STATE STATUTE AND COMMON LAW.

CODIFICATION has been a subject of debate in this country for about half a century. There has been discussion enough, one might naturally assume, if not to settle the question, at least to illuminate it upon all its sides and to furnish all the data for its settlement. Nevertheless, the most important side of the question has scarcely been examined. The attention of the debaters has been centred upon the direct results of codification — upon its immediate advantages or disadvantages. It may be shown, I think, that the direct results for good or for evil are much less considerable than the friends and opponents of the movement have maintained, and that the question of real moment is this: How will codification affect the development of our law in the future? This question is really twofold:

1. What will be the effect of codification upon the legal development of the codifying state?

2. What will be the effect of the general adoption of state codes upon the general development of American law?

About the first of these questions there has been much debate, although the issue has not always been clearly formulated. The second question, so far as I know, has not even been put.

I.

The law of the American colonies, like the rest of their civilization, was English; and the development of American law, however modified by new conditions and alien grafts, has been and is a growth from English roots. The English law which the colonists brought with them and by which they lived — avowedly, in most cases; actually, where they did not avow it — was case law, *i.e.*, judge-made law. It had been developed by the courts. It could be changed by king and people, acting together in Parliament, and such changes were made from time

to time; but they did not compare in number or importance with the changes made by the courts. Besides the law-interpreting power — which is always to a greater or less extent a law-making power — vested in the ordinary courts, the chancellor wielded the law-overriding power of the crown, the old-Germanic right of the king to substitute equity for law; and every student of English legal history knows to what an extent the latter power was exercised.

The United States emerged from the war of independence with this body of English judge-made law as the basis of their legal development. As means of legal development they had all the English factors: the interpreting power of the ordinary courts; the extraordinary powers of the courts of equity; and statute, or act of legislature. They had also the English theory of the relative power of these three law-making organs, according to which equity overrides common law, and statute supersedes both. In addition to these, they devised a fourth form of law, dominating all the others. The people themselves, in state and nation, created written constitutions. As constitution-making power, the people legislates directly; and such legislation overrides, of course, all ordinary statute.

In studying the development of our law during the past century, we observe, in the first place, that the extraordinary powers of equity have counted for very little. The creative movement of English equity had spent itself long before the separation of the colonies. It had left a tolerably well-settled body of rules superimposed upon the common law, and the courts of equity had come to limit themselves to interpreting and applying these rules. In the United States, the tendency has been to intrust the enforcement of both bodies of law to one set of courts; and we have to come to use the phrase "common law" as including equity, *i.e.*, as including all judge-made law. The word will be so used in the remainder of this paper.

All the other law-making factors have continued active and productive. The highest courts of the different states have continued to modify and develop the common law by decisions; the legislatures have issued annual or biennial volumes of ses-

sion laws; and the people, from time to time, has revised and modified its state constitutions. But when we examine the legal development in our states more closely, we see a marked tendency of the superior law-making power to encroach upon and narrow the field of the inferior. Our state constitutions limit the power of the legislatures. Many of their provisions are restrictive in form, prohibiting the legislature from doing certain things; all are restrictive in fact, since the legislature must legislate in accordance with the constitution. And the constitution-making power has by no means confined itself to the domain of the organic public law; the provisions of the state constitutions, particularly in the newer states, touch every branch of the law, public and private, and their scope widens with each revision.[1] In like manner, we find the legislatures encroaching upon and narrowing the power of the courts; not expressly by restrictive statutes, but in fact. Whenever a legislature regulates by statute a matter previously governed by common law, it diminishes *pro tanto* the power of the judiciary. This is obviously true whether the statute change the rule of common law or not. As long as the rule rests upon decided cases, the judiciary can in fact change it by re-examination and re-interpretation of the cases in point. As soon as the rule becomes statutory, the court is restricted to the interpretation of the particular form of words which the legislature has seen fit to employ. The same limitation of the judicial power may sometimes be accomplished when a new statute is passed to meet an entirely new question, if the matter be one with which the courts might have dealt. The legislature, in such cases, seizes ground which the courts might have occupied. So whether it simply re-enacts or changes or adds to the common law, each legislative act invades and lessens the power of the courts. The moment any relation of our social life is regulated by statute, the development of the law governing that relation is substantially barred to the courts and must be obtained from the legislature.

From this point of view, "codification" of the law is simply

[1] Stimson, American Statute Law, preface,

an attempt to do all at once and once for all what appears to be going on gradually without codification. For codification, in so far as it is opposed and has become a subject of debate in the United States, does not mean the orderly arrangement of that portion of the law which is already statutory, — nobody objects to periodical revision of statutes, — but the transfer from the courts to the legislature of the future development of all our law; the elimination, as far as may be, of the judiciary as a factor in the making of our law.

This issue has seldom been squarely presented. American lawyers are not in the habit of arguing abstract questions, and the question of codification never becomes a burning one until the bar of a state is actually confronted with a draft code. Then the discussion necessarily turns, to a great extent, upon the merits or demerits of the particular code which is proposed for adoption.[1] Of course the general question is also discussed; but the real issue is commonly darkened by arguments, or assertions rather, of an extremely absurd kind. The opponents of codification have sinned in this respect almost as grossly as its friends.

The anti-codifiers have maintained again and again that it is "impossible" to reduce the common law to statutory form. If by that they merely mean to say that no human ingenuity can construct a series of statutes, or a code, which shall answer every possible legal question justly and *directly*, *i.e.*, by the simple application of one or more sections to the case in point, without resort to deduction or to inference from analogy, — if they merely mean to deny the possibility of codification in this sense, no sane person will dispute their position. But no sane person at present proposes to make such a code.[2] On the other

[1] This has notably been the case in New York. The so-called "Field code" is opposed on the ground that it is unscientific in structure and inaccurate as a presentation of existing law. It was vetoed on that ground by Governors Robinson and Cornell; and on that ground it was rejected by the legislature in 1885 and again in 1886.

[2] Bentham contemplated the establishment of such a code. He did not think it could be perfected at first essay; but it might gradually be perfected, he thought, by a series of additions. The courts were to have no power of filling open places; the code should be made complete by statutory amendment. See his General View of a Complete Code of Laws, ch. 31 and 34; Works, Bowring's ed., III, 205, 206, 209, 210. — The idea was a common one in the XVIII century. "New law-books were

hand, if they mean to say that the common law cannot be crystallized into forms of words and set forth in rules, the answer is, that this is not only possible, but is in fact precisely what the English and American courts have been doing ever since they began to decide cases. No case was ever decided without affirming or modifying an old rule or setting up a new one. If at the outset a rule is stated too broadly or too narrowly, if its first formulation is crude and unsatisfactory, it is narrowed or extended by subsequent decisions — in other words, it is amended — until it becomes satisfactory. But at every stage of its development the common law is just as truly a body of positive rules as is any book of statutes.

On the other hand, one of the favorite arguments of the codifiers is equally baseless. They assert that everybody "has a right to know the law" — which nobody disputes — and that codification will make the law intelligible to everybody — which is nonsense. For a codifier necessarily does one of two things. He either states the existing rules of law in the technical language in which they are already clothed, or he restates them in other words which are not technical, and which "everybody understands." In the first case it is obvious that the layman is little

demanded, which, by their completeness, were to give a mechanical certainty to the administration of justice. The judge was to be relieved from the necessity of exercising his own judgment and restricted to the literal application" of the provisions of the code. Savigny, Beruf unserer Zeit, 3te Aufl., S. 5. — The Prussian Landrecht of 1794 was meant to be a code of this sort. The codifier attempted to forecast all possible questions. "The consequence of this was the introduction of numerous casuistic passages, which were based on no general principles, and which, therefore, instead of making the law clear, gave the best possible basis for doubts." Die neueren Privatrechts-Kodifikationen, S. 366, in Holtzendorff's Encyklopädie der Rechtswissenschaft, 4te Aufl., 1882. The courts were not to decide doubtful points, but to ask for instructions from a legislative commission in Berlin. The legislation thus obtained was to be added to the code. One such supplement was issued, April 11, 1803; after this, the construction of the law was left to the courts. *Ibid.*, S. 366–8. — The Prussian experiment has never been repeated.' The code Napoleon provides, in art. 4: "The judge who shall refuse to render decision under pretext of the silence, the obscurity, or the insufficiency of the law, is to be prosecuted as guilty of denial of justice." The penalty is fine and suspension (code pénal, art. 185). — None of the codes adopted or proposed for adoption in the United States have attempted to realize the Benthamite ideal. Mr. David Dudley Field has expressly repudiated it. See his article on codification in the *American Law Review*, vol. xx, no. 1, pp. 1, 2.

advantaged. It may be easier for him to find the rule, but it is no easier for him to understand it. In the second case, he appears to be better off — but is he? Every lawyer knows that the restatement of a legal rule in popular phraseology simply makes its application uncertain. He knows that the law is clothed in technical phraseology simply because it is necessary to have words of which the meaning is absolutely certain. He knows that the only difference between a technical phrase and a phrase of common speech is that the one has a definite sense and the other a variety of possible meanings. But it has always been singularly difficult to get this fact through the head of the average layman. Every doctor of theology or medicine, every scientific man, every artist, every tradesman and every mechanic uses in his own science or business technical terms which are unintelligible to the outsider. Even when the term is explained, it is quite likely that the outsider will not understand the explanation, because it involves the understanding of other things unknown to him, the knowledge of which is part of the science or craft in question. Now all these people use technical terms for the same reason that the lawyer uses them — because they need terms of definite meaning. This necessity, felt in the simplest trade, is greatest in the sciences. And yet all these people demand that the law, the oldest and perhaps the most complex of sciences, shall speak the language of the hearth and the street. It seems a waste of effort to combat such a demand, resting upon such a delusion. But if it be a waste of effort, it is not because the delusion is obvious, but because it is imperishable.

Not a few lawgivers have shared it, and have attempted to "popularize" the law. The result has always been the same. As soon as a set of new, vague, and "popular" terms is bundled into the written law, the courts proceed to give them, by construction, that definiteness of meaning which legal science requires — and which in fact the people themselves demand, for the people demand that law shall be certain. That is, a set of new technical terms is constructed.[1] In the meantime, not

[1] So in California. See J. N. Pomeroy, The Civil Code in California, pp. 7, 17, 18 *et passim*.

even the lawyer knows what the written law means; and the layman is worse off than before, because he thinks he knows what it means. He is not to blame; he has been told, by those who ought to know better, that the law can be made perfectly intelligible to him. He therefore attempts to act as his own lawyer — with the proverbial result. Of course he is made no wiser by the event. He simply abuses the "pettifogger" on the other side, who by captious construction has wrested the statute from its true meaning, and the judges who have decided inequitably on "technical" grounds. He will not recognize that the law is a science, and that a science cannot be mastered without study.

Much less can he be brought to understand that the law is simplified in proportion as it becomes more scientific, and that there is no other way given among men by which it can really be simplified. The relations of man to man in civilized society are not few or simple, but infinitely varied and complex; and if the legislator attempts to set up positive rules directly regulating every possible relation, there can be no limit to the number of the rules. Legal science analyzes and classifies these relations and posits general rules to govern the groups of relations which it has created. The further this process is carried, the more simple the law becomes. The jurist who finds a rule burdened with a number of arbitrary exceptions and sets in its place a rule that includes the exceptions, or who brings a number of apparently isolated rules under a single principle of which they are thenceforth corollaries, — he it is who simplifies the law. He does not make it any more intelligible to the layman, but he makes it easier for the advocate and the judge to master and apply it.

There is, then, nothing in the nature of the rules of common law which prevents their being enacted as statutes; and there is nothing in such enactment which makes the rules simpler or more intelligible. The only direct result which can be accomplished by codification is to make the rules more accessible. Upon this point the advocates of codification lay great stress. The common law, they say, is scattered through an immense

number of cases. Reports of decisions have been accumulating for centuries and already fill thousands of volumes. It is in this chaos of cases that we must search for the rules of our law. The number of cases cited in briefs and decisions is appalling. Why should we not collect the rules of the law in a code?

The argument seems a strong one. The evils deplored are undeniable, particularly the multiplication of citations. But are these evils wholly due to the nature of case law? Would they be wholly removed by collecting the rules of the common law in a code? Is it true that the lawyer and the judge have to search through hundreds of cases to find the *rule* which they need, or do they search for guidance in the *application* of the rule to the concrete case before them? I do not believe there are two answers to these questions. Now if the multiplication of citations is due to the attempt to find guidance in the application of the rule, — to find a case running "on all fours" with the case before the court, — what will it avail us that the rules themselves are in a code? They will still be interpreted and applied in the light of old and new cases, until our adherence to precedent becomes less slavish, and our lawyers acquire more of that independence in juristic thinking which characterizes the bench and the bar of France and Germany. Nothing but a complete reform in our legal science will give them that independence; a code will not do it.

It may be admitted, then, that codification will make the *rules* of the law somewhat more accessible; but the greatest difficulty, that of their *application*, is not lessened. This distinction is extremely important. It greatly lessens the force of another argument which constantly appears in the discussion of the code question, and upon which the friends of codification lay great stress. They say that the common law is not only inaccessible but uncertain; that it is not only difficult to find the law in the constantly increasing mass of cases, but that careful exploration discloses important contradictions and conflicts in the law. Here again it will be found, in almost every instance, that the conflict of authorities is in reference to the application of a rule which is itself

undisputed. How will this evil be abated by putting these undisputed rules into a code? Where the conflict of authorities is serious, it doubtless indicates that there is something wrong about the rule — that it is ill formulated. What will it profit us, if that is the case, to have the ill formulated rule made statutory? We shall be worse off than before, by as much as it is harder to get an act of legislature than a decision of the highest court. — I exclude the hypothesis that the codifier is to find that happier formulation which the courts have been vainly striving to discover, because, in the first place, the advocates of codification themselves insist that a code shall simply enact the existing rules, not change them; and because, secondly, it is not to be assumed that we shall be able to get our codes made by men possessed of more than the average wisdom of the wise men of their own day.

That the uncertainty of the law lies almost entirely in the *application* of its rules is a truth that would soon come home to us if our law were wholly statutory. In the case law which has grown up about the codes of France and Germany, there are quite as serious contradictions and uncertainties as in the case law of any state in our Union. He who would satisfy himself that this is true of French law need not struggle through the voluminous *Jurisprudence Générale* of Dalloz; any standard handbook of French civil law will answer the purpose. In fact, we need not go so far afield for our evidence. We have been living under a constitutional code for a century. It was drafted by able men, wise in statecraft and learned in the law. They sensibly used, as far as possible, words and phrases whose meaning had been settled by centuries of constitutional conflict and judicial interpretation. Has there been no uncertainty in the construction of our Federal constitution? Is there no uncertainty to-day?

Unfortunately we have here again to deal with a delusion that seems indestructible. Neither reason nor experience seems to shake it. It is as old as the XII Tables and as new as the proposed civil code of New York.

The points thus far made may be summarized as follows:

Codification of the common law is perfectly feasible if too much is not attempted. It is not possible to make a code that will settle everything, that will wholly free the courts from the duty and deprive them of the power of interpreting and applying the law; but it is quite practicable to make a code that shall contain the positive rules which now rest upon decisions. The immediate results of such codification will not be very great. The law will be made somewhat more accessible; but it will not be made any more intelligible, nor much more certain; nor will the practice of citing cases be abandoned. But the ultimate results may be quite serious. As soon as the rules that now rest upon decisions become statutory, they are withdrawn from the control of the courts. The judges retain a certain power of construction, but have no longer the power of change. Judicial legislation comes to an end, and the development of the law passes wholly into the hands of the legislatures. Is this a thing to be desired? The question, as was said at the outset, must be divided: (1) Is such a change in the interest of the people primarily affected, the people of the codifying state? (2) Will it be better for the whole people, the people of the United States, that the law now made by the judges be henceforth made by the legislatures of the different states?

Neither of these questions can be intelligently discussed until we know *what part* of the law the change will affect — what part of the law, if any, has generally escaped enactment and still rests upon cases. And the second question cannot be satisfactorily answered until we know how far the state legislatures are modifying and adding to the general or common law, and how far their innovations are producing divergences and conflicts of law. Until these preliminary questions of fact are answered, the discussion has no solid footing; it is in the air. But no one can answer these questions who has not made minute study and careful comparison of the statute law of all our states. It is fortunate for my present purpose that I have been able to obtain an answer which rests upon and derives authority from such a study of our state laws.

MUNROE SMITH.

II.[1]

It is obvious that there are four possible ways of dealing by statute with existing law. It may be expressed and formulated, *i.e.*, enacted or codified; it may be added to; it may be altered; and it may be repealed. Let us briefly describe these processes as enactment, addition, change, and repeal. Including the national Congress and the territorial legislatures, there are forty-seven legislative bodies in the United States, with powers more or less sovereign; and these have been at work an average of some fifty years apiece. There is now a distinct tendency to reduce the length and number of sessions; but although there remain but five states with regular sessions so often as once a year, and many western states have shown a desire to limit the session to sixty or ninety days, there are still held, in fact, some thirty sessions of legislative bodies each year within the limits of the national territory, having, in effect, full power to alter or repeal the law. And as few of these bodies have any reverence for the common law as such, it must be a wonderful vitality that has kept it so little impaired as it is.

Of repeal, there has been very little; of change, not very much; of enactment, a great deal; and of addition, still more. And, if we may speak at once of tendencies and of the future, this statement needs but to be emphasized to continue true; there is almost no repeal and change, but an enormous amount of enactment and addition now in progress. This tendency is most exaggerated in those communities which, like California and Dakota, have had the shortest experience of government; but beyond this it is difficult to make a general statement. The tendency to codification, which is, of course, almost complete *enactment*, and is generally accompanied with much *addition* and even considerable *change*, is a sporadic and disturbing one, and has shown itself in states as wide apart as Georgia, Iowa, New York, and California, while the neighboring states of Mississippi,

[1] This part of the article is furnished by Mr. Frederic J. Stimson, the compiler of "American Statute Law." It was undertaken by him at the special request of the Editors.