illegitimate child adopted by the father into his home *fully* legitimate. In the law of landlord and tenant, the change singled out for special damnation was that in section 998, which prohibited the letting of a single room to more than one tenant, giving each tenant in the entire building containing such a room the right to withhold rent until the improper renting is stopped. In a later memorandum signed by Hand alone, reaction to this provision is voiced in the following terms:

What proper connection is there between the 'horrors' of the tenement house and the despotic prohibition against an economy of rent, fuel, and other living expenses, practic-

able for two poor sewing women, with perhaps a child apiece, by hiring each a part of a single room?³⁹

In the law of master and servant, the provision in section 1013 limiting contracts of personal service, other than apprenticeship, to two years, was criticized as contrary to "natural right." In the law of contract, the provision on usury was excoriated because it did not abolish the prohibition altogether.

[W]hile many of the members of this association would be pleased to see the law expunged from the statute book, they probably agree with your Committee that this should be done by a clear and well defined law, which not only strikes out the provision making such a contract void, but also removes the objectionable and unconscionable advantage given by section 975, which makes it 'voidable by the party prejudiced thereby.'⁴⁰

These objections were summed up by Hand in his memorandum as showing three particularly objectionable "general drifts": first, the "tendency to tyranny":

Individual freedom of action, and the responsibility of the citizen, for the care and welfare of himself, are constantly crippled or lessened. Each man is taught to look to someone else for whatever befalls him . . . [T]hese are but instances of the disposition to dictate to men what they may or may not do, and to trespass upon the most essentially valuable of all civil rights, the right to liberty of action.⁴¹

The second tendency was "to overbear and disparage the ties of blood," in strengthening the claims of the surviving spouse over the heirs,⁴² in permitting adopted children to inherit,⁴³ and in permitting a father to fully legitimize his bastard children and those of his wife.⁴⁴ The third, apparently, was blasphemy.

Such vagaries, also, as that which supposes 'irresistible superhuman cause' to be a more reverent expression than the 'act of God', are noticeable. This last attribution to the

39. Memorandum by Clifford A. Hand, appended to the *Report of the Special Committee to Urge Rejection of the Proposed Civil Code*, Oct. 21, 1881, at 20.

40. *Report of the Committee on the Amendment of the Law*, March 15, 1881, at 15.

41. *Supra* note 39 at 19-20.

42. "Under such a dispensation, the labors will be lightened and the hope of gain be better assured for adventurers who marry the aged, weak or infirm for the sole purpose of capturing an estate which, although it may have been inherited by virtue of the ties of blood, is made an easy prey in violation of the obligation of those ties." *Id.* at 21.

43. "The effect will be to expose every act of benevolence, in this form, to the peril of consequences neither desired nor desirable. The further effect would evidently be to shut the door of many comfortable homes to the poor and helpless, who might otherwise find them open." *Id.*

44. "Old landed inheritances must go to bastards begotten during long years of absence of the husband in distant countries, rather than to his true and natural heirs . . . He would thus be enabled, almost at pleasure, to violate the wishes of the dead, who, not deriving their views of morality and social ethics from the modern French novel, may have in express terms limited their bounty to his 'lawful issue.'" *Id.* at 20-21.

will of the Almighty, of whatever is independent of the human will, is, of course, a devout recognition of the divine power, and originated with God-fearing men, whose faith was absolute and unqualified.⁴⁵

It was this tendency to change "essential principles" which constituted the worst evil of codification generally, in the Committee's view, and set it off from the greatest virtue of the common law, namely its "flexibility." The words of one of the 1828 revisers of the New York statutes were invoked for the flavor of the contrast:

. . . [Mr. John C. Spencer] expressed his admiration for 'that principle of flexibility in the common law, which enables it to be adapted to the ever varying conditions of human society', and he declared it to be 'in that respect unquestionably superior to any written code'. This flexibility, however, he regarded as consisting 'not in the change of great and essential principles, but in the application of old principles to new cases and in the modification of the rules flowing from them to such cases as they arise so as to preserve the reason of the law and the spirit of the law.'⁴⁶

These criticisms may be supposed to have been effective in inducing the Governor for the second time to veto the bill adopting the Code, in July of 1882. The veto message purported to be simply a re-referral to the Legislature, in order to make the amendments everyone conceded would be required before adoption rather than afterward. The message was fairly clear, however, that the changes in the law were the chief defect to be removed.

This Bill makes many manifestly radical changes in long and well-established laws and usages beyond what could have been contemplated in the Constitution with reference to codification. Ideas and principles are attempted to be introduced which, as separate propositions in independent Bills, would hardly command support.⁴⁷

This was the last time the Code got as far as the Governor's desk, although in the next seven or eight years the debate continued almost undiminished and one or the other house of the Legislature or the respective committees managed to pass or report favorably on renewed efforts at adoption. It was in this period that the debate evolved into an almost personal battle between Field and James C. Carter and became most explicitly devoted to the merits of codification generally in a common law system.

45. *Id.* at 22.

46. *Report of the Committee on the Amendment of the Law, supra* note 40 at 23-24.

47. Governor's message, as set forth in the *Report of the Special Committee to Urge Rejection of the Proposed Civil Code* 8 (Oct. 10, 1882) in BAR ASSO., N.Y. CITY ON THE CODE 1881-89.

In 1883, 1884, and 1885, the Association pursued the tactic of assigning to various members of the Special Committee to Urge Rejection of the Proposed Civil Code various portions of the Code for detailed analysis, the results of which were distributed to legislators and lawyers as propaganda. It is clear throughout, however, that the Association never contemplated improving the Code, only disposing of it. Each annual report concludes with a warning similar to that in the Third, dated September 26, 1883:

The marvelous vitality of this scheme, and the untiring zeal of its chief promoter, in seeking to press it upon the attention of the Legislature, warn us of the necessity of being still prepared to meet another attempt, at the next Session of the Legislature, to procure the passage of the 'proposed Civil Code.' To that end your Committee would respectfully recommend that the matter be again placed in the hands of a Special Committee, charged with the duty of again opposing to the uttermost, every attempt to secure its adoption.⁴⁸

The main theme of the specific critiques made by various members of the Committee on portions of the Code was that the provisions were inaccurate and incomplete. Since these are both relative concepts, they were based on two premises, both of which even then, still more today, would be open to considerable question: first, that the common law was certain and settled, and second, that the common law was complete in detail. Typical of these critiques, though the most articulate in this respect, was that of Carter on the Code provisions on General Average in admiralty law, in which he pointed out with great emphasis what he considered to be ambiguities and errors in an eight-section passage:

. . . [T]hese eight sections contain four instances of doubtful and ambiguous meaning, involving future strife and litigation, and four other instances of positive error, two of which are of a character gross enough to destroy the reputation of any treatise in which they might be found. And this doubt, uncertainty and error it is gravely proposed to import into a branch of the law where everything is now certain and clear . . .⁴⁹

Apparently in response to this criticism, the proponents of the Code in 1883 tried some changes, including the adoption of standardized rules then in wide usage in admiralty, to which Carter responded in the same vein as before and if anything with more vehemence. To the Fourth Annual Report (1884) were appended

48. *Third Annual Report of the Special Committee to Urge Rejection of the Proposed Civil Code* 8 (Sept. 26, 1883) in BAR ASSO., N.Y. CITY ON THE CODE 1881-89.

49. *Id.* at 23.

papers by Theodore Dwight on Landlord and Tenant, Carter on Insurance, W. B. Hornblower on Negotiable Instruments and Trusts, Albert Mathews on Loan, George H. Adams on Innkeepers, J. Bleecker Miller on Corporations. In 1885 the Fifth Annual Report contained a lengthy analysis of the provisions on Damages by the most widely read author of the day on the subject, Arthur E. Sedgwick. In 1888 Hornblower contributed an extensive discussion of the provisions on Corporations. The technique adopted in virtually all of them was to pile up all possible problems of interpretation, all possible inconsistent authorities (however lonely), and all possible unanswered questions in an indiscriminate heap.

These papers show the Committee at its least convincing, and from this distance valid points of criticism and improvement lose themselves in the mass of polemic trivia. It seems likely that what makes these papers so unconvincing to the present-day reader (it is impossible in this compass to set forth the passages in sufficient number to convey the flavor) is the fact that we no longer suffer so painfully from the illusion that the law, in whatever form of expression, is clear and certain, and are less inclined therefore to engage in dogmatic battle as to which statement of the law on a given point is the "correct" one. Indeed it might be said that this dogfight between codifiers and anti-codifiers in New York in the last quarter of the 19th century was the last gasp of the the-law-is-there-waiting-to-be-discovered school of jurisprudence, giving way (though not without exacting its price of insight) to a legislative experimentalism, fostered significantly by Holmes⁵⁰, in which we are still working today. In any case, we can only note here that such was the flavor of the debate, and that the one item missing completely from all of these papers is any suggestion as to how a "correct" codification in the area in question might be formulated.

The argument for which the opposition to Field remains best remembered in the jurisprudential literature, however, is that which denied the propriety of any codification of the common law. As mentioned, it was one made by the Association from the first stages of the legislative battle over the Code, and they could attribute the idea to a New Yorker speaking in 1825. Many voices contributed to this argument, to which Field's own writings from the submission of the Code in 1865 to his death in 1895 make crisp, logical and increasingly exasperated response.⁵¹ The most widely quoted

50. He began, of course, as an adherent to the historical school. See *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1-2 (1870).

51. See especially his *Codification of the Common Law: A Short Reply to a Long Essay*, in 1 SPRAGUE, SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 494 (1884). Also consult pages 309-502.

and noted voice in the chorus was that of James C. Carter, and it was his pamphlet *The Proposed Codification of our Common Law*, published in 1884, which appears to have aroused the broadest discussion of this issue in the New York literature. The gist of the argument forwarded by Carter⁵² is that case-by-case judicial development of the law ("unwritten law") is a method of establishing the law superior to that of legislative enactment ("written law"). The common law or unwritten law, judicially developed, proceeds from case to case, deciding only that which is before it, ready to modify whatever generalizations it has utilized in solving one problem upon presentation of a new case sufficiently dissimilar to the first to warrant different treatment — bound, that is, not by the generality of particular statements of the law but only by the generality of the fact situations actually presented for decision. The written law, on the other hand, proceeds on the premise:

That it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied. It refuses to proceed any further with the scientific method of examining and classifying transactions according to their actual features.⁵³

This notion that the unwritten law properly operates as a science in the modern sense, empirically, while statutory or codified law operates as a science in the rationalist sense, deductively, is that espoused in somewhat more intelligible language by Oliver Wendell Holmes, Jr., in his early essay *Codification, and the Arrangement of the Law*:

It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . It is only after a series of determinations on the same subject-matter, that it becomes necessary to 'reconcile the cases,' as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.⁵⁴

This is the historical notion in its purest common-law form:

52. For want of a copy of the 1884 pamphlet, we take as typical his two 1889 speeches, *The Provinces of the Written and the Unwritten Law* and *The Ideal and the Actual in the Law*, in 24 AM. L. REV. 1, 752 (1890), respectively.

53. *The Provinces of the Written and the Unwritten Law*, *supra* note 52 at 10-11.

54. Holmes, *Codification and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

the law unfolds in the more or less unconscious decisions of judges in particular cases, representing common sense, and whatever generalizations are to be derived from the law must be inductions from these specific instances. To the attempt to anticipate the growing process by handing down codes to deal with future cases, Carter retorted that with respect to *future* cases both unwritten and written law are equally uncertain, since neither has the specific instance before it; but the written law, being committed to a specific formulation beforehand, will be rigid and unable to adjust itself to the new, while the unwritten law, being committed only to the cases which have already arisen, is free to respond constructively to the new situation.

It can scarcely be too often repeated that the office of private law consists in applying the social standard of justice to *known* facts, and that in respect to future transactions, there is, in human apprehension, no such thing as *law*, except the broad injunction that *justice be done*.⁵⁵

Typically, Carter overstated his case, and had resort even to the notion, already considered an antique in his day, that the judge does not make law but only declares it.⁵⁶ Even as Holmes more judiciously formulated it, however, it can be regarded as a hollow argument, emptied of practical significance by the realization that the "unwritten law" simply does not function in the way described. Judges do overgeneralize, and even when presented with actual cases consider themselves bound in the face of justice by their own and other judges' prior overgeneralizations. Statutes, on the other hand, properly formulated, are not rigid but can leave room for the imagination of the judge in the particular situation, and in any case be amended if they prove inadequate. The point was made repeatedly by Field, though without resounding success.

Somewhat more practical reasons were put forward to serve the general argument against codification. To a considerable extent, these arguments responded to points made by the codifiers. To Bentham's distrust of the judges as lawmakers, the answer was that legislatures, especially democratically elected, non-expert ones such as were found in most American states, were even worse. California's legislature was shown to have indulged in an orgy of amendment and external but related statute-making in the decade or so of the life of their Civil Code,⁵⁷ while the New York legislature was said to have made continuous and voluminous petty and gross amendments to the Revised Statutes of 1828.⁵⁸ In other words,

55. *The Provinces of the Written and the Unwritten Law*, *supra* note 53 at 17.

56. *Id.* at 21.

57. See in particular the remarks before the New York legislature's joint Judiciary Committee in 1886, reprinted in 2 COLUMBIA JURIST 327, 330.

58. *Id.*

whatever the capacities of the ideal legislator, the real ones would do more damage to the best purposes of codification than would no legislation at all. Further, it was argued, those countries in which codification was more or less successfully undertaken, notably France and (in process) Germany and Switzerland, the purpose of the undertaking was not to substitute statutory for judge-made law, but to unify the law in nations newly formed out of disparate political and legal systems.⁵⁹ Whatever might be the situation in the United States as a whole, no such need showed itself in New York. Further, if codification is seen as a remedy for the unreliability and unpredictability (or, on the other hand, the rigidity) of judges, a code of general principles would leave as much to the judge in the way of interpretation as the "unwritten law" — there would be as much case law as before with the same defects.⁶⁰

What might be characterized as the last healthy breath of the codification movement in New York in its purest form took place at the ninth annual meeting of the American Bar Association, in 1886, when its Committee on Delays and Uncertainty in Judicial Administration, chaired by David Dudley Field, introduced the following resolution:

The law itself should be reduced, so far as possible, to the form of a statute.

The debate which ensued took two days of the meeting and encompassed sixty-three pages of print in Volume nine of the *American Bar Association Reports*. It resulted in the adoption of the following resolution, by a vote of fifty-eight to forty-one:

The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute.

New Yorkers Field and John Dillon took the lead in proposing the resolution, and were accused of (and admitted) wanting eventually to commit the American Bar Association to codification as such, although the merits of the New York Code were from time to time said to be outside the proper scope of discussion. All of the old arguments pro and con were presented, and the closeness of the vote suggests why no further attempt was made to push the American Bar Association toward taking up the cudgels for the Code. The codification movement then retrenched and institutionalized itself with respect to statute law in the National Conference of Commissioners on Uniform State Laws (first convened in 1891 on the invitation of the 1890 New York legislature) and eventually

59. Remarks of Munroe Smith, *id.* at 333.

60. *Id.*

with respect to the common law in the American Law Institute (formed in 1925).

The action now was in the states and territories which had adopted the Code, to provide some empirical evidence for the argument.

THE CODE IN CALIFORNIA⁶¹

Due largely to the efforts of David Dudley Field's brother, Stephen, California had adopted the Field Code of Civil Procedure in 1851. Agitation for a codification of the substantive law continued until a commission was set up in 1868 by the legislature "to revise and compile the laws of the state into a comprehensive and concise system."⁶² For want of time, this commission failed, but it did make recommendations including one calling for "the codification, or the reduction 'into a written and systematic code for the whole body of the law of this state,' as had already been done in the State of New York, by the creation of a Civil, a political and criminal code."⁶³ The legislature responded by creating a new commission in 1870, but did not give it authority to codify the common law. Nonetheless, the commission, whose life was eventually extended to 1874, proceeded to do just that, and adapted the New York Civil Code to that purpose.⁶⁴ Its first product was adopted in 1872.

The chief alterations made by the California Commissioners on the 1865 draft involved incorporation and revision of existing statute law into the framework of the Code. Perhaps the most important of the areas thus affected was that of Corporations, which the Commission also quite properly relocated (conforming to Kent and Blackstone) in the Division on Persons rather than that on Property. The law of corporations was one of the weakest in the New York Code, in the sense that only the most general regulations were included. The trend in the law of that day, which still shows itself toward separate regulation of corporations engaged in various types of enterprises — road, transportation, mining, building, banking, insurance, etc. — was totally unrecognized in the draft, while the California Code followed the trend fully.⁶⁵ The draft dealt almost exclusively with the process of formation of corporations and with the handling of shares and memberships, and had little to do with

61. An extended discussion of the California Civil Code is contained in Professor van Alstyne's "Commentary", printed as a prologue in CAL. CIVIL CODE Vol. 6 at 1-41 (West 1954). Much of what follows is based on this article with a few points of differing interpretation and approach.

62. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CAL. L. REV. 766, 770 (1954).

63. *Id.* at 771.

64. *Id.* at 773.

65. No less than 15 chapters were devoted to special-purpose corporations, following one chapter on corporations in general.

the internal operation of corporations as institutions, while the California provisions emphasized the latter function.

Another area in which indigenous law replaced provisions of the New York draft was that of marital property, where California's Spanish civilian heritage dictated the adoption of the principle of community property. Other areas such as wills and succession, apprenticeship, homestead, and fraudulent conveyances were Californized with less significant departures from the substance of the draft provisions. Further, of course, existing California law on specific points too numerous to mention was given precedence in the areas of which the bulk of the provisions were taken from the New York draft.

Apparently with some deliberation, the life of the Commission extended over two years beyond adoption of the first Code in 1872, an advisory group headed by Stephen Field was asked to examine it, and an extensive revision was proposed and adopted in 1874. Most of the new changes were editorial in nature, although a few, such as that which removed the exclusive list of permissible purposes of incorporation and substituted a provision permitting incorporation for any purpose for which men might associate with one another, were of considerable significance.⁶⁶ One sweeping change, the repeal of the entire chapter on powers, was explained by the Commissioners rather cryptically:

We have proposed to strike out the whole Chapter on Powers, as wholly unsuited both to the wants and habits of the people. . .⁶⁷

It should not astonish anyone that public acceptance of the Code in California was not whole-hearted and universal. Indeed, one of the strongest advocates of codification on the original commission of 1870, Charles Lindley, resigned before the report to the 1872 legislature, on the ground that the codes were not complete and that they had not had a sufficiently careful examination and discussion aimed at perfecting the system and the detailed provisions. He was not much less dissatisfied with the results of the 1874 revision.⁶⁸

One published attack which carried with it some of the socio-economic flavor of the New York City Bar Association's criticisms, took the form of a largely fictitious news story concerning a case said to have aroused

a universal feeling that the Civil Code should at once be

66. § 286.

67. VAN ALSTYNE, *supra* note 61 at 18.

68. See Kleps, *supra* note 62 at 773-74 and 778.

repealed and the other codes referred to a competent commission to revise them.⁶⁹

The case was alleged to involve upon polygamy sanctioned by the rigidities of codified law. A man thought to have lost his first wife in a Maori attack on their New Zealand village, moved to California believing her dead and eight years after the attack, married another woman. The first wife then appeared with children and moved in with the husband and second wife. The indignant community prosecuted the husband for adultery, but was frustrated by the fact that the first marriage was valid and the second, due to the five-years'-absence provision of section 61 (2) of the Civil Code,⁷⁰ was also not void. A second prosecution, this time for bigamy, also foundered on the legitimacy of both marriages. The community then sought to have the second marriage annulled, only to be thwarted by the provisions of section 83, which required an action for annulment to be brought either by one of the parties to the marriage or by the former spouse whose marriage is still valid; and a petition for a legislative divorce ran aground on a constitutional provision. The parties were thus enabled to flout one of nature's (or the community's) most sacred laws with full sanction of the Civil Code.

The incident was presented by the article's source as an instance in which the Code had disastrously changed the law, although the Commissioners had been careful to conform the Code as near as possible to the existing California law. The latter, with the common law, in this instance would have held the second marriage not merely annulable but void.

A New York lawyer, one who was in fact no particular friend of codification, took note of the *Albany Law Journal's* account of this story and pointed out that the provision, indeed copied from the New York Code, was faithful to the law of New York, which had overturned the traditional common-law rule with its first Revision of the Statutes in 1830.⁷¹ The case, however fictitious, thus points up a problem which was exacerbated when the Code was adopted in a jurisdiction other than that for which it was drafted, and for which indeed the Code itself tries rather unsuccessfully to provide

69. The story appeared in the *Los Angeles Express*, and is reviewed in 9 ALBANY L. J. 5 (1874).

70. § 61: A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

71. Letter from Mr. Austin Abbott, 9 ALBANY L. J. 25 (1874).

a solution: namely, the relationship between the Code and the prior law, as a problem of interpretation.

As drafted for New York, the Code listed the "common law" as one of the sources of law, manifested in the decisions of the tribunals. In three provisions, however, it made a strong suggestion of intention to have the Code supersede the common law in the broadest sense:

All statutes, laws and rules heretofore in force in this state, inconsistent with the provisions of this Code, or repeated or re-enacted herein, are hereby repealed or abrogated; . . . [Field, *Civil Code of New York*, §2033 (1865)].

The rule that statutes in derogation of the common law are to be strictly construed has no application to this Code. [Field, *Civil Code of New York*. §2032 (1865)].

In this state there is no common law in any case where the law is declared by the five Codes. [Field, *Civil Code of New York*. §6 (1865)].

In the introduction to the draft, however, Field was at some pains to point out that the Code would leave the common law (or other statutes) intact insofar as not inconsistent with it, and the California Commissioners picked up this cue by adding the following provision:

The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments. [Pomeroy, *Codes of California Annotated* §5 (1901)].

Thus in California, at any rate, the notion that the Code was in the first instance a codification of the common law was strengthened by requiring rules derived from the common law to be interpreted in the light thereof. On the other hand, the Commission (again picking up a suggestion in Field's introduction) also reinforced the abrogation of the strict-construction rule by adding the following sentence to that section:

The code established the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. [Pomeroy, *Codes of California Annotated* §4 (1901)].

This can be read in conjunction with the no-common-law provision as requiring the interpretation of a given section as repealing by omission related rules which are not inconsistent with those included.

Cases which made such problems of interpretation concrete are

not frequent. In *McLean v. Blue Point Gravel Co.*,⁷² an 1876 case, however, the California Supreme Court was faced with interpretation of the Code's formulation of the fellow-servant rule:

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee. [Pomeroy, *Codes of California Annotated* §1970 (1901)].

There was respectable, if not unanimous precedent in other jurisdictions for the proposition that the fellow-servant rule did not apply where the culpable employee was in a position of authority over the victim (e.g., where the victim was a crewman and the tortfeasor a foreman). The Supreme Court held, however, that the Code provision precluded the application of that exception, since it did not mention any such distinction among "persons employed by the same employer in the same general business." It need hardly be said that a contrary interpretation would have been feasible, if it had been desired, but for the notion that the Code had to be interpreted literally.

Perhaps with such instances in mind, a broad attack on the Code and on the role of the courts in interpreting it was launched in 1884 by the dean of the law school at Berkeley, John Norton Pomeroy. This attack, which can be said to be the most significant single event in the history of the Code in California, was contained in a series of articles in the *West Coast Reporter*,⁷³ of which Pomeroy was then editor. In them he assaulted vigorously all of the defects of the Code which have been mentioned in connection with the New York controversy: its disregard for established terminology, its incompleteness, its strangeness of organization, and above all its inaccuracy. His articles carried the title "True Method of Interpreting the Civil Code," and the purpose of his criticism was to establish a uniform method of interpreting the Code, namely by reading it as completely as possible as if it did not change a thing.

As a result, no doubt, of having the ulterior purpose of establishing a uniform method of interpretation for the Code, Pomeroy tended greatly to overstate his case, spending considerable time, for example, in pointing out provisions of the Code which would have to be *interpreted* by the courts, a need which only the Code's

72. 51 Cal. 255 (1876).

73. 3 West Coast Rep. 583, 657, 691, 717 (1883); 4 West Coast Rep. 1, 49, 109, 145 (1884).

opponents supposed was intended to be obviated.⁷⁴ At some points, further, it is interesting to note that the defects he finds were introduced by the California commission where the New York draft was not "defective." For example, the first of his targets⁷⁵ involved a change by the California Commissioners of section 575 of the New York draft, which read as follows:

Whenever any real or personal property is disposed of by will to a descendant or a brother or sister of the testator, and such legatee or devisee dies during the lifetime of the testator, leaving a successor who survived the testator, such disposition does not lapse, but the thing so disposed of vests in the surviving successors of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

The California version, section 1310, in the same context, read as follows:

When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee would have done had he survived the testator.

Pomeroy's criticism here was that where in other sections the term "devise" is used as relating only to real estate, here it is used in the context of a rule (the anti-lapse statute) which in its common law scope applied equally to real and personal property, and the result must be either to interpret the section literally (unthinkable in substance), or to interpret it as *intending* the common law scope (untidy in form). Of course, the meaning of the section, so long as the term "devise" is understood in its traditional sense, is clear, and there is no evidence as to the purpose of the distinction:

. . . yet it is almost impossible to conceive that the authors of the code intended to have the common law rules in full operation in all instances of lapsed legacies, and to change them only in some instances of lapsed devises.⁷⁶

As in the case of Carter, much of Pomeroy's criticism depends upon the assumption that the present law is clear while the Code is unclear and will require interpretation. There appears to be merit, however, in some points of complaint, in particular those concerning the adoption of novel terminology. For example, Pomeroy points out that while in the common law of agency the key dis-

74. *E.g.*, his criticism of § 1310, 3 West Coast Rep. 583, 590-91 (1883), which is that the term "legal heirs" might leave room for interpretation.

75. *Id.* at 588-90.

76. *Id.* at 590.

inction across which agencies are classified is that between "express" and "implied" agencies, the Code changes to a distinction between "actual" and "ostensible," which may or may not be the same one. Similarly, endorsements "in blank" and "in full" are dropped, and the distinction between "general" and "special" is introduced into the law of bills and notes; "express" and "implied" trust are abandoned, and "voluntary" and "involuntary" are introduced — all admittedly with no *necessary* change in the law, but, as Pomeroy saw it, also with no necessary improvement in the law from any point of view.

Pomeroy also saw as a defect what was mentioned above a probable attempt to reach the layman, namely, the condensed and simple style of drafting the provisions. It may seem at this distance a little strange that he should criticize this aspect of the Code, just after claiming that the Code did not make any effort to achieve the simple directness of the French *code civil*; but he explained his objection in the following fashion:

One necessary consequence of the extreme conciseness and brevity is, that matters of the greatest importance are constantly left as inferences, and often as doubtful inferences, which might much better have been expressed in the text as additional rules. Even if the court succeeds in drawing the correct inference, and thus determining the true rule, the necessity for such work of judicial interpretation might readily have been obviated by incorporating the inference in the text as a separate rule. In many cases, the court will have great difficulty in drawing the correct inference as intended by the legislature, and may sometimes reach a wrong conclusion. All this element of doubt, uncertainty and possible or even probable error might have been completely removed by making the provisions of the code fuller, more detailed, explicit and explanatory.⁷⁷

Further, Pomeroy suggested, the avowed purpose of permitting the layman to know the law is frustrated by the omission of detailed rules, since these must then only be known by the experts out of whose hands the law was sought to be delivered. Here again it might be pointed out, from the vantage point of eighty years' movement in the law, that the notion that there is always a correct and an incorrect view of the law applicable to a particular situation, and the concomitant view that the law is made up not of principles but of rules, is one which was much more current then than it is now and we would be inclined to think Pomeroy's criticisms more nearly one hundred and eighty degrees off the mark in this respect.

77. *Id.* at 718.

If anything, we should be more inclined to say that the goal of reducing the law to principles is wrong, not because lawyers *know* better, but because laymen *think* otherwise, think rather that the law is a collection of rules, and would therefore be unable to be enlightened by principles. In any case, the criticism serves to emphasize Pomeroy's main point, that interpretation and supplementation of the Code were not only inevitable but necessary.

Pomeroy's conclusion was that because interpretation was necessary, a *consistent* and *uniform* method of interpretation should be developed. Otherwise, he argued, no lawyer would be able to advise his client as to the state of the law on the point before him, and the citizen would be unable to know what his situation would be. Since the issue is the relationship between the Code and prior law (which was complete and harmonious and intelligible), there were two systems, either to consider the common law wholly abrogated, or to consider it as little abrogated as the language of the Code would permit. Pomeroy chose the latter:

On the other hand, the court might regard the code as primarily and mainly a declaration and enactment of common law rules. They might interpret every provision as intended to be a mere statement of the common law doctrine unchanged, with all its consequences, unless from the unequivocal language of that provision, a clear and certain intent appeared to alter the common law rule. They might construe all new, hitherto unused, and ambiguous phraseology, as not designed to work a change in the pre-existing settled rules, unless the intent to work such a change was clear and unmistakable. This, I submit, is the principle of interpretation which the courts should adopt and apply without any deviation to the civil code.⁷⁸

That is to say, the strict construction rule should be restored.

Within a year of the publication of these articles, the California Supreme Court was faced with a problem which called for at least some application of this method, where it was necessary to determine what law applies to the distribution of a decedent's personal estate — the law of the situs of the property, or the law of the decedent's domicile at time of death. In *Estate of Apple*,⁷⁹ the court held that there was no provision in the Code regulating this subject, and that therefore the common law rule would apply, making the law of the domicile controlling. The court acknowledged, however, that had there been a provision in the area, it would have been necessary to construe it liberally, pursuant to section 4 of the Code, in order to effectuate its purposes. Presumably, therefore,

78. 4 West Coast Rep. 52 (1884).

79. 5 West Coast Rep. 518 (1885).

the Court was not yet prepared to adopt Pomeroy's position that section 4 should be read out of the Code.

Pomeroy's articles were first noticed expressly by the California Supreme Court in 1888, in the famous case of *Sharon v. Sharon*.⁸⁰ The case involved an action for divorce in which the defense was that there was no valid marriage. The parties had signed a declaration of marriage and had cohabited at least occasionally, but maintained separate homes and expressly agreed to keep the marriage a secret. After a year the husband threw the wife out and refused to support her further. The issue in the case was whether a valid marriage required publicity under California Civil Code section 55 (taken with some modification from New York draft section 34):

Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations.

Where the New York draft had made consent alone sufficient, the California draftsmen had added the requirement of solemnization. Pomeroy had made this provision the object of express criticism (mentioning its involvement in the then pending *Sharon* case), precisely on the ground that it did not deal with the secret marriage.⁸¹ The general requirement of solemnization was already an addition to the common law, unless the phrase "mutual assumption of marital rights, duties or obligations" could be read as equivalent to "copulation," which was the common law requirement where there was no solemnization. Pomeroy was of the opinion that unless the provision could be read as a simple rephrasing of the common law requirement, the only available innovation was the requirement of publicity, which he thought inappropriate, where its function under the common law cases was merely as evidence, of which there could be other, of the fact of copulation. The court discussed Pomeroy's argument and California cases on which it was based, and reached the conclusion that the section was not intended to establish a requirement of publicity, but only a living together as husband and wife, and that the secret agreement followed by copulation was sufficient. The court adopted some of the language of Pomeroy's proposed method of interpretation:

The common law underlies all our legislation and furnishes the rule of decision, except insofar as the statutes have changed the common law. When the common law is de-

80. 75 Cal. 1, 16 P. 845 (1888).

81. 4 West Coast Rep. 50-51 n. 2.

parted from by a provision of the Code, effect is to be given to the provision to the extent, and only to the extent, of the departure. This is not saying that the Code must be strictly construed, as those terms were sometimes applied to classes of statutes prior to the Codes. Every provision of the Code, expressed in intelligible language, must be given full force and effect. But, under pretense of interpretation — or explanation in different language — the courts cannot add to the significant terms of a statute; nor, by resorting to conjecture, can they go beyond the intent derivable from the terms actually employed, considered with the pre-existing law.⁸²

In a subsequent opinion,⁸³ the court reconsidered its conclusion that the facts satisfied the requirements of section 55, without changing the basic understanding of what was required. It was concluded that because the parties maintained all the outward semblance of separate lives, and did not live together as husband and wife in any sense other than occasional copulation, that there had not been a mutual assumption of marital rights and duties. While this conclusion did not constitute a decision that publicity was in fact required, it did suggest that lack of publicity may be fatal if the efforts to avoid detection involve refraining from assuming the full marital life.

If it be thought that Pomeroy's proposed method of interpretation and its apparent adoption by the California courts destroyed the Code's effectiveness as a codification of the common law, it is perhaps important to consider what is at stake. It is clearly a repudiation of the Code to hold that the Code is a statute to be strictly construed; it is quite another thing merely to say that it is to be interpreted in the light of the common law, and that ambiguities or gaps are to be resolved or filled by reference to the common law. It would seem that the one way the Code would be rendered ineffective as a codification of the common law would be to establish the principle that as to any problem in the private law, the court should look first to the common law, and having determined precisely how it would be answered according to that prior law, then look to the Code to see if any change has been made. Then the Code would not have effectively replaced any of the formal sources of law previously relied upon, but would only be used as a statute in the traditional sense, that is, as a means of changing the law in certain particulars. If, on the other hand, the Code is looked to first, and the common law consulted only where the meaning of the Code is not clear, it would be performing

82. 16 P. 345, 357.

83. *Sharon v. Sharon*, 79 Cal. 633, 22 P. 26 (1889).

its office as well as its draftsmen have fitted it to do. It seems to me that the approach taken by the California court in the *Sharon* case was the latter rather than the former, and that if Pomeroy intended, as he seems to have, that the former approach be taken, he did not succeed in persuading the court.

Other aspects of the relationship between the Code and the common law have been explored by the California courts. The literal significance of section 5, requiring provisions substantially similar to the common law to be construed as continuations of that law, was manifested in *Churchill v. Pacific Implement Co.*,⁸⁴ in which the liability of an innkeeper as bailee under section 1859 was sought to be enforced. The defense was the statute of limitations, which had not run on liability created by statute but had run on liability arising out of an obligation. The court held that the liability was essentially similar to that of an innkeeper at common law, and was therefore not created by the Code, and that the statute of limitations on obligations generally therefore applied.

Another interesting problem of continuity was presented in *Kennedy v. Burnap*,⁸⁵ where the easement of ancient lights was at issue. Under the English common law, a reserved easement of light and air was implied in any grant of vacant land adjacent to a house, such that the new owner could not build buildings on the vacant land which would interfere with the enjoyment of light and air by the house. The American common law never adopted this view, or at least most jurisdictions didn't, and the California Code said nothing on the subject except to say that light and air could become the subject of an easement, and that all easements are passed with title unless otherwise expressly stated. There was apparently no prior California law on the subject. The court held, without discussing the matter in great detail, that the common law was not abrogated by the Code, and that the gap could be filled by the essentially common law process of choosing the preferable rule, which the court found to be the American one. It is not clear, however, since the court refers to the English rule as the common law rule, whether it was applying section 5 of the Code or section 4.

Finally, *Siminoff v. Jas. H. Goodman & Co. Bank*,⁸⁶ a 1912 decision, illustrates the sort of detailed examination of provisions of the Code in their context that can precede a holding that the common law rule is still applicable. This was an action against a bank for wrongfully dishonoring plaintiff's checks when presented

84. 96 Cal. 490, 81 P. 560 (1892).

85. 120 Cal. 488, 52 P. 843 (1898).

86. 18 Cal. App. 5, 121 P. 939 (1912).

by his payees when there were sufficient funds in his account to pay them. A major element in the plaintiff's assignment of damages was loss of business reputation. The defendant argued that section 3302 of the Code applied, precluding a claim for loss of reputation:

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon.

The court noted that this section was preceded by a general contract provision, section 3300:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

and that it is immediately succeeded by a provision relating to torts:

For the breach of an obligation not rising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

The court concluded that the provision relating to obligations to pay money only did not apply, both because the relationship between banker and customer is something more than merely debtor-creditor (although the obligation with respect to the checks is clearly only to pay money) and because the Code could not have intended to deprive the customer of what was his common law right to substantial damages in such a situation. Since the Code was therefore silent, the common law rule applied. It is not clear why the holding should not have been that the general contract provision applied, rather than the common law rule as such, but the result, and the intense searching for meaning and rationale in the Code before looking to the common law, are significant.

Of the legislative treatment of the Code, which is chronicled in rich detail by Professor van Alstyne in his commentary on the California Civil Code,⁸⁷ probably the most significant events are the gradual removal, largely in the extensive revisions undertaken in the 1930's and 1940's, of substantial portions of the Code for separate handling. The largest single area was that of Corporations (Corporations Code), nearly equalled by the law of Wills and Succession, and Guardianship (Probate Code), Insurance (Insurance

87. *Supra* note 61.

Code), much of Master and Servant and Apprenticeship (Labor Code), and Shipping, Maritime Liens and Maritime Personnel (Harbors and Navigation Code). The chief effect of these removals was on the unity of the Code and on its image as something more than a mere statute to be revised and juggled according to convenience.

THE CODE IN THE DAKOTAS

The Territory. The New York Code was adopted almost verbatim by the 1865 session of the Dakota territorial legislature, apparently at the instance of the members of the territorial Supreme Court.⁸⁸ No evidence has been found to indicate why the members of the Supreme Court were interested in the Code or how they came to be in possession of the draft. All three — Jefferson P. Kidder, Ara Bartlett (chief) and William E. Gleason — were natives of other areas and received their law training elsewhere, as could be expected in so young a territory. In all probability, the fact that it came from New York, whence came the already widespread Code of Civil Procedure, and that it constituted a handy statement of the law in more or less instant form for a virtually unlaywerized territory, sufficed to ensure its adoption once its existence and contents became known.

The first notable thing that happened to the Code in Dakota after its adoption was its thorough-going revision in 1875-77. This revision was undertaken by a Commission composed of Chief Justice Peter Shannon, associate justice Granville Bennett, and the prominent attorney Bartlett Tripp, with a non-lawyer as secretary, W. H. H. Beadle. Beadle tells of the experience in personal terms in his memoirs,⁸⁹ mentioning scarcely a single detail about the contents of the Civil Code. The genealogical hint he gives is that the California code was utilized along with the New York as model:

The legislature had shown a preference for the New York codes. California had them in more complete form, modified to suit their tribunals and civil system. We had the report of the New York (Field) code commission upon the entire subject. There was much study and discussion toward a clear understanding of the whole subject, and upon some points, such as corporations, some differences, but all sessions and all final action were harmonious Thus, from the former incomplete code of Dakota, from the Field report in New York, California code and original work, grew the full civil code. . . . Judge Shannon had nearly full charge of the civil code. . . .⁹⁰

88. I KINGSBURY, DAKOTA TERRITORY, 429-430 (1915).

89. 3 SOUTH DAKOTA HISTORICAL COLLECTIONS 85, 129 (1906).

90. *Id.* at 131-32.

The result in 1877 was by no means a slavish copy of the California code, but in most particulars substantially identical. Both retained virtually all the peculiar features of the Field draft, its organization and classification, its strong civil law influence, its tendency to adopt new terminology, etc. Dakota did not follow California into community property, and it frequently omitted changes made in other areas of the law, but it did accept the approach and to a considerable extent the details, for example, of the California provisions on corporations, while retaining and incorporating existing territorial legislation.

Unlike the California codifiers, Dakota did not attempt to change the draft provisions concerning the relationship between the Code and the common law. This left the reconciliation of what might seem to be inconsistent commands to the courts. Since the first reported decision of the territorial Supreme Court was handed down in 1867, its sixth year of existence, and since only a half-dozen had been reported by 1875, when the revision commission was already at work, it perhaps should not surprise anyone that the first opinions dealing with this problem of interpretation were written after the 1877 revision and by the chief architect thereof, Chief Justice Shannon.

Wambole v. Foote, 2 Dak. 1 (1878), was an action to cancel three deeds and set aside a tax deed on the ground that the plaintiff transferor was a minor at the time of the conveyances and at the time of execution by her of a power of attorney to sell, and that the deeds and power were therefore void. The power was executed in 1862, before adoption of the Civil Code, but the first conveyance was not executed by the attorney in fact until January 24, 1866, after the effective date of the Code. The common law was to the effect that a contract of conveyance by a minor was void unless the conveyance took effect by manual delivery by the minor, in which case the conveyance was only voidable. Since a power was not a conveyance of interest, the execution thereof was not a conveyance taking effect by the transferor's manual delivery, and it was therefore void. The Code provision stated simply, "A minor cannot give a delegation of power" (section 15), without attempting to deal with the distinction between void and voidable transfers. Justice Shannon found that the Code provision was declaratory of the common law rule (the New York commissioners' notes specifically referred to absolute voidness) and should therefore be understood as rendering such a power absolutely void. A second problem in the case was the fact that between the giving of the

power and its execution, the plaintiff married; at common law this would have voided the power, since it was not coupled with an interest, and while the Code said nothing on this specific issue it did require that a conveyance by a married woman would be effective only if acknowledged directly by private examination as prescribed by statute. This was said by Shannon to have been taken via the New York Revised Statutes of 1828, and an extensive analysis of the New York Code from the cases interpreting this provision was undertaken to show that the acknowledgement by the plaintiff of the deeds in question was insufficient. Shannon's justification for this excursion shows a healthy respect for the historical background of the Code which is difficult to distinguish from the rule of interpretation in the light of the common law:

In thus tracing the origin and in giving the contemporaneous exposition of these statutes incorporated into our Code, this opinion has become somewhat lengthy. The cause of this, however, is that a thorough and complete understanding of them is essential in this, the first case in this Territory calling for their interpretation. It is not that there is any ambiguity in the language, but that a clearer light is shed from the history of statute, and from opinions in respect to it entertained by jurists at the time of its passage. . . .⁹¹

Everett v. Buchanan, 2 Dak. 249 (1880), was an action to recover property wrongfully taken from the plaintiff's possession on the basis of a chattel mortgage with power of sale, and sold to the defendant at private sale. Plaintiff was lessee under a lease executed after the chattel mortgage. The Code, incorporating by reference the provisions on pledge, required sale under a chattel mortgage to be made by public auction (section 1743), and provided that wrongful conversion by the holder of the lien would extinguish it (section 1718). The plaintiff claimed that the improper sale constituted a wrongful conversion, and that therefore the lien was extinguished and the plaintiff entitled to recovery of possession. The majority opinion by Judge Kidder, without any discussion of the sources to be consulted in interpreting section 1718, cited a New York case for the plaintiff's proposition and held in his favor.

Shannon's concurring opinion launched into an extensive discussion of the common law of mortgages and how the provisions of the Code relate thereto. He pointed out (as did Field in his notes to the draft) that the common law, and Kent and Story with it, adopted the title theory of mortgage — that they constituted a conveyance on condition with an equitable right of redemption —

91. 2 Dak. at 28.

and that in New York and California, prior to the Code, only the mortgage of realty had come to be considered a lien, while the chattel mortgage had retained its character of a conveyance upon condition. The Code, however, as drafted for New York and adopted in both Dakota and California, took the final step, making all mortgages liens (section 1608 of the draft, section 1722 of the Dakota Code) and expressly denying that a lien passed any title to the property (section 1591 draft, section 1706 Dakota Code) it was observed with Story, that the lien theory of mortgages is a generalization of the civil law notion of *hypothecation*, which is subjection of property to the payment of a debt, conditionally, without transfer of possession. While a chattel mortgage (unlike a real mortgage) could be foreclosed without legal proceedings, and the mortgagee might take possession preliminary to such extrajudicial foreclosure, the mortgagee's right remained a lien only and the mortgagor retained title until the actual sale. Prior to the Code, at common law, the power to sell was not limited to public auction, unless the instrument creating the mortgage made it so; but the Code made public auction a requirement, and Shannon pointed out that the Code did not innovate altogether in making a wrongful conversion extinguish the lien. In any case, however,

. . .these and other decisions have here given place to positive enactments. They are no longer the sole guides; for when the Code speaks, the common law vanishes. They may furnish the reasons for the law, and aid in its interpretation, but nothing more.⁹²

In other words, the Code must be understood and interpreted in the light of the existing law at the time of its formulation, but its terms are nonetheless controlling.

A more common-law-oriented opinion was handed down by Justice Hudson in *Herbert V. Northern Pacific R.R. Co.*, 3 Dak. 38 (1882). There the action was for personal injuries suffered by a railroad brakeman when he attempted to stop two cars in a yard pursuant to order of the yard-master. The immediate cause of the accident was defective brakes on both cars. The defendant claimed that the yard-master was negligent and the fellow-servant rule applied, the railroad thus being exonerated from liability. The opinion begins with an exposition of the common law relating to the fellow-servant rule, including the exception for concurrent negligence of the master, and then notes that the defendant claimed, in effect, that the Code provision on the fellow-servant rule

92. *Everett v. Buchanan*, 2 Dak. 249, 270.

eliminated the exceptions by omission.⁹³ The court concluded that the section in question, when read in conjunction with the following section establishing the master's liability for his own negligence,⁹⁴ was not intended to change the common law rule.

But we cannot see that the section of the statute above quoted [section 1130] has changed in any respect the rule of law relating to this subject. It has enacted simply the common law into the statute which cannot give it any more force than it had before such enactment. . . .

This section of the statute [section 1131] is in perfect accord with the decisions which hold that the master is liable to a servant for his, the master's own negligence, or want of care and prudence, or for his own personal act or misconduct, occasioning injury and damage to the servant.⁹⁵

To the assertion that by stationing a repairman at the yard the yard master has fulfilled his duty, and that the faulty brakes were the result of the repairman's negligence, Justice Hudson retorted:

We understand the principle maintained *in the cases cited* to be, that there are certain duties which concern the safety of the servant that belong to the master to perform, and he cannot rid himself of responsibility to his servant for not performing them by showing that he delegated the performance to another servant who neglected to follow his instructions or omitted to do the duty entrusted to him.⁹⁶

This comes close, at least in appearance, to the approach which Pomeroy advocated for California two years later, namely, to consider the first inquiry always to be into the common law and to consult the Code only to determine if any change is intended. The same result would no doubt have obtained if the opposite approach had been used: first to consult the Code and, upon finding that the Code does not expressly deal with the problem of concurrent negligence of master and fellow-servant, but does restate the common law as to the fellow-servant rule and the master's liability separately, then to consult the common law to fill the gap. The significance of the Code as a legislative act, however, is vastly different in the two approaches, and if the first was intended by Judge Hudson (as is suggested further by his constant references

93. "An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." REV. CODES, DAK. § 1130 (1877).

94. "An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care." *Id.* § 1131.

95. 3 Dak. 38, 53-54.

96. *Id.* at 54 (emphasis supplied).

to "our statute") it could have been a severe blow to its usefulness. The opinion contains no exhortation to adopt such a principle of interpretation, however, and the suggestion by example seems not to have been overtly taken up in later opinions.

It is interesting, on the other hand, that a somewhat similar treatment was given the Code on appeal to the United States Supreme Court in the same case, by no less a proponent of codification than Justice Stephen Field. In his opinion Field, like Hudson, began with an exposition of the common law, which he found to be clearly against the railroad, and then looked to the Code for possible alteration of this rule.

If . . . one was appointed by [the master] charged with that duty [to maintain the equipment in working order], and the injuries resulted from his negligence in that performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence, and imposed a liability upon it, *unless, as contended, it was relieved therefrom by the statute of Dakota.*⁹⁷

Field concluded, again with Hudson, that no change in the common law rule was intended by section 1130 of the Code, noting that a Massachusetts case applying the common law rule had held that providing and maintaining machinery is not "the same general business" as operating it, and noting also that California had given the same construction to its identical Code provision. Field did, however, attempt to explain his position a little further in terms of the silence of the Code itself:

We do not perceive that the provision of the . . . Civil Code of Dakota, that . . . 'there is no common law in any case where the law is declared by the codes', at all affects the question before us.

There cannot be two rules of law on the same subject contradicting each other. Therefore, where the code declares the law there can be no occasion to look further; but where the code is silent the common law prevails. What constitutes the 'same general business' is not defined by the code, but may be explained by adjudged cases. The declaration by the Code of a general rule, which is conformable to the existing law, does not prevent the courts from looking to those cases for explanation any more than it prevents them from looking into the dictionary for the meaning of words.⁹⁸

Of course, to say that the common law prevails where the Code

97. Northern Pacific R.R. Co. v. Herbert, 116 U.S. 642, 652 (1886) (emphasis supplied).

98. *Id.* at 654.

is silent is quite a different proposition from that which says the common law prevails unless the Code contradicts it. It would have been more helpful, however, if Field had begun his opinion by noting the silence of the Code, rather than adding it as an after thought.

Justice Hudson met the Code on rather more direct terms in *Wood v. Cuthbertson*, 3 Dak. 328 (1884). The action was to recover principal and interest on a loan, with a defense of usury and a counterclaim for the interest paid. The case was seen as a straightforward problem of interpretation of the Code provisions on usury, the issue being whether the entire interest paid on a usurious loan was recoverable or only that paid in excess of the legal rate. The plaintiff invoked an Illinois statute and cases interpreting it, for the proposition that the entire interest is recoverable, but his authority was brushed aside:

Section 1100, of our Civil Code, is the same as to the forfeiture; then adds the provision for the recovery of the excess of the usurious interest paid over 12 per cent per annum, differing from the Illinois statute. This, we think is exclusive of all other remedies. The Code having declared the law as to the recovery of usurious interest there is no common law right: See Sec. 6, Civil Code.⁹⁹

Finally, a fairly straightforward application of the no-common-law provision is to be found in *Garretson v. Purdy*, 3 Dak. 178 (1882). There the action was to enforce a promissory note, by a holder in due course, which contained in addition to the basic promise to pay a stipulation for attorney's fees in case litigation became necessary to enforce the note. The issue was whether the additional stipulation rendered the note non-negotiable and therefore subject to equitable defenses. After examining the common law and finding a split of authority on the question, the court back-tracked and noted that "independent of these conflicting decisions, and independent of the common law upon this question," the Code had resolved the issue. The crucial provision found to be controlling was section 1827: "A negotiable instrument must not contain any other contract than such as is specified in this article." This, in conjunction with the no-common-law rule, settled the matter.

No other legislative developments of interest here were made in the Code during territorial days. It can be seen that the courts did not develop a consistent pattern of interpretation, at least overtly, although the overall impression is that the Code was taken seriously and was given its due, with the common law resorted to only when the Code was silent or ambiguous.

99. 3 Dak. at 334.

South Dakota. At the first session of the South Dakota legislature following statehood, it was necessary to pass a law continuing in force the laws of the territorial period. In the context of this act the legislature also included a provision expressly making the common law applicable in cases where the positive law was silent. The phrasing of the statute seems innocent enough:

[Section 1]. All laws, in force in the Territory of Dakota at the date of the admission of the State of South Dakota into the Union and not repugnant to or inconsistent with the Constitution of said State, shall continue and be in full force and effect until altered, amended or repealed.

[Section 2]. In any and all cases not controlled by the laws enumerated in section 1 hereof the Common Law shall be the law of this State . . . [Laws 1890, ch. 105]

In the code revision of 1903, however, this provision was translated into the following rather different proposition:

In this state the common law is in force except where it conflicts with the codes or the constitution. [Civil Code Section 6].

It is not clear at all that the 1903 revisers supposed the revised section 6 to be vastly different from the provision it replaced:

In this territory there is no common law in any case where the law is declared by the codes [Dakota Civil Code Section 5].

for the marginal note "Codes exclude common law" was retained by them. By the 1919 revision, however, which interestingly enough dropped the designation "Civil Code" and adopted that of "Substantive Provisions," even this hangover from the original Code was eliminated. Despite this apparent confusion, and the retention throughout of the original provision as modified by California abolishing the strict-construction rule, the end result comes very close to an adoption by the legislature of the Pomeroy method of interpretation, of looking first to the common law and then to the Code.

To my knowledge, the South Dakota Supreme Court has remarked on this amendment only once, and that almost incidentally. In *Moberg v. Scott*, 38 S.D. 422, 161 N.W. 998 (1917), the action was for wrongful death in selling opium in eventually fatal amounts to plaintiff's husband. The defendant argued that the basis of the action was injury to personal relation that this was governed by Code section 32(1) which read: "The rights of personal relation forbid: 1. The abduction of a husband from his wife, . . ." and

that this constituted an exclusive list of injuries which did not include death by narcotic addiction. A number of responses were available to the court to the defendant's argument. California had interpreted its identical provisions by holding the word "abduction" to include interferences short of a physical carrying-off, but the South Dakota court declined to stretch the words so far. Rather it held that section 32 was not an exclusive list of rights of personal relation, and that other sections of the Code supplied authority for the plaintiff's claim:

[Section 27] [E]very person has, subject to the qualifications and restrictions provided by law, the right of protection from . . . injury to his personal relations.

[Section 1940]. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefore in money, which is called damages.

[Section 2076]. For every wrong there is a remedy.

At this point the opinion looks like an example of the most imaginative use of the Code to solve problems not expressly dealt with. The court went on, however, to state that the common law, once the disability of coverture had been removed, would recognize a right of action in such a case, and pointed out that while old section 6 ("there is no common law in any case where the law is declared by the code") would have afforded ground for arguing that section 32 is an exclusive list of rights of personal relation, the 1890 amendment makes the common law applicable in the state. "For both reasons" the plaintiff's complaint was sustained.

Other cases dealing with interpretation of the Code in South Dakota fill out a picture similar to that in California, that is, a mixed bag of utterances each apparently designed more to resolve the particular conflict before the court than to establish firm principles of interpretation. In *Rudolph v. Herman* 4 S.D. 283, 56 N.W. 901 (1893), a mortgagor sued to recover rents and profits due on property subject to the mortgage. The defense of the tenant was that the mortgagor had foreclosed and that demand for the rents and profits during the redemption period had been made by the purchaser at the foreclosure sale. The Civil Code incorporated by reference provisions of the Code of Civil Procedure as governing the foreclosure proceedings, but the latter provisions did not deal with the right of the purchaser to rents and profits during the redemption period. The analogy of an execution sale was available, however, where the Code of Civil Procedure expressly gave the purchaser the right to rents and profits during any redemption

period. Without discussing the applicability of the provision abolishing the strict-construction rule, the court held that the right to purchase at a mortgage foreclosure sale is a purely statutory one, and as such to be strictly construed to avoid expanding the liability of the mortgagor beyond that expressly established. A North Dakota case interpreting the same provision as giving the purchaser the right to the rents and profits during the redemption period was rejected as violating the strict-construction rule. This opinion goes as far toward reducing the Code to the status of an ordinary common law statute as any, but it does not appear to have had general influence.

Hallen v. Martin, 40 S.D. 343, 167 N.W. 324 (1918), was an action for fraud and deceit in misrepresenting land for which plaintiff traded his own to defendant. The dispute was over the proper measure of damages in such a situation, with the competing formulations being: (1) the difference between the actual value of the land and the price paid for it, and (2) the difference between the actual value of the land and the value it would have had had the representations been accurate. The Code contained no provision prescribing the measure of damages for deceit in such cases. The court held that the damages provisions in the Code were declaratory of the common law, and that it was therefore proper to look to the law of other jurisdictions to determine the common law and to interpret the Code in the light thereof. The conclusion was that the second formulation was the common law rule and was to be adopted in South Dakota. A concurring opinion pointed out that the decisions in other jurisdictions were in conflict, even as to the general measure of damages in tort actions, and that therefore it was to some extent improper to talk about a common law rule; dissenting opinions argued in preference for the other view of the common law. The case thus illustrates the weakness of the Pomeroy method of interpretation in the face of uncertainty as to what the common law rule was, and the question remains after such a decision, whether the South Dakota Code has been interpreted, in the light of the common law, as making the measure of damages in deceit actions equivalent to that of breach of warranty of quality, or whether the common law has been read as requiring this result.

An interesting example of argument based on the premise that South Dakota is a common law state is to be found in *Truxes v. Kenco Enterprises, Inc.*, 119 N.W. 2d 914 (S.D. 1963). The issue there was the existence of a right of privacy, allegedly violated by unauthorized publication of the plaintiff's photograph. The defendant argued that the common law adopted in South Dakota was

that in existence as of 1890, the date of adoption, and that in 1890 there was no right of privacy.

The court held, however, that there is no such limitation on the common law of the State, and that since the right of privacy is now a part of the common law of other jurisdictions, it is a part of the law of South Dakota. No attempt was made to find provisions of the Code which might furnish support for such a right such as the general tort provision:

Every person has. . .the right of protection from bodily harm or restraint, from personal insult, from defamation, and from injury to his personal relations, and every person is bound, without contract, to abstain from injuring any such rights of others and to abstain from injuring the person or property of another. [Section 973 Civil Code].

Thus it can be seen that while the cases are not conclusive, there is a strong tendency in South Dakota, encouraged by the almost inadvertent adoption of the common law in 1890-1903, to relegate the Code to the secondary position of a common law statute, and to look in the first instance to the case law of other jurisdictions.

The other significant development in the life of the Code in South Dakota is also a legislative one. In 1939 all the Codes and statutes of the State were consolidated into a single Code covering all subjects in an alphabetically arranged system. The Civil Code thus lost its identity as a separate system of law, with its provisions scattered in a conceptually unorganized fashion throughout the new Code. The importance of this move will be discussed below in connection with the identical move of North Dakota in 1943.

North Dakota. Unlike South Dakota, North Dakota made no attempt, at least none prior to 1943, to amend the Code provisions dealing with the relationship between it and the common law, but left those provisions substantially as they were in the territorial period. The chief interest lies, therefore, in the way the courts have handled the Code.

In *Garr, Scott & Co. v. Clements*, 4 N.D. 559, 62 N.W. 640 (1895), the 1890 mechanics' lien law, which gave the mechanics' lien priority over mortgages and other liens, was challenged as unconstitutional. The only provision relating to mechanics' and artisans' liens in the Code, section 1814, said nothing about priority. It was held that the statute was declaratory of the common law with respect to priority, and therefore did not affect existing rights in a unconstitutional manner.

The 1890 statute was absorbed into the 1895 revision of the

Code, but without the priority provision, and a new statute was passed in 1907, again expressing the priority. This statute was attacked on similar grounds in *Reeves & Co. v. Russell*, 28 N.D. 265, 148 N.W. 654 (1914), and again held constitutional since declaratory of the common law. It should be noted here that the principle that statutes declaratory of the common law are to be construed in the light thereof is a generally recognized one of long standing in the Anglo-American law.¹⁰⁰

The principle that where the Code is silent the common law applies was invoked in *Brignall v. Hannah*, 34 N.D. 174, 157 N.W. 1042 (1916), where owners of riparian land sued squatters to recover possession of land uncovered by recession of non-navigable lake waters. The court found no statutory or constitutional provisions dealing directly with the problem, although streams and navigable lakes are dealt with in the Code, and held therefore that the common law applied to give riparian owners title to the center of the lake.

The liberality with which Code provisions are to be construed was the subject of two interesting cases decided in the 1930's by the North Dakota Supreme Court. In *Grabow v. Bergeth*, 59 N.D. 214, 229 N.W. 282(1930), plaintiff sued for fraud in the sale of stock, and the issue was the assignability of a cause of action for deceit. The key Code provision was section 5446, Compiled Laws of 1913 (section 361 of the Civil Code):

A thing in action, arising out of the violation of a right of property or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives . . . (emphasis added).

A cause of action for deceit, as a tort claim, falls under the general heading in the Code of an obligation imposed by law, and the question for the court was whether the term "obligation," as used in section 361, included "obligation imposed by law." The court concluded, having in mind the general common law prohibition against assignment of choses in action, that section 361, by virtue of the insertion of the italicized portion in the position of a qualifying phrase, was not intended to be a general abolition of the common law rule, but only a limited one. Since all choses in action arise either from a violation of a right of property or out of an obligation in the broad sense (contract or tort), the limitation must lie in the extent of the term "obligation" as used in the particular section, and that can only consist in exclusion of causes of action *ex delicto*. The court then launched into an extremely com-

100. See, e.g., 82 C.J.S. *Statutes* § 363; CRAWFORD, *STATUTORY CONSTRUCTION* § 74 (1940); CRAIG, *STATUTE LAW* 104 (1911).

plex analysis of other provisions in the Code and in other codes or statutes, to show that the legislature assumed that some types of things in action were not assignable. First, the Code of Civil Procedure of 1877 (originally adopted in 1867 after the Civil Code) contained a provision which read as follows:

Every action must be prosecuted in the name of the real party in interest. . . ; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. [Code of Civil Procedure section 74].

Second, the North Dakota Probate Code, despite the provisions of section 361 of the Civil Code, listed in sections 8798, 8800 and 8801 (Compiled Laws of 1913) all those actions in which the executor or administrator of a decedent's estate could prosecute or defend in his representative capacity, and actions for fraud, deceit, and so-called personal torts are conspicuously absent from the list, indicating an understanding that such causes of action did not survive — and since section 361 uses assignability and survival co-extensively, it follows that such actions must not be assignable. Similarly, certain of the provisions in the Code of Civil Procedure on statutes of limitation imply that personal injury claims do not survive. The common law prohibition against assignment of choses in action survived, in that choses in action *ex delicto* continued unassignable. A South Dakota precedent construing the identical provision in their Code otherwise was rejected by the North Dakota court as having failed to take into account the existence of the common law rule in the background of the Code provision.

On the other hand, it was noted by the court that though some states had changed the common law rule, it was always by statute and not by judicial decision. A strong dissent by Chief Justice Burke emphasized that the language of the civil procedure provision was stricken by the legislature in 1895. The net effect of this case appears therefore to be similar to the adoption of the Pomeroy method of interpretation, or a strict-construction rule, despite the emphasis on other statutory language as tending to support the restrictive interpretation of the Code provision.

A much more sympathetic reading of a similarly ambiguous provision was given in *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932). That was an action by a wife against a husband for personal injuries resulting from an automobile accident, and the issue was whether the common law disability of coverture had been abolished. The Code provision coming closest to dealing with the subject was section 79 (Compiled Laws of 1913, section 4411):

Either husband or wife may enter into any engagement

or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name.

The plaintiff argued that the Code provision was clearly intended to abrogate the common law disability with respect to tort actions against the husband, while the defendant relied on Minnesota cases which interpreted a similar statute as leaving the common law prohibition intact. The court undertook an exhaustive review of the history of legislative liberalization of the interspousal relation in the territory and in North Dakota, as well as an analysis of the cases in non-code states construing similarly worded statutes and concluded that the common law rule was intended to be abolished altogether.

Read in the light of the common-law principles alone. . . there would be, to say the least, good room for argument to the contrary. This is attested by the formidable array of authorities cited above, wherein statutes of a more or less similar character have been thus read and construed. But taking into consideration the growth and development of the idea of the emancipation of the wife and the equality of the husband and wife before the law disclosed by the history of our legislative enactments, we hold that in this state the common-law rule is wholly abrogated, and that a wife may sue her husband for a personal tort. . . [S]ection 4411 does more than merely put a married woman on an equality with her husband with respect to person, reputation, and property. It recognizes her legal individuality, and preserves for her every right that she had prior to her marriage. . . .¹⁰¹

It could be pointed out, of course, that the court could simply have held that the provision itself was clear and did not need interpretation. The court acknowledged this, in fact, in stating that "read by itself without regard for the common law" the section was susceptible of but one interpretation. By refusing to accept the suggestion that the common law should be given the benefit of even the remotest doubt, however, the court reaffirmed the supremacy of the Code where the legislative background militates against such doubts.

The relationship between the North Dakota Code and the common law was involved instructively in the very recent case of *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967). There an unemancipated

101. *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 200, 242 N.W. 526, 529 (1932).

minor sued a truck driver for injuries suffered in an automobile accident. The defendant filed a third party complaint against the plaintiff's parents, alleging that they were negligent in operating the car in which the plaintiff was riding and would therefore be liable at least in contribution as joint tortfeasors. The trial court dismissed the third-party complaint for failure to state a cause of action, in that an unemancipated minor could not sue his parents. This was the common law view, and the trial court found no statutory provision removing this disability. The State Supreme Court reversed, directly applying the provision that there is no common law in any case where the law is declared by the Code. The appellate court found the law to be stated in the general negligence provision,¹⁰² and two other provisions dealing with parental authority, indicated an intention not merely to lift the disability in certain special cases, but to limit it to certain specific cases, of which none applied. The general negligence provision was found to be unambiguous and therefore not in need of interpretation in the light of the common law. This case is perhaps the most forthright vindication of the Code (and indeed after consolidation!) by application of the no-common-law provision that can be found in the literature of any of the adopting states.

The single most dramatic event in the life of the Code in both South and North Dakota, however, was the consolidation of the six codes (Civil, Criminal, Political, Justices, Civil and Criminal Procedure) into a single mass, in 1939 and 1943 respectively. The significance of this consolidation is difficult to assess. Obviously, the Civil Code did not retain a separate identity, and its internal arrangement was largely destroyed. Indeed, the Revised Statutes format involved a deliberate abandonment of logical order altogether. In the place of a more or less systematic, logically arranged whole, there was an alphabetically arranged conglomerate of provisions on various subjects of greatly differing levels of generality. The provisions themselves were largely retained, of course; in the North Dakota Revised Code of 1943, seventeen of sixty titles were mostly or entirely made up of provisions from the Civil Code. Nor was all opportunity for logical arrangement lost, for many of the titles were broad enough to include large portions of the Code in substantially the same order as they appeared in the original. Most of the Division on Persons in the Code is still to be found in Title 14 on Domestic Relations and Persons in the consolidated code, with Title 34 on Labor and Employment containing

102. N.D. CENT. CODE § 9-10-06 (Civil Code § 979): "Everyone is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter, willfully or by want of ordinary care, has brought the injury upon himself...."

most of the rest. The general provisions from the Division on Obligations in the Code are found in Title 9 on Contracts and Obligations, although much of the material under the heading of "obligations arising from particular transactions" is scattered through separate titles on Agency, Carriage, Guaranty and Indemnity, Insurance, Warehousing and Deposits, and of course the Uniform Commercial Code (formerly Sales). Much of the material from the Division on Property is found in Title 47 on Property, though with much less order, and with large chunks removed into separate titles on Corporations, Liens, Succession and Wills, and Trusts, Uses and Powers. Many of the provisions in the Fourth Division of the Code were transported to Title 1 (General Provisions), Title 32 (Judicial Remedies) and Title 42 (Nuisances). Within each title, the arrangement of the chapters usually, though by no means always, preserves the arrangement which appeared in the Code, so that consideration of the logic of arrangement can still sometimes be useful in interpreting the specific provisions.

What is most clearly lost, however, is the overriding idea that logical arrangement is useful in a written statement of the law. The alphabetical arrangement of the major units in a collection of revised statutes is justified primarily because the statutes collected within each such unit can be assumed to have been adopted separately and as independent units, with concern for other statutes only to the extent of avoiding (or eliminating) inconsistencies. This is traditionally the case with statutes in the common law world. However, not even a revised statute collection would attempt to break up a single enactment into fragments to be placed under separate, unrelated headings, for the assumption would be that the statute passed as a unit was intended to be useful as a unit. It may be arguable that the old division into six codes was not a perfect one, and that the constant necessity of crossing the code lines to resolve particular problems demonstrated a need for re-arrangement. To adopt the alphabetical arrangement, however, is to abandon the search for meaningful arrangement altogether, and to serve inefficiently that practical lawyer's need which is much better served by a thorough general index.

The revisers' notes disclose no reason for changing the arrangement of the Code so radically, other than that the system adopted was that of the United States Code and has been widely accepted by codifiers of statute-law. Undoubtedly, however, one of the major reasons that the code format was so willingly abandoned was that the legislature, in passing new statutes, made no attempt to incorporate its enactments into the Code format unless it was amending Code sections. This process had to await the sporadic

code revisions, which took place with less and less frequency. In North Dakota, the last revision attempting to re-establish the Code categories prior to the 1943 consolidation occurred in 1919, and almost the only one ever undertaken in California was in the 20's and 30's. The absence of any institution such as a Code Commission responsible on a continuing basis for incorporating new enactments into the Code structure—the Dakotas have never had such, and California has had one only since the late 30's—no doubt made it inevitable that in time the codes would come to be considered not as organic wholes but as mere statutes bearing a particular date and aimed at a particular subject. It is clear, however, that the effect of this lack on the *status* of the codes, if not on their content, has been fundamental.

CONCLUSION

The precise cause of the substantial failure of the 19th century codification movement has been much speculated over, but the evidence does not yet justify singling out any one factor. The matter can be seen in New York as involving chiefly personalities, timing, and chance: if there had been earlier action by the legislature (no doubt occupied by post-civil war matters at the time the proposals were submitted), if the governors had not somehow been persuaded that the draft needed revision before adoption, if there had not been so much new law in it (though this element in the Code has been greatly exaggerated), if the chief spokesman had been a less controversial personality, etc., perhaps the substantive code would have been adopted and could have had something like the influence of its predecessor, the Code of Civil Procedure. On a broader plane, with reference to the American scene generally, it can be said with Pound that American law was not ready then for codification, not sufficiently developed in its separate identity to permit any codification to gain enough sympathy; but I confess that this reasoning, on the evidence, bears a strong circular aspect. A more pragmatic notion, related to the historical thesis that the development of the law must come casuistically, is that the American legislature, popularly elected and without technical expertise, was not competent to do the job of codifying or of maintaining the vitality and integrity of a code once adopted. Certainly to the extent that the debate over codification resolved itself into argument over the relative merits of legislatures and judges as law-makers, the influential writers and commentators were not prepared to give the nod to the legislatures. The polemics of the New York City Bar Association and especially of Pomeroy in California show little confidence in legislators in this respect. Finally, it is possible

to believe that the opponents of the code really did find it so inferior a product as to be unworthy even of the effort to improve. In the absence of conclusive evidence, I am inclined to emphasize the first factor, the logically irrelevant, but practically all-important one of personalities and timing.

In those jurisdictions which adopted the Code, the picture is somewhat different. Here it cannot be said that the Code failed, for in those jurisdictions at least the substance remains in effect and has constantly been used, without obvious disaster. It has been suggested that the Code provisions have been ignored, in many respects, at least in California, but only a single instance is cited without identifying details, and the proposition is one inherently very difficult to prove. The cases do show a very ambivalent attitude toward the Code as a source of law, but the courts have neither ignored it nor flatly repudiated it.

It seems to me that the most important respect in which the Code has failed, however, is in what Holmes thought the primary function of codification, namely to lay down a philosophically arranged *corpus juris*. It would not have been a fatal defect to be incomplete, if the Code had succeeded in establishing itself as the philosophical framework over which a complete statement of the law could be draped; then the inevitable amendments and supplementary legislation could have been related to the Code rather than accumulating helter-skelter alongside it. One of the most telling commentaries on the Code, or on the commentators, was that of Pomeroy, echoed by J. O. Muus some years later for North Dakota,¹⁰³ to the effect that he found the Code unsuited for academic use because of its incompleteness, supposed defective arrangement, and local character. It was never said of this Code by a teacher, as it was of the French and could have been of the German, that "I teach only the Civil Code." No doubt a significant factor for the law student, as Professor Muus suggested, was the national orientation which became traditional in American Law Schools attempting to prepare their students to function anywhere in the country. So long as the code remained the exclusive property of four or five jurisdictions, it was bound to be relegated to the status of local law, to be studied only for particular needs. It was thus never a source from which the law could be learned and understood, only one from which it could be ascertained for particular cases. This being so, it is not surprising that no one thought enough of the Code in the Dakotas, after seventy years of use, to retain its original form, to improve it rather than dissolving it.

103. *The Influence of the Civil Code on the Teaching of Law at the University of North Dakota*, 4 DAK. L. REV. 175 (1932).

It is not clear what the Code would have had to contain in order to achieve this oracular status which seems essential to the long-term survival of the Code in the continental sense—more detail or a more rigid use of terminology, as in the German, appended practical examples of application, as in the Indian Contract Act and Penal Code, a more readable style, as in the French, perhaps merely an ongoing commission responsible for its tender care and feeding—but whatever the lack it was fatal to the complete success of the venture.

Lying in the background of this philosophical failure is the most frustrating fact of all, namely the absence in the American legal literature of *any* successful attempt at fixing the philosophical framework of our private law. Holmes searched and did not find, and neither has anyone else who has tried. This, it would seem, remains the overriding problem of the time.

