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Is Codification of the Law Expedient?

The subject of codification of the so-called unwritten or common law is a subject of extreme importance, not only to the lawyer but to the layman. The science of jurisprudence is of interest only to the theorist in his study, or the professor in his lecture-room. The law itself, however, affects the interests of every man, woman and child in the community.

It has been forcibly said by a Justice of the United States Supreme Court, in an address delivered by him before one of our law schools:

“At first view, when we walk about amongst our fellow men, we may not observe the omnipotent influence and controlling effect of the law. Its power is so subtle and all-pervading that everything seems to take place as the spontaneous result of existing conditions and circumstances. It is like gravitation in the natural world, which, whilst it governs and controls every movement, and produces all the order of the universe, is itself unseen. It must be studied in its effects in order to understand its power. So with law in civil society. It is over, under, in and around, every action that takes place.”*

When, therefore, the question arises whether the law shall be codified, the question is one which affects the

* Mr. Justice Bradley, Lecture to Law Department of University of Penn., 1884.

layman quite as much as the lawyer. Nay, it affects the layman more than the lawyer, since the lawyer's work will continue uninterrupted and his profits may even be increased by changes in the form or substance of the law, while the layman's interests may materially suffer thereby. It is the layman who is injured by bad law, rather than the lawyer. It behooves the laymen, therefore, whose votes and influence are to determine the question and whose social and pecuniary interests are to be affected thereby, to see to it that they are not misled by specious and fallacious arguments either for or against codification.

What, then, is codification? It is the reduction into the form of a statute, under the sanction of the Legislature, of the body of legal principles and rules which form the law of the State. It may be (1) confined to the statement of such principles and rules as have already been announced by the Legislature or the Courts, or it may (2) contain changes in such principles and rules to correct or amend them, or it may (3) extend still farther and may undertake to lay down entirely new principles and rules for future cases which have never as yet been provided for by the Legislature or which have never yet come before the Courts for adjudication. These are three distinct theories of codification, and much confusion has arisen in discussing the subject from not bearing in mind the distinction between those theories. Arguments for or against codification upon one of these theories are often entirely fallacious when applied to the other theories. Much may be said for or against one of the theories which is entirely inapplicable to either of the other theories. Yet in the popular mind and to a large extent in the legal mind, there is a total failure to distinguish between codification of the existing law without alteration, codification of the existing law with alterations, and codification of existing law together with law as yet non-existent and with a view to settle

questions which have not yet arisen or have not yet been legislated upon or decided by the Courts. *

As to the desirability of codification, there are extreme views on both sides. On the one hand, the extreme opponents of codification in any form take the view that the elasticity of the unwritten or judge-made law is itself a merit and that it would be an unmixed evil to embody the rules and principles of law, even as now settled by the decisions of the Courts, into the rigid and inelastic form of a statute. On the other hand, the extreme advocates of codification claim that elasticity is only another name for uncertainty; that codification of existing and non-existing rules of law is the only sure and effective remedy for the evils of our present system; that it will make the law definite, coherent, certain and easily ascertainable and will thereby reduce litigation and promote justice; that the law should be made accessible to the common man and not be the exclusive property of the learned lawyer to be extracted by him from a wilderness of text-books and reports.

At first blush, the codifiers have much the better of the argument. What they say sounds very plausible and logical, and seems very feasible. Nor are they entirely without justice in their criticisms of the system of judge-made or so-called common law. The objections raised by such men as Bentham and Austin to what they call "Judicial Legislation" are very forcible and are entitled to careful consideration. That the principles of the law are difficult of ascertainment, imbedded as they are in numerous and often inconsistent decisions, is quite true. That groat research

* I do not propose to discuss codes of practice, or of criminal law, or of evidence, or of other special branches. Many of these branches I think may be properly and advantageously codified, but to discuss them in detail would be beyond the scope of this address, which is intended to deal with the subject of codification of the law of the State as a whole.

and keen acumen are often requisite to extract the rule of law governing a particular question from the mass of authorities bearing directly or indirectly upon it is also true. It is also unfortunately true that the law is to a large extent unknown and even unknowable to the layman who lacks the trained skill necessary to enable him to collate, compare and distinguish cases in the reports or to utilize the digests, while, nevertheless, he is bound at his peril to know the law and to act accordingly, since "every man is conclusively presumed to know the law," on every subject. The unfortunate layman may well be compared to a traveler wandering through an unknown wilderness, full of pitfalls on every hand. These he must at his peril avoid. Yet his only guides are a series of signs posted upon the trees, each referring back to the other and directing him by references to land-marks utterly unknown to him or by courses and distances which he has no compass or instrument wherewith to measure or compute. Surely, says the codifier, there can be no harm in giving the traveler a chart by which he can journey without the necessity of a trained guide to interpret the sign posts.

So, also, as to the uncertainty of the law even to the skilled lawyer, there is very great force in the objections urged to the existing system. Elasticity may have its advantages. It may in the long run work well for the community as a whole. It may enable courts of justice by a long course of decisions, now tending in one direction, and now in the other, to work out a systematic and harmonious and just scheme of law. But for the individual suitor, whose rights are *sub judice* and who must pay the expenses of a particular stop in the path of advancing jurisprudence, elasticity is anything but a reassuring word. The right of a Court to vary from previously declared rules of law, to modify, to distinguish, even to overrule earlier decisions, may be a good thing for mankind, but it is a manifest

hardship to the individual man, who is mulcted in costs and lawyers' fees for relying on the earlier decisions, under the advice of counsel "learned in the law." It sometimes seems, indeed, as if the science of the law consisted only in the art of guessing what the highest court of the State will decide on a given condition of facts if established by evidence, and how far it will follow and how far distinguish or overrule previous adjudications. I, for one, must own up to the heresy of a disbelief in the merits of elasticity in the law. I regard certainty as one of the greatest *desiderata* in jurisprudence. Law that is certain can at least be known and obeyed; Law that is uncertain can neither be known nor obeyed. Law that is uncertain is not law at all. It is only when law defines itself and declares itself in precise and accurate and definite language that it becomes a rule of conduct demanding and enforcing obedience. If codification can give us a practical remedy for elastic and uncertain law, and a remedy which will not bring with it other evils greater than the one it cures, then I, for one, am heartily in favor of codification.

Another serious objection urged against judge-made law is that it is largely *ex post facto*, as Austin puts it, that is to say, the Courts declare the law upon a given state of facts in an actual controversy after the parties have acted, instead of the law being declared in advance by the Legislature to meet future cases. In other words, rules of law are worked out at the expense of individual litigants, and in the heat of forensic controversy, with all the adventitious advantages or disadvantages of one side as compared with the other, in the eloquence or ingenuity or learning of counsel upon one side, or the stupidity or ignorance or inaptness of counsel on the other side. And when as the result of months and, perhaps, years of litigation, the rules of law applicable to the case are declared by the Court of last resort, perhaps, by a bare majority of one, the defeated party

is obliged to foot the bill of an expensive litigation and abide by all the consequences of the rules of law thus declared, although he could not possibly have known in advance what the rules of law were or rather would be when declared, and could not possibly have governed his conduct by rules of law not yet formulated or announced. There is great force in the argument that the Legislature should prescribe rules of law in advance of litigation by which men's conduct could be governed and their controversies decided rather than leave the rules of law to be wrought out by the hammering of the judicial anvil upon the red-hot iron of a fierce lawsuit. The anvil process may produce a good piece of workmanship, but it is terrible to the unfortunate litigant whose case is being hammered for the benefit of jurisprudence and posterity. Well may he exclaim with the humorist: "What has posterity done for me, that I should suffer for posterity?" Why should not the State bear the expense of making law in advance rather than the individual bear the expense of having law made *ex post facto*?

I have endeavored to state as candidly and as forcibly as I could some of the principal arguments advanced in favor of statutory law as distinguished from judge-made law. I am not one of those who regard these arguments as wholly fallacious. On the contrary, as I have already indicated, I regard them as exceedingly forcible and weighty. I regard them as so forcible and weighty that if I were satisfied that codification were a practical and effectual remedy for the evils complained of, I should heartily favor codification.

There is, however, another side to the question. In the first place, the arguments against judge-made law are more formidable in theory than in practice. In the actual working of the system there is far less injustice and hardship than would be naturally anticipated. It is only in occasional and exceptional instances that the inconveniences and anomalies of the system make

themselves felt. True, this does not justify such inconveniences and anomalies; ~~but it is fair matter for consideration~~ in weighing the arguments *pro* and *con* in the scales of expediency. For, after all, the practical question is whether on the whole, in view of the present state of the law and under the present conditions of society, codification is expedient, not whether it is theoretically preferable to unwritten or judge-made law. Looking at the question, then, from this standpoint, we find that in the vast majority of transactions and in almost the entire field of human conduct, the law is reasonably plain and certain and ascertainable. Where common sense and conscience do not suffice to point out to the individual what is the rule of law applicable to the matter in hand, resort may readily be had to textbooks or to the advice of competent counsel. The cases where the law is doubtful and where litigation is necessary to determine it, are the exceptions and exceedingly rare exceptions considered in connection with the enormous mass of cases where the law is certain and ascertainable. If we can make these exceptions rarer by codification without running into other evils, then codification is expedient. But if codification will not make the exceptions rarer, but will increase them, or if it will bring other and greater evils in its train, then codification is not expedient.

It is to be noted that the point where the layman now goes astray as to the law is not usually as to the so-called unwritten or judge-made law, but as to the statutory law, which is vaunted as making the law accessible and plain to the layman. How many merchants know the provisions of the Statute of Frauds? How many laymen in the State of New York who draw their own wills know the provisions of the New York statute against perpetuities, making an arbitrary limit of the right to suspend alienation of property to two lives in being? These statutes are of vital importance to every merchant and to every would-be testator. Yet half

the contracts made by merchants are void under the Statute of Frauds, and half the wills drawn by laymen in the State of New York are ineffectual because in violation of the statute against perpetuities. Judge-made law, on the whole, tends to conform itself to the principles of common sense, right reason and justice. Statutory law, on the other hand, tends to become technical and arbitrary. A rule of law stated in statutory form becomes rigid and is more and more rigidified as time goes on. **There is this much of truth on** the side of those who favor the elasticity of the common law. Elasticity in itself is not an advantage, but a disadvantage, as we have seen. But the opposite extreme of rigidity and technicality is also a disadvantage, and we are thus left to a choice of evils. My own opinion is that if this were the only objection to codification, the balance of expediency would be in favor of the codifiers. It seems to me that certainty would be a gain, even if the law became more rigid and technical, since it is better in most cases that the law should be certain and ascertainable than that it should be theoretically just.

The patriarchal system of dispensing justice by hearing both sides and then deciding as seems right and fair may approximate more nearly to the ideal of divine justice; but it leaves too much to depend on the ability and conscience and sense of equity of the patriarch. The more nearly we are able to predict what decision will be made by the Courts on a given state of facts, the more nearly do we approach to a scientific and civilized jurisprudence. This is the reason for the principle of *stare decisis*, under which the judges are in duty bound to follow previous adjudications. Even the best of judges is liable to errors of judgment. Hence, our elaborate system of appellate tribunals. And what a deplorable condition we should be in when before some judge who, to use a phrase of Browning, is

“Steeped in conceit, sublimed by ignorance.”

were it nor for the right of appeal and the rule of *stare decisis*, which are checks upon his otherwise unbridled license to administer arbitrary and uncertain and elastic justice according to his own good pleasure.

Unfortunately, however, statutory law is quite as uncertain as judge-made law, nay, even more so. Experience shows that when rules of law are reduced to statutory form the work of interpretation and construction commences. Each word in the statute assumes importance and calls for enforcement. A "but" or an "and" becomes as important as the subject or the predicate of the sentence. In judge-made law this element of uncertainty is largely eliminated, since the opinion amplifies, reiterates in different form, illustrates and applies the principles enunciated. But in a statute, conciseness, exactness and precision are sought after, and each particle or preposition is as much the will of the Legislature and as binding upon the courts as are the nouns and the verbs.

Human language is at best defective and ambiguous. Theologians dispute over the meaning of texts of Scripture and when they have formulated creeds and confessions as setting forth the doctrines of the Scriptures, the dispute begins again over the meaning of the creeds and the confessions. So with statutory law. No matter how clear and simple the language may appear at first sight, doubts will arise, ambiguities will be disclosed, inconsistencies between different sections will present themselves, and a series of never-ending decisions will be inaugurated, construing and interpreting the Statute, till each section becomes, overlaid with a body of judge-made commentaries forming a new body of precedents and a new jurisprudence. No greater fallacy is indulged in by the advocates of codification than that it will diminish litigation. Statutes brood litigation. Experience demonstrates this. Whatever other merits codification may have, the diminution of litigation is certainly not one of them. Look at our New

York Code of Civil Procedure (our Code of practice), with the two bulky volumes of Bliss' Annotations of Decisions construing it, each volume as large as a volume of the Encyclopaedia Britannica, if not larger. Look at the little Statute of Frauds, with its wilderness of authorities interpreting it. Look at the portion of our New York Revised Statutes on Trusts and Powers and count the cases in each volume of our Court of Appeals Reports construing these few sections.

Nor can we burn up or lock up our accumulated mass of reported common law cases and our common law textbooks and begin *de novo*. As to each section of a Code, the question arises *in limine*, does it alter the common law rule or does it merely declare it and re-enact it? Of course in the vast majority of cases if the Code is properly constructed, the common law rule would be declared and re-enacted; not altered. In those cases, the Courts would at once turn to the old common law reports, to interpret, and to apply the rule thus declared and re-enacted. For after all, the vast bulk of litigation arises not from doubt as to the principles, but from doubt as to the application of well settled principles to a particular state of facts, or from doubt as to whether one or another of two well-settled principles should govern, or from doubt whether some well-known exception to the general rule should not be allowed to operate in order to moot a new and peculiar condition of circumstances. And just here, where the work of actual litigation commences, a Code would fail us. It is impracticable without expanding the Code to an enormous and unwieldy bulk to give more than the general principles of the law. The application of those principles, and the choice between one principle and another as governing the particular case in hand, would still have to be wrought out by the courts, and the courts must go back to reported cases to guide them in this task, or be left to navigate an unknown sea without a chart to guide them. Even

where the Code alters the law the courts would still be obliged to have recourse to the common law cases to give canons for interpretation and to furnish analogies and to guide them in applying the new rules of law so as to make them, as far as possible, consistent with the rest of the law which has not been altered.

The great objection, however, to codification is the lack of proper machinery for framing a code. Theoretically, a code must be framed and enacted by the legislative body. Our legislatures, however, are utterly incompetent for such work; even if their accumulated wisdom were as great in fact as it is in theory, their term of service is too short and their time too much occupied for such a work. A good code must be the product of years of unremitting toil by trained minds. Practically, the work must be done by a commission of one or two or three men, and must be adopted or rejected as a whole by the Legislature. It thus becomes, not the deliberate will of the people represented by their law-makers, but the decision of the commission. The value of the Code thus depends, not upon the combined judgment of the commonwealth represented by its courts or its legislature, but upon the judgment of the commissioners. The opportunity thus offered for individual errors and individual caprices and crotchets is so great that the work must necessarily be defective. If feasible at all, it can only be feasible by adopting the first of the plans of codification above enumerated, and forbidding a single intentional change in the existing law, and confining the work of the commission to formulating and declaring well settled principles. Any other course results in such blotchy work as our proposed New York Civil Code, embodying the most radical and dangerous innovations in the law, the offspring of one or two minds, and not the outgrowth of public sentiment or judicial deliberation. But on the other hand, if the commissioners be confined to merely announcing and formulating well-settled

principles, nothing will be gained towards abolishing *ex post facto* law, which is the chief objection to judicial legislation. It follows that codification under existing conditions is only feasible under restrictions which would make it of little value.

But even if a good and valuable code could be framed, a very formidable objection would remain—namely, the facility afforded for amendments by bungling and corrupt legislators. The composition of our legislative bodies is unfortunately such that this would be a most serious evil. A rule of law cannot now be altered by the Legislature without a bill clearly setting forth the proposed change, so that every legislator and the community at large are apprised of its exact purport, and public opinion can readily be brought to bear upon it. Let any one now undertake to change the law of husband and wife, parent and child, the law as to negotiable paper, or the law of partnership, and the attention of the bar and the press would be at once arrested. Criticism would be aroused, favorable or unfavorable. Even if the measure should escape public notice, it could not pass through the routine stages of consideration in committees of both Houses without becoming known in its scope and object to the more active and intelligent members of the Legislature. Nor could it well come to a vote without an opportunity at least for examination and consideration on its merits by each member. The language of the bill itself would disclose its purport. Suppose, however, that the law is codified; and then suppose that some member introduces a bill to amend Section 3510 of the Code by striking out the word “and” and inserting the word “or;” or a bill to repeal Section 5001 of the Code. The bill is read twice, referred to a committee, perfunctorily examined, reported to the House and passed, not one member in twenty knowing what Section 3510 is or what Section 5001 is. The habit of amending grows from year to year;

examination of and opposition to particular amendments by individual members is a laborious and thankless task; and so the botchwork goes on, year after year. Lawyers and litigants procure amendments to suit their own real or supposed interests; men with cranks and crotchets take their turn at amending the law, and instead of the "elasticity" of judge-made law, which is at least the result of honest and intelligent efforts to reach substantial justice, we have the "elasticity" of statutory law, which is the result of lobbying, influence, politics, or at the very best of chance or Imp-hazard blundering. Every year now bears its crop of amendments to our New York Code of Civil Procedure, (our Code of practice) the object or effect of which, it is safe to say, not a dozen members in each House understand. A few years ago, a bill was passed by the Legislature of New York repealing a certain section of the Revised Statutes, referring to it simply by its number. It attracted no particular attention, until one day it was discovered that the law prohibiting preferences by insolvent corporations had been repealed, and that a certain individual had received a large sum of money by way of preference from such a corporation shortly afterwards. Thereupon the section in question was re-enacted. What a magnificent field for unscrupulous lobbyists would be opened if the whole body of the law were in such shape that it could be thus altered or repealed by reference to sections and numbers, without a word in the amendatory or repealing bill to disclose the subject matter of the section repealed or the scope of the amendment.

Even if, by reason of constitutional requirements, or by rules adopted for the purpose, the old law and the new should be printed side by side, *so* that each member could see and understand for what he was voting yet how much easier it is to vote "yes" than "no." Good-nature, indifference, desire to please one's fellow-members, fear of retaliation by defeat of one's own

measures, all these are inducements for an affirmative vote, even if there be no worse motive, while there is no inducement to persistently give a negative vote, except a stern sense of duty which requires moral courage and often results in making the dissenting member an object of dislike and abuse by his fellow-members; and if it be so hard to get a single negative vote how almost impossible it would be to get enough votes to defeat any amendment reported by the overworked and perhaps not over-careful Committee to whom it had been referred. The result of a few years' code tinkering by legislative amendments would be deplorable in the extreme. The evils of "elasticity or uncertainty" in judge-made law dwindle into insignificance compared with the evils of "elasticity" and "uncertainty" in politician-made law.

Another very great evil which will result from codification in this country has been recently pointed out very forcibly by Prof. Monroe Smith, of Columbia College, in a very interesting and valuable article in the "Political Science Quarterly" for March, 1888, on "State, Statute and Common Law." Prof. Smith calls attention to the effect codification of the law will have in denationalizing our jurisprudence. Much inconvenience already exists by reason of the diverse systems of law existing in our thirty-eight States. A merchant residing in New Jersey, having his manufactories in Massachusetts and his salesrooms in New York, is subject to the laws of three different commonwealths. When he sends out drummers to sell goods and make contracts throughout the United States, those contracts are governed by the laws of the various States in which they are made. Yet so long as the body of the jurisprudence of these States is "judge-made" or common law, there is a constant tendency to assimilation between the various States. The decisions of New York or of Massachusetts or of Illinois are cited as authorities in the courts of New Hampshire or Ohio or Mis-

souri, and while not, of course, binding upon the courts of those States, are usually followed unless plainly in conflict with their own previous adjudications. Where conflict exists there is a tendency to minimize as far as possible such conflict. Thus the law of the country remains very largely homogeneous, while the independence of each State is preserved.

Let the law of one of the States be codified, however, and the tendency at once turns in the opposite direction towards differentiation from the law of the other States. Our present laws of marriage and divorce, descent and distribution, furnish abundant evidence of this tendency of statutory law. "Confusion worse confounded" is the only appropriate characterization of the condition of the divorce laws of this country; so much so that many are crying out, with a sublime disregard of constitutional limitations, for Federal legislation on this subject to remedy the present chaotic condition of affairs. And as Prof. Smith points out, the same result will follow from codification of the laws by the several States. Even if the codes should be originally similar they would rapidly grow dissimilar by ill-considered amendments and by varying interpretations by the courts of the different States. And then would come the cry for Federal legislation to unify the law and for amendment to the National Constitution so as to authorize such legislation; and thus would be struck a fatal blow at that most vital principle of our Federal form of government — the autonomy of the States within the sphere of private and municipal law.

But some will say that all these theoretical objections to codification sound plausible, but experience has demonstrated that codes of law can be made which are practicable and useful. The three great examples cited by the codifiers are the Roman, the Prussian and the French Codes, or the Codes known as those of Justinian, Frederick the Great and Napoleon.

The so-called Code of Justinian, however, is, as has

been frequently pointed out, in no proper sense a code at all. To call it so, and to cite it as an example in favor of what is now meant by codification is simply juggling with words. The "Digest" or "Pandect" is a digest of the writings of the great juris-consults of Rome in their own words with their reasonings and illustrations, arranged, however, under systematic heads or titles. It is no more a Code than Abbott's New York Digest is a Code, nor as much, since it gives the original language of the authorities, and not merely their purport or salient point. The "Codex" is merely a compilation of the existing statutory law of the empire, arranged in systematic form. The "Institutes" is merely a text-book, containing a summary of the law set forth in the "Digest" and "Codex." This is no more a Code in the modern sense of the word than is Kent's Commentary.

As to the codes of France and Prussia, even Austin admits that they "have not accomplished the primary ends of a code in the modern sense of the term, that is, a complete body of law intended to supersede all the other law obtaining in the country," and they have been "unsuccessful to a considerable extent." He proceeds to point out the principal defects of the French code, "because its failure is the most remarkable" and calls attention to its "glaring deficiency" in the "total want of definitions of its technical terms, and explanations of the leading principles and distinctions upon which it is founded." He further says that "in the details of the code they (the compilers) display a monstrous ignorance of the principles and distinctions of the Roman law which they tacitly assumed." He proceeds to point out other defects in the Prussian and French codes, which it is hardly necessary to recapitulate.

I do not pretend to be qualified to give an opinion of ray own on the merits or demerits of these codes, but when the champions of codification point to

these codes as conclusive arguments in their favor, I have a right to summon a witness who certainly is not prejudiced against them, since he is himself an advocate of codified law and a severe critic of "judge-made" law. I might call other witnesses, but I forbear.

The great question after all is, not what has been done in other nations and under other systems of jurisprudence, but what is best for us in this age of the world and in this country and under our present conditions. And for the reasons already indicated, I am clearly of the opinion that codification is not expedient for us, in either of the three forms pointed out above, either as a statutory declaration of existing law without change, or of the existing law with changes, or of the existing law plus law not yet declared or announced by the courts.*

Time does not permit me to discuss as I should like to do the proposed Civil Code of New York, which has been before the Legislature of that State so many years. This work is a good example of what a code

* In this country, the Code of Louisiana is based upon the Civil law and the Code Napoleon. It does not furnish a fair test for determining the feasibility of codifying the common law. In view of the anomalous position of that State as alone among the States of the Union in following the Civil law, her Code is doubtless a convenient hand-book for the bar without which they would be obliged to search through the writings of foreign jurists in a foreign tongue for the precedents, which in other states are found in the text-books and reports of our mother country and of our own country. The Codes of California and Dakota are founded upon our New York proposed Civil Code and have the same authorship and the same glaring defects as pointed out in the next paragraph.

The Code of Georgia more nearly approaches the standard of a good codification of the common law. I have not examined it with sufficient care to pronounce a definite judgment upon its merits. I am informed, however, by a very reliable number of the Georgia bar, that the tinkering by amendment at each session of the Legislature is a crying evil, and probably a careful examination of this Code by an impartial critic would show that the other *a priori* objections to codification were also exemplified thereby.

ought not to be and illustrates on every page the defects and dangers of codification. Thus far our State has been spared the disaster of its enactment into law, for disaster it would be. Defective in arrangement, crude and inconsistent in its statement of principles, glaringly deficient in its definitions, ambiguous and often unintelligible in its language, revolutionary in its changes of existing law, grossly incomplete in some branches, absurdly minute in others, it has all the vices of a code with none of its virtues. These are severe words, but they are not used lightly or without due consideration. Every one of these criticisms could be abundantly justified by quotations and references to the proposed code had I time to give them, or had you patience to hear them. Even the advocates of codification in England have united in condemnation of this work, which its authors seek to foist upon us as law under the false pretense of a constitutional mandate in the Constitution of 1846.

It would be unfair, however, to judge of the advisability of codification by the demerits of this particular code. It may be possible, it ought to be possible, to make a code which should avoid many of the faults of this one and which should approach vastly nearer to a succinct and valuable hand-book of the law. But when the *a priori* objections to codification are re-**forced by the *a posteriori* argument from this lamentable failure in practical codifying**, we may well rest content with our present system of "judge-made" law, rather than risk the experiment of "commission-made" law or "politician-made" law.