



1967

Civil Code: Notes for an Uncelebrated Centennial

William B. Fisch

[How does access to this work benefit you? Let us know!](#)

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Fisch, William B. (1967) "Civil Code: Notes for an Uncelebrated Centennial," *North Dakota Law Review*. Vol. 43: No. 3, Article 4.

Available at: <https://commons.und.edu/ndlr/vol43/iss3/4>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

CIVIL CODE:
NOTES FOR AN UNCELEBRATED CENTENNIAL

WILLIAM B. FISCH*

This is the first installment of a projected study of the Dakota Civil Code. While this portion deals with the historical background of the Code and its content as drafted for New York by David Dudley Field, a subsequent article will deal with its fate in the hands of the bar, the legislature and the courts in New York, California, and especially in the Dakotas.

On January 12, 1866, Dakota Territory, in its fifth year of territorial existence and still consisting of a few scattered settlements on the fringes of a vast Indian-swept, fort-flecked wilderness, adopted that hallmark of advanced civilization, a Civil Code.¹ This particular monument of legislation, codifying the substantive private law, was imported almost verbatim from New York, the product of a Code Commission whose chairman and chief draftsman² was David Dudley Field. The final report of this Commission was submitted to the New York legislature on February 13, 1865; some time in the next few months a printed copy of the final report came into the hands of the Supreme Court of Dakota Territory, who were "favorably impressed",³ and with very minor editing the code was adopted by the Territorial legislature which convened in December, 1865. Dakota was thus the first jurisdiction to adopt the so-called New York Code;⁴ California adopted a substantially amended version in 1872;⁵ Idaho, following California's lead and

* Assistant Professor of Law, University of North Dakota. A.B. 1957, Harvard College, L.L.B. 1960, University of Illinois, M. Comp. L. 1962, University of Chicago.

1. LAWS OF DAKOTA TERRITORY, §§ 1-2034 (1865).

2. Field was primarily responsible for the Civil Code, other members of the Commission for the Penal Code, Probate Code, Political Code and Code of Criminal Procedure. Reppy, "The Field Codification Concept," in FIELD CENTENARY ESSAYS, 50 (1949).

3. 1 KINGSBURY, DAKOTA TERRITORY 430 (1915).

4. This designation is used to distinguish the Civil Code from the more famous Code of Civil Procedure, which is most frequently referred to as "the Field Code."

5. CAL. CIV. CODE (1872), effective January 1, 1873.

experience, adopted a further amended version in 1887;⁶ Montana a still further amended version in 1895;⁷ while New York, despite great debate and at least five journeys through the legislative process in the 1870's and 1880's, ultimately abandoned the project.

January 12, 1966, passed, so far as I am aware, without so much as a mention of the New York Code as such or of Dakota's role in putting it into effect. Indeed, of the five American jurisdictions which adopted the code in one form or another, only California retains it (greatly but haphazardly amended) as a separate body of law, although at least in North Dakota the better portion of the original provisions remains in pieces scattered throughout the consolidated Century Code. By almost any standard of comparison, and certainly in comparison with Field's own earlier Code of Civil Procedure, which was adopted in New York in 1848 and subsequently in about thirty other states,⁸ and which is only recently being replaced by the Federal Rules of Civil Procedure as the dominant system in the United States,⁹ the Civil Code must be termed if not a failure, certainly less than completely successful. Why is it now all but forgotten? What purposes did it seek to achieve? Would it have been more successful in operation if the adopting states had handled it differently? These questions may not be answerable to anyone's complete satisfaction; but the following will attempt a review of some of the evidence.

It must be noted here, though it ought to be superfluous to do so, that the subject is not exclusively a matter of historical curiosity. The goal of capturing the substance of the law in the form of comprehensive and systematic legislation is one actively pursued in this country today, and not merely by idle academics. The activities of the American Law Institute and of the Conference of Commissioners on Uniform State Laws need only be mentioned: The Restatements of the Law are now coming out in revised second editions, and the Commissioners' greatest work, the Uniform Commercial Code, is now the law of three-fourths of the states and almost certainly will become the uniform law of the land. A glance at the thousand-odd volumes of the sparest working private practitioner's library—let alone the 50,000 volumes of the most minimal research library and the several million of the most complete existing collections—affords such a convincing impression of the need for rationalization of the sources of the law that one can scarcely believe

6. IDAHO REV. STAT. § 2400 (1887).

7. CODES OF MONT., Part II, 763 (1895).

8. Clark, *Code Pleading and Practice Today*, cited in Reppy, *supra* note 2, at 55.

9. The Federal Rules have been adopted in substance by at least 20 states, including North Dakota (1957), see WRIGHT, FEDERAL COURTS 225 (1963). The Field Code, of course, is not merely predecessor to the Rules but progenitor; *Ibid.*

that this complaint has been voiced without much success by lawyers and laymen for centuries. No less a champion of the Common Law than Roscoe Pound, in his last great work, concluded that the time for codification of Anglo-American law may have come.¹⁰ If the goal is to be pursued in the private law, it will be important to understand the strengths and weaknesses of the New York code, as one of the few precedents in the common law world. It may also be possible, incidentally, to gain some understanding of the present law of North Dakota.

THE 19TH CENTURY CODIFICATION MOVEMENT

A sketch of the background of legal ideas into which Field's work was cast is in order here. For that purpose, although the roots of the idea of codification go back as far as our knowledge about law goes, we may begin with the publication in the 1760's of Blackstone's *Commentaries on the Laws of England* and in the next decades of Jeremy Bentham's *Fragment on Government* (1776) and *Principles of Morals and Legislation* (1789). Blackstone's work was the outcome of the introduction for the first time of a systematic study of English law in the universities; until he assumed the newly-created Vinerian professorship at Oxford, university law (if any) was Roman law, and the working common law was the more or less exclusive property of the bar, cultivated through the Inns of Court and the articling system.¹¹ The popularity of the *Commentaries* in the United States was immediate and overwhelming, and it served through countless editions for much of the 19th century as the lawyer's primer, supplemented in detail for American needs by Kent's *Commentaries* and Story's treatises.¹² With Bentham's work, on the other hand, begins the so-called legislative reform movement in England and the United States, of which the codification movement was a corollary. The *Fragment on Government*, in which Bentham first sets forth his reformist philosophy, is a "Comment on the Commentaries,"¹³ a broad attack on Blackstone's conception of law as reflected in certain passages in his introduction.

The prime contribution made by Blackstone to the codification controversy of the nineteenth century was the apotheosis of the unwritten or customary law, the *lex non scripta*, as "the first ground

10. 3 POUND, *JURISPRUDENCE*, 732-38 (1959). Compare the smug jingoism of his early article, *The Place of Judge Story in the Making of American Law*, 48 *AMER. LAW REV.* 676 (1915).

11. 12 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 91-101 (1938). Blackstone began his lectures in 1753, and the chair was created for him in 1758.

12. See HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS*, 257 (1950).

13. The phrase is Bentham's own. BENTHAM, *FRAGMENT ON GOVERNMENT* 98 (Montague ed. 1891).

and chief cornerstone of the laws of England.”¹⁴ While there had been attempts by early English kings to compile authoritative digests of the customary law,¹⁵ which digests may have been the direct source for the statements of later treatise writers, still the authority of the common law derived not from sovereign command but from immemorial custom.¹⁶ The function of determining what the customary law is on any given point, or of testing the validity of any statement of it, is performed by the courts; and the courts will take as the primary evidence of the existence of a customary rule prior judicial decisions to that effect.¹⁷ Therefore the established rule was that precedents must be followed. However, Blackstone admitted of a higher authority than precedent, namely reason or Divine Law, or what is also called Natural Law. If a precedent is absurd or unjust, it would not be followed. Nonetheless, Blackstone was careful to point out, when a precedent is rejected, it is not rejected because it is *bad law*, but because it is *not law*, that is, that it is an inaccurate statement of the customary law.¹⁸ Thus the judge does not make law here, although he may be the sole governmental organ with the power to determine its content; the law is given to him by custom, and “reason” and “Divine law” are not so much sources of law as tests of the accuracy of a given statement of the law, and generally the model to which the law strives to conform.¹⁹ For it is not enough that the real reasons behind a given precedent be obscure, to allow a judge to replace it with what he

14. 1 BLACKSTONE, COMMENTARIES *73.

15. He refers in 1 BLACKSTONE, COMMENTARIES *64-65 to “Alfred’s dome-book” and subsequent revisions by Edgar and Edward the Confessor.

16. “[T]he maxims and customs are of higher antiquity than memory or history can reach. nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.” 1 BLACKSTONE, COMMENTARIES *67.

17. “They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.” 1 BLACKSTONE, COMMENTARIES 69.

18. “But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined.” 1 BLACKSTONE, COMMENTARIES *69-70.

19. Thus a statute, whose accuracy as a statement of the law (the will of Parliament) is not open to question, cannot be rejected by the courts as contrary to reason, Parliament is superior to the judiciary as a source of law. 1 BLACKSTONE, COMMENTARIES *91. Bentham misses this point (as he does many others), when he attacks the notion that the courts can be given power to declare an act of Parliament void, thinking he finds it in the somewhat loose statement that “no human laws should be suffered to contradict” Divine or natural law, 1 BLACKSTONE, COMMENTARIES 42. See BENTHAM, *op. cit. supra* note 13, at 213.

understands to be a more rational solution, rather he must find that the rule is flatly contrary to reason.²⁰

Blackstone's theme, then, was reverence for all things English, and most especially for the judicially-developed common law. Perhaps this attitude was made inevitable by his mission of establishing the common law as a university study in direct competition with the hallowed Roman law. Today we may be inclined to read into his smug (or defensive) but eloquent assessment of the English legal system the seeds of the liberalizing role of the judiciary which characterized the English chancery of a much earlier day, and which has periodically characterized the constitutional interpretations of the United States Supreme Court, as well as much of the work of the regular American courts in the 19th century.²¹ But in the England of his day Blackstone's praise and rationalization of the status quo was sufficiently at variance with the actual performance of the system to jolt the sensibilities of many, especially those of Jeremy Bentham. It has been pointed out that the spirit of the English leadership in the last quarter of the 18th century was not at all callous and inhuman, rather philanthropic and conciliatory toward interests such as the Catholic Church which had been previously the victims of severe repression.²² The judiciary had managed, through Lord Mansfield, to incorporate much of the law merchant into the common law. However, the law was still ostensibly dominated by incredibly severe criminal sanctions, repressive regulation of labor, a long-outdated system of land tenures which inhibited the commercial and industrial use of land, and a commercial law which, despite the assistance of the internationally accepted law merchant, was in many ways unhelpful if not hostile toward commerce, particularly in the law of bankruptcy and of corporations.²³ Such reform as took place was accomplished through the use of judicial fictions and evasions, reaching acceptable results in particular cases while leaving the outdated theories and statutes available for rigid application by less enlightened or less imaginative judges.²⁴

It was the need for reform of the substantive law—primarily of the criminal law—that motivated Bentham, and he reached the

20. "Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned, but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation." 1 BLACKSTONE, COMMENTARIES *70.

21. As to the latter, see Hurst, *op. cit. supra* note 12, at 184-9.

22. DICEY, *LAW AND OPINION IN ENGLAND DURING THE 19TH CENTURY* 77-83 (2d ed. 1914).

23. See also STONE, *HUMAN LAW AND HUMAN JUSTICE* 113-17 (1965).

24. See DICEY, *op. cit. supra* note 22 at 165-67.

conclusion that the legislature was the only agency capable of full scale law reform. Blackstone's overoptimistic evaluation of the capacity of customary law, supplemented by "reason" and administered by the courts, to fulfill the need for reform made him in Bentham's eyes a mortal enemy. A passage in the preface to the *Fragment on Government* sets the tone, and indicates why Bentham and his writings tended to polarize opinion and to prevent rational discussion.

If to [law reform] we should fancy any Author, especially any Author of great name, to be, and as far as could in such case be expected, to avow himself a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works; of a great part, at least, of the esteem and influence, which these works might under whatever title have acquired.

Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least that I saw, in the Author of the celebrated *Commentaries on the Laws of England*;

It is on this account that I conceived, some time since, the design of pointing out some of what appeared to me the capital blemishes of that work, particularly this grand and fundamental one, the antipathy to reformation; or rather, indeed, of laying open and exposing the universal inaccuracy and confusion which seemed to my apprehension to pervade the whole. For, indeed, such an ungenerous antipathy seemed of itself enough to promise a general vein of obscure and crooked reasoning, from whence no clear and sterling knowledge could be derived; so intimate is the connection between some of the gifts of the understanding, and some of the affections of the heart.²⁵

It is clear that the conception of the judge as a minister rather than a creator of law, as voiced by Blackstone, was not what Bentham objected to. He regarded the judiciary as just so many more "executive magistrates,"²⁶ and not an independent branch of government. So, too, Blackstone's coordinate branches were not the American executive, legislative and judicial, but rather one executive (Crown) and two legislative (Lords and Commons), although the House of Lords was the highest court of appeal and traditionally the original source of jurisdiction for all courts,²⁷ Lords was none-

25. BENTHAM, *op. cit. supra* note 13, at 94-5.

26. The phrase is used in BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* 65 (1879).

27. 3 BLACKSTONE, *COMMENTARIES* *56-7. The real significance of this tradition, tracing back to Magna Charta, appears to have been slight in Blackstone's time, except as an historical explanation for the judicial function of Lords.

theless primarily a legislative body Neither Blackstone nor Bentham accorded the courts power to annul acts of the legislature on higher-law grounds, though Bentham thought Blackstone did.²⁸ Bentham explains his position on the ground that while Parliament may not be the perfect representative body, it is one in which "the people" have at least some influence, whereas the judges are appointed by the very executive against whose oppression protection is sought.²⁹ Indeed, Bentham allows himself a measure of praise in this respect for the English judicial tradition:

One of the most eminent characteristics of the English tribunal is their scrupulous fidelity in following the declared will of the legislator; and in directing themselves as much as possible, by former judgments, in that imperfect part of English legislation which depends on custom. This rigid observation of the laws may have considerable inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with much horror for what they call *ex post facto* laws.³⁰

Bentham's objection to Blackstone's paeon to the status quo, in so far as the judiciary is concerned, was rather simply that the judiciary was an inadequate institution for the ascertainment of the law and the adaptation of it to meet the needs of the day, especially so in view of the very virtues of obedience and conservatism demanded of it. The law had to be divined out of the maze of particular lawsuits, the records of which until 1730 were in law-latin, which no one but a lawyer and by no means all of them could understand;³¹ even after proceedings were required to be in English, "fiction, tautology, technicality, circuitry, irregularity, inconsistency remain."³² Instead, Bentham developed criteria for sound legislation which he felt "judge-made" law could not possibly fulfill.

For Blackstone's natural or Divine law, which he dismissed as a polite word for personal predilection, he substituted the "principle of utility"³³ In this principle he found the guiding ideas not only of criminal law reform, which was his chief concern, but also of the private or civil law These ideas were set forth most clearly in the *Theory of Legislation*, first published in French in 1802, containing a chapter entitled "Principles of the Civil Code"—intended no doubt for the benefit of the commission working on Napoleon's civil code project, or for the proponents of such a commission. The

28. See, *supra* note 19.

29. BENTHAM, *op. cit. supra* note 13, at 221.

30. BENTHAM, *THEORY OF LEGISLATION*, 156 (1911).

31. BENTHAM, *op. cit. supra* note 13, at 113.

32. *Ibid.*

33. BENTHAM, *op. cit. supra* note 30, 1-4.

principle of utility was seen as yielding four basic purposes of legislation: Subsistence, Abundance, Equality, and Security³⁴ Of these, Security is the most important (liberty being but a branch of security), and this consists, at least as a goal for legislation in the private law, in the maintenance of the expectations of the people.³⁵ He then listed seven conditions necessary to the attainment of this most important goal of legislation. Two are substantive, that the law must be in conformity with *expectations*, and that it must be in conformity with the *principle of utility* The possible inconsistency between these two notions is crucial to the whole codification movement and to Bentham's place in it; but he dismissed the problem by noting that as soon as the utility of a law becomes apparent to the public, any contrary expectations will be willingly abandoned.³⁶ The remainder are formal in nature: that the laws should be *known*, logically or conceptually *consistent*, *methodical* or systematic, *certain to be executed*, and *literally followed*. Further, or perhaps therefore, the law must be *written*, and in a style which emphasizes *simplicity* and *common language*. The ideal is stated with quotable eloquence:

If that obscure system called *custom* were no longer permitted, and everything were reduced to written law, if the laws which concern every member of the community were arranged in one volume, and those which concern particular classes in little separate collections; if the general code were universally disseminated; had it become, as among the Hebrews, a part of worship and a manual of education; if a knowledge of it were required as preliminary to the enjoyment of political rights;—the law would then be truly known; every deviation from it would be manifest; every citizen would become its guardian; its violation would not be a mystery; its explanation would not be a monopoly; and fraud and chicanery would no longer be able to elude it.

If the style of the code differed from that of other books, it should be by a greater clearness, by a greater precision, by a greater familiarity; because it is designed for all understandings, and particularly for the least enlightened class.³⁷

These ideas, or variants of some or all of them, can be said to lie behind every subsequent effort toward codification in Anglo-American law, and certainly behind the efforts of David Dudley Field.

34. *Id.* at 96.

35. *Id.* at 110-11.

36. *Id.* at 151-2.

37. *Id.* at 156-7.

Bentham's most sympathetic audience was in post-revolutionary France, where his works were published (many for the first time) in substantially edited and revised form by Etienne Dumont, beginning with the *Theory of Legislation* in 1802. Some credit is given to these works for the ultimate acceptance of the idea of codifying the civil law by Napoleon and by the conservative scholars commissioned by him to do the work, after several drafts of codes failed during the revolution proper; the phrasing of the utilitarian theory in sufficiently mild terms to win acceptance has been attributed largely to Dumont.³⁸ His dominance over the English legal scene did not come until the end of his life, when the Reform Act was passed by Parliament in 1832, the year of Bentham's death—and, incidentally, the year of publication of John Austin's lectures on Jurisprudence, which were strongly influenced by (but also critical of some aspects of) "Benthamism."³⁹

The influence of Benthamism on the legislative reform movement in the United States dates from about the same period. In 1811 Bentham addressed to President Madison an offer to codify the laws of the United States, and at Madison's suggestion made similar offers to some of the states who then as now had competence over the general law, but none of these offers were accepted.⁴⁰ In at least one of these offers Bentham suggested that the chief benefit to be gained by a code is to make every man his own lawyer;⁴¹ while there was probably a substantial reception for such an idea among laymen, it can be doubted that there was much among lawyers, or among legislators who were themselves mostly lawyers.⁴² Nonetheless, a substantial work of legislative reform was accomplished in New York with the promulgation of the Revised Statutes of 1828, which not only brought the bulk of the statutory law of the state into organized form but also effected substantial modernizations of the substantive law, chiefly in the law of real property. Field incorporated most of this legislation into his code. This can be said to be the first important fruit of the legislative reform movement in the common law world. In 1825, on the other hand, in that corner of the United States governed primarily by the civil law, Edward Livingston completed his revision of the Louisiana

38. BENTHAM, *op. cit. supra* note 13, at 10-11. In introduction by Montague.

39. Dicey dates the period of intellectual dominance of Benthamism from 1825. DICEY, *op. cit. supra* note 22, at 126.

40. Passage quoted and note appended in HONNOLD, *THE LIFE OF THE LAW* 100-02 (1964).

41. Passage quoted from an 1817 pamphlet, Lewinsohn, *Law Reform in California*, 3 CALIF. L. REV. 300, 303 (1915).

42. Perry Miller points out that the more successful advocates of codification within the legal profession in the 1820's, particularly Grimke in South Carolina, dropped the every-man-his-own-lawyer notion and emphasized rationalization and systematization and "science", of which more below. MILLER, *THE LIFE OF THE MIND IN AMERICA* 245-48 (1965).

Civil Code, modeled strongly on the Napoleonic code but with substantial changes (mostly by way of expansion) This was also used frequently by Field as a source.

The first serious motion made toward true codification in the common law states came in Massachusetts with the establishment in 1836 of a commission headed by Joseph Story to investigate the feasibility and desirability of codifying the common law of Massachusetts.⁴³ While no direct action was taken on the basis of their report, submitted in 1837, Story's subsequent importance in the rationalization of American law through his many treatises and the sober, practical logic of the report make it a significant milestone. In the report, a distinction was sharply made between a codification in Bentham's sense, namely a complete rendition in every detail of the entire body of the law into systematic statutory form, and codification in a more limited sense, namely a coherent, logical statement of the general principles of the law, along with such detailed exceptions, qualification, etc., as "have already, by judicial decisions or otherwise, been engrafted upon" such principles, "and are now capable of distinct enunciation."⁴⁴ The first alternative was rejected as impracticable; the second was recognized as feasible, and the French civil code was given as a living example, both of the feasibility of the approach and of the great amount of construction, argument, development and elaboration which necessarily supplements such a code. In effect, therefore, Story rejected the Benthamite dichotomy between statute-law and judge-made-law, and took the French experience as proof that the latter cannot be eliminated by codification.

More important still for our understanding of the debate which raged over Field's civil code in New York and elsewhere in the 1870's and 1880's, however, is Story's insistence that a code can only contain that portion of the common law which is *known, well-ascertained, and well-defined*. Thus he explained why the general principles of the common law, as distinguished from the applications of those principles to particular instances, were *capable* of being reduced to a code:

These general principles are to be found, for the most part, collected in elementary treatises now extant, upon the whole or particular branches of the common law They are capable

43. Set aside here are at least two very early considerations of codification pursuant to rationalist principles: by the Virginia legislature in 1776, whose commission led by Jefferson abandoned the attempt except to call (unsuccessfully) for a codification of *statutes*, and by the Pennsylvania legislature in 1791, whose commission headed by James Wilson was eventually denied even initial appropriation. See MILLER, *op. cit. supra* note 42, at 239-41.

44. The report is published as *Codification of the Common Law*, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698-735 (W. Story ed. 1852).

of being stated in the very form and language, in which they are there enunciated, as they have, from long examinations and critical trials, acquired a precision and exactness, which approach very near to scientific accuracy; and for all the ordinary uses of life, they are sufficiently clear in their interpretations and qualifications.⁴⁵

Clearly for Story codification was not a creative process so much as a descriptive one; it was not a means of achieving certainty, clarity, and definition, but rather presupposed that these goals already have been achieved. It must therefore be accurate, and can only encompass that which can be accurately described.

Story did not fully develop this notion. His emphasis on the descriptive nature of the task may result as much from the fact that description was all he was asked to consider—the report is entitled not “Codification of Law” but “Codification of the Common Law of Massachusetts”—as from a conviction that a code could properly do nothing else. Nonetheless we can see in his report the influence of ideas which were most fully developed in the course of the century by the so-called “historical school” of German jurists, and which in turn gained currency in the United States in the latter third of the century. The historical school was founded by C. F. von Savigny with his book *On the Vocation of Our Age for Legislation and Jurisprudence*, published in 1814 as a response to a proposal to enact a civil code for Germany based upon Napoleon’s for France. The thrust of his argument was that private law is not deliberately laid down by a sovereign but grows more or less spontaneously out of the life of a people, and that before a useful codification of its laws can be accomplished it is necessary to know the people, its history and conditions of life, and to develop the systematic study of the living law to a high degree. Germany could not satisfy any of these conditions at that time, therefore any codification for Germany would have been disastrously premature. It has been suggested that Savigny’s real concern was not so much that a people not be governed by a premature codification, as that Germany not be governed by a French code.⁴⁶ Be that as it may, Savigny proceeded to establish in the German universities a generation of scholars devoted to investigation, analysis and systematization of the law applied in Germany, which lasted through the entire 19th century and which culminated in the Civil Code of 1900.⁴⁷ It was

45. *Id.* at 713-14.

46. KOSCHAKER, *EUROPA UND DAS ROMISCHE RECHT* [EUROPE AND THE ROMAN LAW] 258-59 (1947). (Munich, C. H. Beck, 1947, repr. 1953).

47. Ironically, though perhaps inevitably, the historical school had by that time developed its ostensibly inductive analysis to such a high degree that it had spawned its own scholasticism, and the German Civil Code was clearly an attempt to render in legislative

Savigny who popularized the notion that law was a "science" in the modern sense, that is, not scholastic but empirical, not deductive but inductive; and this notion more than any other was the weapon that ultimately defeated Field's code in New York.⁴⁸ It seems likely that Story was already familiar with these ideas in 1837, since he had published in 1832 the first of his great treatises, on *Bailments*, which shows a thorough familiarity with the civil law and the French code, though it does not cite Savigny as an authority on the civil law. His references to French and Roman sources were so numerous in fact that he felt moved in the preface to explain, if not to apologize for, so much use of foreign law.⁴⁹

The chief advantages which Story saw as flowing from a codification of the common law were: (1) a simplification of the job of researching the law, by eliminating to a large extent the necessity for a lawyer, in order not to miss any possible relevant authority, to slog through numberless cases in all their factual detail;⁵⁰ (2) the rendering of the more general and useful rules of law accessible to the layman, as a "means of guarding them from gross mistakes in business, or gross violations of the rights of others",⁵¹ and (3) a reduction in the number of lawsuits resulting from the inability of the less studious or well-outfitted lawyer to determine precisely what is the law applicable to his client's situation. Neither lawyers nor judges can be eliminated, but the law can be made more accessible and clear.

In the same year in which Story's report to the Massachusetts legislature was published, David Dudley Field set up his own practice and joined in agitation for reform of the law of New York.⁵² His first target was procedure: the division between law and equity, survivals of the archaic forms of action, and a general overtechnicality in procedural rules. Here codification was not so much an end in itself as the indispensable vehicle for a thorough-going, radical

form a self-contained, highly logical system of precisely formulated, interlocking general concepts, the combination of which would answer as nearly as possible to all the legal needs of the people in the private sector. Indeed the whole historical movement, in its reliance on Roman law as the framework for research and analysis, and in its academic emphasis, has been aptly characterized as "professors' law", as distinguished from the "lawyers' law" of classical Rome, England, and to a lesser degree pre-revolutionary France. KOSCHAKER, *op. cit.*, at 211.

48. Interestingly enough, Austin insisted that Bentham was of the historical or inductive school, and that it was only a peculiarity of Savigny's thought that he should have been an enemy of codification while other historians such as Thibault were pro-codification. 2 LECTURES ON JURISPRUDENCE 679 (Campbell ed. 1885). This seems to exaggerate Bentham's interest in empirical study of a given country's law-in-action as well as Savigny's real opposition to codification.

49. STORY, COMMENTARIES ON THE LAW OF BAILMENTS at xi-xii (3rd ed. 1843). It is a little ironic that precisely in this area Field's code relies on Story most heavily.

50. STORY, *op. cit. supra* note 44, at 723.

51. *Id.* at 722.

52. Reppy, *The Field Codification Concept* in FIELD CENTENARY ESSAYS 30-1.

reform of the procedural law; in this connection Field can be regarded as a Benthamite in the fullest sense. However, the need for radical reform was widely enough felt among the public as well as the bar, that the 1846 state constitutional convention included in the constitution a provision for the establishment of a commission "to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts." Though initially rejected as too radical, Field managed shortly to get on the commission, and the Code of Civil Procedure which was the result of their labors was adopted in 1848.⁵³

The same constitution of 1846 also contained a provision calling for the establishment of a commission to codify the substantive law. Here, however, reform was not the keynote of the provision; the language is strongly reminiscent of Story

[The legislature] shall appoint three commissioners, whose duty it shall be to reduce into a written code the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. And the said commissioners shall specify such alterations and amendments therein as they shall deem proper⁵⁴

Field himself read this as calling for codification of the Common Law. He chastised the members of the original commission, which after four years had accomplished nothing and whose authorizing legislation was repealed in 1850, for their lack of faith in codification of the common law and for limiting their ambition to a revision of the statutes.⁵⁵ After constant agitation by Field, the Code Commission was revived in 1857 by the legislature, with Field as chairman.

Field's conception of the task of codification of the substantive law—at least in the private law, for which he was primarily responsible—is a somewhat different one from that of reforming procedural law. In the latter, the rules themselves needed changing; in the former, what was most unsatisfactory was the confusing form in which the rules were to be found, the lack of a clear statement of some rules anywhere, the persistence of technical distinctions such as law/equity that had lost their substance, and the inaccessibility of the law to the general public. Nonetheless, the first report of the commission, submitted in 1858 to outline the projected work embracing a political, a civil and a penal code, shows Field drawing a broad power to revise the law if not to reform it:

53. *Ibid.*

54. N.Y. CONST. art. I, § 17 (1846).

55. 1 THE SPEECHES, ARGUMENTS AND MISCELLANEOUS STATEMENTS OF DAVID DUDLEY FIELD 307 (Sprague ed. 1884).

Two great purposes are to be subserved in revising the jurisprudence of a nation: the reduction of existing laws into a more accessible form, resolving doubts, removing vexed questions, and abolishing useless distinctions; the other, the introduction of such modifications as are plainly indicated by our own judgment or the experience of others. We are satisfied that this work should be performed with delicacy, caution and discrimination, that nothing should be touched from mere desire of change, or without great probability of solid advantage. That which in the judgment of the Commissioners can reasonably be attempted is to collect, condense and arrange those general and comprehensive rules of action, resting upon fundamental principles, recognized by the law or by reason, which will afford, as far as possible, a guide in regard to the rights of person and of property⁵⁶

In the introduction to the completed code, submitted with the Ninth and Final Report of the Commission on February 13, 1865, Field enumerates the advantages to be obtained through codification: (1) saving of shelf space for law libraries; (2) saving of vast labor in legal research; (3) settling of disputed questions which the courts have not been able to resolve; (4) reform of the law, where necessary; (5) diffusion of more general and accurate knowledge of the law among the public.⁵⁷ The extent of his ambition is indicated in the following remarks in connection with the fourth advantage:

The making of a Code involves a general revision of the law. It is indeed in this way alone that such a revision seems practicable. The occasion is thereby afforded to look at the law of the land, as a whole, to lop off its excrescences, reconcile its contradictions, and make it uniform and harmonious.⁵⁸

It is clear, then, that Field, while calmer, more judicious, and much more a lawyer than Bentham, still had a great deal more of the reformer in him than Story. Perhaps this is why Field managed to complete a code, while Story got only so far as a series of private treatises. Nonetheless, due to factors of time and place and no doubt of personality, as well as the form in which their offerings were cast, Story's treatises can be said to have had much greater influence on the private substantive law than did the New York Code. Indeed, the Code itself took a great deal of advantage of Story's treatises as sources for specific provisions and general classifications. The advantage of a treatise, of course, is that it can be useful and in-

56. *Id.* at 312.

57. N.Y. CIV. CODE at xxix-xxx (1865).

58. *Id.* at xxx.

fluent merely by gathering together the available sources on a given point, noting similarities and differences in approach and result, and suggesting a preference, without firmly committing either the writer or the reader to one answer. The legislator, on the other hand, cannot discuss, suggest or speculate, but must decide, ignore, or leave vague; and one who proposes legislation reforms at the risk of rejection.

With this background of ideas, purposes and problems, we can turn to some of the outstanding features of the New York Code, and perhaps get an inkling of the difficulty it faced in gaining acceptance.

THE CODE AND THE COURTS

As we have seen, the chief talking point of codification is the superiority of legislation over judicial decisions as the primary source of law. The first key to understanding any given code, then, is the role it foresees for the courts in applying it. It appears to have been a great temptation for codifiers to try to restrict the role of courts as much as possible. Justinian, for example, decreed that the Emperor was the sole interpreter of statutes, as well as the sole author;⁵⁹ apparently at one point in the post-revolutionary discussion of codification in France, Robespierre also advocated a general prohibition against interpretation;⁶⁰ and we have noted that Bentham set down as essential to the achievement of security in expectations, that the laws be literally followed.⁶¹ We may regard these attempts as doomed from the start; Justinian's prohibition was not taken seriously,⁶² Robespierre's was repudiated by the Napoleonic code, and Bentham's was never incorporated into any actual system. The difficulty, of course, is that such a prohibition against interpretation, if taken literally, leaves the judge without a guide in situations not clearly covered by the code, and creates the risk that such cases will not be decided at all. Thus the Napoleonic code in article 4 makes it a crime to refuse to decide a case on the pretext that the law is silent, obscure, or insufficient on the point to be decided.⁶³

The problem of the unprovided-for case resolves itself, then,

59. Codex 1.14.12 translated and discussed in ALLEN, *LAW IN THE MAKING* 112-13 (1927).

60. Samuel, *Codification of Law*, 5 *UNIV. OF TORONTO L. REV.* 148, 151 (1953).

61. BENTHAM, *op. cit. supra* note 30, at 155.

62. See, e.g., JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 11-15 (1957), where it is noted that one of the most formidable obstacles to literal acceptance of Justinian's prohibition was the inclusion in the *Corpus Juris* itself of many passages from classical jurists advocating and applying much more liberal canons of construction.

63. "The judge who refuses to decide, on the pretext of the silence, obscurity or insufficiency of the law, may be prosecuted as guilty of a denial of justice." *Code Civil* art. 4.

into a hierarchy of secondary sources. In the codes in operation at the time of Field's work, attempts to provide expressly for such a hierarchy varied considerably in scope. It appears that the Prussian code (1794) did in fact attempt to prohibit interpretation, and required that doubtful cases be referred to a commission which legislates for that particular case; but despite the prohibition against making decisions on the basis of judicial precedent, Austin insists that they had substantial persuasive authority.⁶⁴ Somewhat more sensibly, the French code contented itself simply with prohibiting in article 5 the deciding of cases on the basis of overt precedent, without attempting to prescribe the sources of authority which *could* be utilized in cases where the law was silent, obscure or insufficient.⁶⁵ The Austrian code (1811) added to the prohibition against overt precedents a list of priorities, namely analogy from provisions of the code, and (failing such analogies) the principles of natural law.⁶⁶ The Louisiana code (1825) provided in article 21.

In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent.

This provision is the only one which recognized pre-existing custom as an appropriate secondary source, and that only as a permissible alternative without special priority; it has since been held, however, that since judicial decisions are evidence of "received usages" within the meaning of Article 21, *stare decisis* applies in Louisiana.⁶⁷

Field, however, was working under somewhat different conditions than the civilian codifiers, primarily in that he was codifying an existing system which had consisted primarily of customary law, but which had also developed an elaborate set of rules for interpreting the relatively few statutes which presumed to impinge on its domain. Accordingly, the New York code provides more elaborately than its continental counterparts for the unprovided-for case, and the keynote is preservation of prior law. It starts with a recognition of case-law or common law as one of the three ways in which the law-giver ("the State") expresses his will (sec. 3 (3), sec. 5)—the others being the Constitution and statutes—and then

64. This feature of the Prussian system is discussed in II AUSTIN, JURISPRUDENCE 668 (Campbell 5th ed. 1885).

65. "Judges are prohibited from deciding cases before them by way of general or rule-making opinions." *supra* note 63, art. 5.

66. Art. 7, discussed in Samuel, *supra* note 60, at 152.

67. Keller v. Haas, 209 La. 343, 24 So.2d 610 (1946). This problem is discussed in connection with the recent Dutch code revision in Dainow, *Code Revision in the Netherlands: General Problems*, 17 LA. L. REV. 273 (1956).

provides, somewhat clumsily, that "there is no common law, in any case, where the law is declared by the five Codes" (sec. 6), that the rule of strict construction of statutes derogating from the common law is inapplicable to the code (sec. 2032), and that the Code repeals statutes, laws, etc., which are inconsistent with it (sec. 2033) What is contemplated, then, is that the first inquiry be into possible analogies from other provisions of the code, but that the prior law be the next alternative. Field explains his ideas in the introduction to the completed code:

Therefore, if there be an existing rule of law omitted from this code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists . and if new cases arise, as they will, which have not been foreseen, they may now be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the Code, or to some rule omitted from the Code and therefore still existing, or by the dictates of natural justice.⁶⁸

Thus Field clearly did not contemplate the abandonment of precedent as a source of authority where the code is found to be silent. Another way in which a code can leave room for a creative function in the courts is by the formulation of particular provisions so as to give the judge discretion in certain types of cases. In general, Field's code does not abound in such provisions; the style of draftsmanship is dogmatic and precise and tends, rather more than Field's own statements would suggest, to be dominated by rules rather than principles.⁶⁹ However, a number of such provisions can be found, a few of which follow, with the key individualizing phrases emphasized:

Sec. 12: A child conceived, but not yet born, is to be deemed an existing person, *so far as may be necessary for its interests* in the event of its subsequent birth.

Sec. 69: A judgment for separation, whether for life, or for a limited period, may be at any time revoked, *under such regulations as the court may impose*, upon the joint application of the parties, with satisfactory evidence of their reconciliation.

Sec. 92: The (trial-level) court may direct an allowance to be made to the parent of a child, out of its property,

68. N.Y. Civ. CODE at xix (1865).

69. The most effective critic of the code in action, John Norton Pomeroy in California, objected particularly to the abandonment of established terminology, which he found was not accompanied by a shift to a non-technical style but amounted simply to a revision of technicalities. Pomeroy, *The True Method of Interpreting the Civil Code*, 3 WEST COAST REPTR. 585, 586, 657 (1884).

for its past or future support and education, *on such conditions as may be proper*, whenever such direction is for his benefit.

Sec. 1905: On adjudging the rescission of a contract, for any other cause than usury, the court may require the party to whom such relief is granted to make any compensation to the other *which justice may require*.

This style of drafting as a technique for freeing the courts from the inconveniences of abstract rules is not talked about in any of the literature on codification in Field's time. It is to be assumed therefore that such provisions in a substantive code result not so much from a design on the draftsman's part as from the fact that existing formulations were in those terms. Other forms of indeterminacy leaving scope for judicial creativity, such as deliberate vagueness or non-technicality of terminology, are even less frequently found in the Code.⁷⁰

A peculiarity of the Code, which seems to recognize some range of freedom of interpretation in the courts, is the inclusion in DIVISION IV (General Provisions) of a part entitled "Maxims of Jurisprudence," secs. 1964-1998. The only precedent for this type of provision in a code, to my knowledge, is the title in Justinian's Digest, *De diversis regulis juris antiqui* (of various rules of ancient law)⁷¹ Indeed Field cites several of those 211 "rules" in his notes, as ultimate sources for his own. However, such maxims were woven into the fabric of English law; Coke and Blackstone bristle with them, and so has every treatise on Equity down to the present day⁷² While many of the maxims of English law were derived from the Digest, others were developed indigenously; their function may be not simply to state a broad principle of law, as did most of the maxims of Equity, but also to provide a rule of thumb for the interpretation of a statute or of a private transaction.⁷³ Field's 34 maxims are only a more or less judicious selection of those which had a general application, leaving those having special application to the appropriate special section of the Code. Some of the Equity

70. Rather more thought is given to these considerations today, and the Uniform Commercial Code demonstrates acute awareness of them. See, e.g., part IV of Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 *YALE L. J.* 1341 (1948).

71. D. 50.17. For an extremely interesting study of this title and its role in the history of legal ideas, see STEIN, *REGULAE JURIS* (1966).

72. One of the three full-scale treatises, devoted entirely to maxims, cited by Field in his notes to the completed draft, BROOM, *A SELECTION OF LEGAL MAXIMS*, was first published in 1845 and was in its fourth edition by 1864, the ninth edition was published in 1924 (London, Sweet & Maxwell, 1924). For Equity, e.g., POMEROY, *EQUITY JURISPRUDENCE*, § 363 (4th ed., 1918).

73. A long passage on maxims and their historical function is to be found in 3 POUND, *JURISPRUDENCE* 513-57 (1959).

maxims, for example, are incorporated into the section on specific relief. The Code attempts an explanation of their purpose:

Sec. 1964: The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application.

Field probably conceived of them as serving something like an educational purpose, as well as providing the courts with some handy tools of interpretation. It seems unlikely that even he supposed maxims not included to be repealed by implication.

Even the Latin counterparts of many of the maxims are familiar today: *ubi jus, ibi remedium* (for every wrong, there is a remedy),⁷⁴ *de minimis non curat lex* (the law disregards trifles),⁷⁵ *cessante ratione legis cessat ipsa lex* (when the reason of a rule ceases, so should the rule itself),⁷⁶ *volenti non fit injuria* (he who consents to an act is not wronged by it),⁷⁷ fortunately, some appear to have no Latin counterparts, such as "That which ought to have been done, is to be regarded as done, in favor of him to whom, and against him from whom, performance is due"⁷⁸—a maxim of Equity from which, among other things, the doctrine of equitable conversion was derived. All of the maxims included in the Code are found in the Anglo-American literature of the period. They survive in the present North Dakota Century Code.⁷⁹

CLASSIFICATION, TERMINOLOGY, SOURCES

It has been said that the influence of the civil law on the New York Code is especially apparent in the classification of various portions of the private law.⁸⁰ There is some truth to this, although not much light, since the various civilian systems differ from each other in this respect as much as from any of the common law systems and writers. Some peculiarities of the Code, however, are of interest.

Obligations. The New York Code consists of four Divisions: Persons, Property, Obligations, and General Provisions applicable in at least two of the first three divisions. The first notable peculiarity of classification, then, is the devotion of a separate division to the law of obligations—which included both contracts and torts, the

74. N.Y. CIV. CODE § 1978 (1865).

75. N.Y. CIV. CODE § 1988 (1865).

76. N.Y. CIV. CODE § 1965 (1865).

77. N.Y. CIV. CODE § 1970 (1865).

78. N.Y. CIV. CODE § 1984 (1865).

79. N.D. CENT. CODE § 31-11-05 (1960).

80. HARRISON, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 193 (1922).

latter under the rubric "obligations imposed by law" Certainly there was no precedent for this in the common law Blackstone deals with contracts in his Book II on Property, as modes of acquiring rights,⁸¹ and with torts in his Book III on Private Wrongs;⁸² Kent deals with contracts in his section on Personal Property⁸³ and with torts (very briefly) in his Rights of Persons.⁸⁴ On the other hand, neither the *Corpus Juris Civilis* nor the Napoleonic code treats obligations as a wholly separate classification; the former classed obligations as incorporeal things, *res incorporales*,⁸⁵ while the latter classed them as modes of acquiring property⁸⁶ However, both of the latter systems refer to contracts and torts generically as obligations, and Pothier, whose works Field cites from time to time in the notes to his completed draft, wrote a separate treatise on the law of obligations which was almost the sole source for the provisions in this field of the Napoleonic code.⁸⁷ Field's explanation for this and other peculiarities of classification, in his introduction, is terse but suggestive:

It will be observed that there has been some departure from the ordinary arrangement, resulting principally from the desire of the Commissioners to confine each title to a single branch of a general subject, and not to permit the repetition of a principle once stated. In the first part of the third division, that which treats of obligations in general, many provisions are placed, particularly in respect to the extinction of obligations, which have generally been referred to contracts alone.⁸⁸

The matter of classification, of course, is not all that simple, for it is possible to arrive at quite different results, ostensibly in the interest of conceptual economy, depending on one's starting point. Perhaps it should be said, in defense of Field's seeming nonchalance, that the bulk of the serious thinking about how to arrange a systematic statement of the law had yet to be done in the Anglo-American systems by the time he did his work on the Civil Code, and that there is still much to be done. For present purposes it will suffice to refer to an article published in 1870 by Oliver Wendell Homes, Jr., in which he expresses the belief that

81. 2 BLACKSTONE, COMMENTARIES *442.

82. 3 BLACKSTONE, COMMENTARIES *ch. VIII.

83. 2 KENT, COMMENTARIES ON AMERICAN LAW *449 (1896).

84. *Id.* at 15.

85. See JOLOWICZ, ROMAN FOUNDATIONS OF MODERN LAW 73 (1957).

86. *Supra* note 63, art. 711 "Property in things is acquired and transmitted by succession, by gifts *inter vivos* or testamentary, and by the effect of obligations."

87. See for an outline of the treatise Montmorency, *Robert Joseph Pothier and French Law, GREAT JURISTS OF THE WORLD* 742-5 (1914), See also as to the statement in the text AMOS & WALTON, INTRODUCTION TO FRENCH LAW 31 (2d ed. 1963).

88. N.Y. CIV. CODE at xxxi-xxxii.

"the most considerable advantage which might be reaped from a code" would be the achievement of "a philosophically arranged *corpus juris*," and that a code "would treat (a) subject once and in the right place."⁸⁹ He then suggests that the basic conception for classification purposes should be *duty* rather than *right*; and he concludes that torts are a distinct class of inter-personal duties ("duties of all the world to all the world") from contracts, property, agency, etc. ("duties of all the world to persons in certain particular positions or relations")⁹⁰

Bailments. Another peculiarity of arrangement acknowledged by Field in the introduction to the Code is the handling of bailments, which is "not treated by itself, but under different titles, as deposit, loan, hiring, service, carriage, trust, agency, and pledge."⁹¹ Here Field undoubtedly reflects the influence of civilian notions, but the reasons for this appear to be more accidental than arbitrary. In Field's time the Anglo-American law of bailments was only beginning to develop, and was still dominated by categories taken directly from the civil law. Kent⁹² lists five species, each with a Latin name: *depositum*, *mandatum*, *commodatum*, *pignus*,⁹³ and *locatio*; Story⁹⁴ supplies the English equivalents as *deposit*, *mandate*, *loan for use*, *pledge* or *pawn*, and *hiring*, respectively. Blackstone defined bailment (the word coming from the French *bailler*, to deliver) as "a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee."⁹⁵ Kent added the characteristic that the goods were to be returned,⁹⁶ but Story pointed out that this is not true of a bailment for sale, such as a consignment,⁹⁷ and offered the following definition:

(A) bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.⁹⁸

The difficulty of classification, obviously, is that bailment combines elements of contract with elements of property. Having once decided to divide property and contract (obligations) into two coordinate branches of private law, the difficulty becomes acute. None

89. Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1-3 (1870), reprinted in 44 HARV. L. J. 725 (1931).

90. *Id.* at 3, 6, 7. Holmes was then editing the 12th edition of Kent's *Commentaries*, which ostensibly proceed from the basis of *right*.

91. N.Y. CIV. CODE at xxxii.

92. 2 KENT, *op. cit. supra* note 83, at *558-59.

93. Only this is rendered in English by Kent, as *pledge*, for no obvious reason.

94. STORY, *op. cit. supra* note 49, at 9, 10.

95. 2 BLACKSTONE, COMMENTARIES *451.

96. 2 KENT, *op. cit. supra* note 83, at *558.

97. STORY, *op. cit. supra* note 49, at 2.

98. *Id.* at 4.

of the precedents are entirely helpful. The *Corpus juris civilis* of Justinian classifies each of the relevant transactions as contract, which is a subheading of obligation which is in turn a subheading of the law of things.⁹⁹ Perhaps the most significant classification of contract in the Roman law is that of real, verbal, literal and consensual, according chiefly to the manner in which the obligation is established.¹⁰⁰ Of the contracts classed in English law as bailments, only three are classed in Roman law as real, that is, created by the transfer of thing: *commodatum*, *depositum*, and *pignus*;¹⁰¹ *mandatum* and *locatio*, on the other hand, are classed as consensual, that is, created by the agreement of the parties by itself.¹⁰² For the Romans, then, the fact that a contract involved the transfer of possession of a thing was not a unifying factor, but rather whether the obligation itself arose upon delivery of the thing or simply upon the agreement of the parties. Blackstone lists bailment as a type of contract, without breaking it down into categories; but contract is a subheading of the law of things, so that the combination of property and contract aspects does not pose a problem of classification. Similarly, with the Napoleonic code, the various types of contract classed in our law as bailments are listed separately, but obligations are classed as modes of acquiring property, so that although Pothier probably included them in his separate treatise on obligations, the *code civil* itself is not a helpful precedent. Only Kent lists bailments separately in a classification coordinate with contracts generally, but each is a subheading under Personal Property

Although Story was already toying with the classification of bailments according to whether they are for the benefit of the bailor, the bailee, or both,¹⁰³ he did not shake the civilian typology, and it was not until much later that the tripartite classification became the dominant one.¹⁰⁴ This shift in classification, which serves chiefly the purpose of defining the extent to which the bailee is responsible for damage or loss of the thing bailed, emphasizes the property aspect of bailments, but the subject is quite confused even today by the variety of contractual arrangements which can surround the possession of a thing owned by someone else.¹⁰⁵ Indeed, once

99. JOLOWICZ, *op. cit. supra* note 85.

100. See LEE, *ELEMENTS OF ROMAN LAW* 285 (4th ed. 1956).

101. *Id.* at 290.

102. *Id.* at 307.

103. STORY, *COMMENTARIES ON THE LAW OF BAILMENTS* 5-6 (3rd ed. 1843).

104. See generally BROWN, *LAW OF PERSONAL PROPERTY* § 80 (2d ed. 1955).

105. BROWN, *Id.* devotes 60 pages, out of his 250 on bailments, to distinguishing them from "other similar transactions" (ch. X), and another 106 to "some special types of bailments"—namely involuntary bailments, carriage, and innkeepers (ch. XII). Holmes also thought "bailment" to be a category not worth keeping; HOLMES, *op. cit. supra* note 89, at 11.

the common identifying characteristic of bailments is defined as "possession of goods [by one person], which belong to another,"¹⁰⁶ it is not difficult to see why Field chose not to use it as a classification at all, since the contractual aspects are the crucial ones, and since some bailments, such as mandate, share these contractual aspects with other transactions which are clearly not bailments. This peculiarity, then, is dictated largely by conceptual economy, and vindicated by the unsatisfactory results of the usual alternative.

Agency A point of classification for which the code was later mildly criticized as departing from "principles of the English common law"¹⁰⁷ was the inclusion of agency under the heading of Obligations rather than of Persons. Field notes in the introduction that "matters usually treated under the title of principal and agent, are here treated under service, trust and agency"¹⁰⁸ To the extent that principles of English common law can be found, they are not altogether clear on this point. Blackstone, to be sure, dealt with agency under the general heading of master and servant, which appears in Book I on the Rights of Persons.¹⁰⁹ However, Kent makes the law of principal and agent a subheading of the law of personal property, coordinate with contracts and bailments, among others, while master and servant remains a subheading of the Law of Persons. The connection with the law of persons seems to result from looking at the relationship first internally, then only secondarily from the point of view of the outsider dealing with the agent. Master/servant to Blackstone was a basic personal relationship, coordinate with husband/wife, parent/child and guardian/ward;¹¹⁰ the prototype of the master/servant relationship is the institution of slavery, which was outlawed as such by English law but which is difficult to distinguish for this purpose from "perpetual service," which was still recognized:

[I]t is laid down, that a slave . . ., the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term.¹¹¹

106. BROWN, *op. cit. supra* note 104, at 254.

107. Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 193 (1922).

108. N.Y. CIV. CODE at xxxii.

109. 1 BLACKSTONE, COMMENTARIES *428.

110. *Id.* at 422.

111. *Id.* at 424-425.

This point of view is rather similar to that of the Roman law, where in fact the principal/agent relationship was limited to the family in the broad sense, that is, to wife, children, slaves, with very limited exceptions, and never reached the point of allowing the agent who was not a subordinate member of the family to act solely as an intermediary without binding himself.¹¹² That Kent split off principal/agent from the law of persons, and Field the remainder of master/servant, is probably due less to an abandonment of essential principles of English common law, than to the industrial revolution and the emancipation of labor

Trusts. Another of the more troublesome points of organization and terminology in the Code is found in the provisions on trusts. The main title on trusts (secs. 1167-1215) is set forth in the Division on Obligations in the part on "Obligations Arising from Particular Transactions." It is pointed out in the introduction that the title on trusts includes provisions governing all confidential relationships. An explanation for this is essayed in the note to sec. 1168, defining trusts in general:

A trust is defined by Story as an equitable title to property
 But this is a very narrow definition. So far as his obligations are concerned, a technical trustee stands upon the same footing with a confidential agent or adviser, a guardian, etc., and there is little difference, so far as business relations are concerned, between his position and that of a husband, wife, parent, or attorney. The *confidence* reposed is the essence of this relation, and it will be found, by reference to the numerous cases cited in the course of this Title, that little or no distinction is made between trustees, strictly so called, and any other persons who accept the personal confidence of another

Dealing with the general subject of trusts under the general heading of obligations involved a departure from the usual. Both Blackstone¹¹³ and Kent¹¹⁴ discuss trusts in connection with real property, and both explain the history of trusts (as does Story¹¹⁵) in terms of development from the early English "use" and the Roman *fideicommissum*, which were originally methods of accomplishing beneficial transfers of land to persons or entities (such as the church, in England, or peregrines, in Rome) not capable under the strict law of receiving or inheriting it directly from the transferor. By Story's time, and probably even by Blackstone's, it was

112. See LEE, *op. cit. supra* note 100, at 360, 61, 63, 64.

113. 2 BLACKSTONE, COMMENTARIES *327-29.

114. 4 KENT, COMMENTARIES ON AMERICAN LAW *289-91 (1896).

115. 2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 965 (Bigelow 13th ed. 1886).

clear that trusts could be established in personalty as well as realty,¹¹⁶ but the association with property was still of the essence of the trust; as will be discussed below, Field does not escape this in the substance of his provisions, and he also devotes a title of the part on Real Property to the ownership aspects of trusts. Nonetheless, the obligational aspects of the modern trust are so predominant that it seems appropriate to deal with them primarily under that head.

More difficult is the suggestion that trusts ought to be subsumed under the general heading of confidential relations. If this is the case, it seems clumsy to have used the term "trust" to designate the larger class, when to Story and to the bar generally that term had the very specific meaning of a separation of legal and beneficial ownership. It is more likely, however, that Field's explanation was ineptly put, and that what he was trying to do was rather to subsume portions of the law of various confidential relations under the heading of trust. Thus the relations of husband and wife, guardian and ward, agency, and partnership are all dealt with in separate titles, but each includes a cross-reference to the title on trusts for certain obligations, chiefly those arising when a spouse, guardian, agent or partner (fiduciary) deals in property or interests properly belonging to or inuring to the benefit of the other spouse, ward, principal or partner.¹¹⁷ Hence also the division of the title on trusts into a chapter on "trusts in general" and a chapter on "trusts for the benefit of third persons;" the former contain provisions, applicable to all transactions designated as trusts, the latter is specifically limited to the classic express trust in which property is vested in a trustee for the benefit of someone other than the transferor (trustor) (sec. 1191)

A third distinctive facet of the Code's handling of trusts is the fundamental division of trusts into two classes, "voluntary" and "involuntary." A later critic suggested that these were just idiosyncratic words for the accepted division between "express" and "implied" trusts,¹¹⁸ and the 1943 North Dakota Code substituted these terms for "voluntary" and "involuntary," respectively (59-0101). This was clearly a misunderstanding of what Field had in mind. In Story's treatise on Equity, which appears to have been Field's main source in this area, "express trusts" are defined as "those which are created by the direct and positive acts of the

116. *Id.* § 964.

117. N.Y. Civ. Code §§ 79 (husband/wife), 131 (guardian/ward), 1240 (3) (agent/principal), and 1292 (partnership) (1865).

118. Pomeroy, *The True Method of Interpreting the California Civil Code*, 3 WEST COAST REPTR. 691, 694 (1884).

parties by some writing or deed", and "implied trusts are those which are deducible from the nature of the transaction as a matter of clear intention, although not found in the words of the parties, or which are superinduced upon the transaction by operation of law as a matter of equity, independent of the particular intention of the parties."¹¹⁹ The former class of implied trusts are also called "resulting," and the latter "constructive," Field's definitions of "voluntary" and "involuntary" make it clear that the former includes both express trusts and resulting trusts, while the latter includes only constructive trusts.

A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by one, for the benefit of another (sec. 1169)

An involuntary trust is one which is created by operation of law (sec. 1169)

This is further reinforced by the obviously deliberate use of the term "express trusts" in the definition of the special class of "trusts for the benefit of third persons" (sec. 1191)

The provisions in both chapters of the title on trusts are instinct with the standard notion of trusts as involving the handling by a trustee of property or business affairs for the benefit of another. Although the parties to a trust—the trustor, trustee and beneficiary—are expressly defined in sec. 1170, the notion of "the trust property" is dropped into sec. 1178 without any definition, as if it were self-evident that a trust involved property in some sense:

A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner

This in the section on trusts in general, when the definitions thereof (secs. 1168, 1169 quoted above) omit any reference to property

The property aspects of trusts, strictly so called, are dealt with in the title "Uses and Trusts" (secs. 274-299) in the Real Property part of the Division on Property. There are no corresponding provisions in the part on Personal Property, perhaps because it was felt that the doctrine of estates was so realty-oriented as to demand treatment in that area although in theory also applicable to personality; in any case, as we have noted, Blackstone and Kent both placed uses and trusts in this category. This must be regarded as an unfortunate oversight, especially in the law of trusts where

119. 2 STORY, *op. cit. supra* note 115 § 980.

realty and personalty are often if not inevitably mixed. The title reflects the traditional execution of passive uses as under the English Statute of Uses, to vest the estate in the *cestui que use*, with the subsequent exception of the active use or trust from the operation of the Statute, but with two refinements of note. First, the theory of an equitable estate in the beneficiary is dropped by sec. 291.

Except as hereinafter otherwise provided, every express trust in real property, valid as such, in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

Second, and more importantly, a short exclusive list of permissible purposes for express trusts is attempted in sec. 285, leaving little room for development except through the medium of "powers in trust." Sec. 288 provides:

Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers, contained in Title V of this Part.

The permissible purposes are four in number: (1) to sell realty for the benefit of creditors; (2) to sell, mortgage or lease realty for the benefit of legatees, or to satisfy a charge on the property (this could be stretched to cover most testamentary trusts), (3) to collect rents and profits for the benefit of another, but only for the latter's lifetime; and (4) to accumulate the rents and profits.

The bulk of this title is taken from the New York Revised Statutes of 1828, including the provisions mentioned above, and were therefore not inventions of Field. They were enacted in time to be criticized by Kent in his *Commentaries* as inept, because the net effect, if not to restrict the scope of the institution, was to change established terminology, without a corresponding benefit.¹²⁰

Mortgages. In the Code, the law of mortgages, pledges, maritime mortgages, and various liens are gathered together under the single title, "Lien," in the part on "Obligations Arising From Particular Transactions." The introduction contains the following remark on the subject:

120. 4 KENT, *op. cit. supra* note 114, at 308-13.

Mortgage, equally with pledge, is treated under the lien, an effort having been made to clear the law of mortgage from the confusions and contradictions which have been produced by the counter action of law and equity for so many years.¹²¹

At that time the standard terminology apparently distinguished between common law liens, which depended upon possession by the creditor, and equitable liens, which were independent of possession in the creditor; the term "Lien" by itself was understood to refer only to common law liens.¹²² What Field sought to do in the title on lien was to establish transfer of possession or retention thereof as the central distinction between types of lien, and to use the term "mortgage" to designate those established without the necessity of transfer of possession, with "pledge" designating liens established by transfer of possession to the creditor. Here he expressly drew on the civil law concepts of mortgage and pledge, although the heart of the difference appears to have been terminological, in that the effective range of choice among security devices does not seem to have been much enlarged or diminished. One aspect of the modern civil law of mortgage which was not adopted by Field, for example, was the restriction of the device to real or immovable property;¹²³ the chattel mortgage was well established in American law and was retained.¹²⁴ He apparently saw the chief difference between security interests accompanied by possession and those not so accompanied, in the necessity for publicity. A mortgage had to be in writing and recorded,¹²⁵ whereas a pledge did not, because in the latter case the possession of the creditor and the requirement of public sale afforded the requisite publicity toward third persons. A change was made in one respect, however, in that a chattel mortgage accompanied by a transfer of possession was deemed in the Code to be a pledge, under sec. 1648. The effect of this would seem primarily to cause the creditor to lose his lien if he lets go of the property, pursuant to sec. 1607, unless he gets a specific agreement to the contrary; it is hard to see why this was necessary, if a given transaction complies with the writing and recording re-

121. N.Y. CIV. CODE at xxxii.

122. See commissioners' note to § 1582.

123. See NAPOLEONIC CODE art. 2118. The Roman law appears not to have made any such distinction, although the original use of *hypotheca* was to give a landlord a lien for rent on the possessions of the tenant; See LEE, *op. cit. supra* note 100, at 176-77.

124. *E.g.*, KENT, *op. cit. supra* note 83, at *516-632. Here it is noted, nonetheless, that many jurisdictions adopt the view (which Kent approves) that a chattel mortgage without a transfer of possession is void as against creditors of the mortgagor. To this extent, then, by making chattel mortgages without delivery of possession valid (if written and recorded) and chattel mortgages with delivery of possession into pledges, Field changed the law of New York.

125. Mortgages of realty, sec. 1623, of personalty, sec. 1634.

quirements of chattel mortgages, particularly if the two sections are open to the construction that a writing and recordation of a chattel mortgage agreement constitutes the agreement necessary to preserve the lien under 1607 after relinquishment of possession.

Other Civilian Influences. We have already discussed most of the major areas in which the New York Code consciously draws on French, Roman or other civil law sources. All told, such sources are cited in the commissioners' notes to over 75 out of the 2031 sections of the Code; in most instances the civilian source is accompanied by New York or other common law authorities, but on the other hand much of the law of bailment is cited to Story, which in turn drew on civilian sources, and there are a few other instances of this sort. Perhaps the biggest single direct draft on the civil law is in the law of accession; six of the seven sections on accession to real property are taken almost verbatim from the Napoleonic Code, and eight of the nine on accession to personal property are also practically lifted out of that code. However, it is not obvious whether this constituted a drastic change in the substance of the law, or merely adoption of a particularly apt formulation of rules already accepted in the common law.¹²⁶ Another area in which substantial reliance is placed on civilian sources is the powers and duties of shipmasters, secs. 1050-60, as a "particular employment" in the title on Service; most of these sections are drawn from the French *code de commerce*, as are several others in the law of Service and Carriage relating to maritime shipping.

In at least one instance, a civilian term is introduced into an area where the Anglo-american law is thought to have peculiar rules, thus raising at least the possibility of substantive effect. In the law of contract, sec. 745 provides:

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.

The problem is raised here, whether "cause" and "consideration" are intended to be synonymous, and if they are, wherein the difference lies. "Consideration" is a common law term with which every lawyer is now and was then familiar, however vague the

¹²⁶ For a suggestion that the common law might have developed, but for the civil law influence, the notion of occupancy as the basis for giving title to the owner of the land to which the accretion attaches, rather than accession as such, see the article by Professor Beck in this issue, at p. 436 n. 29.

outer limits of it appear to be; "cause" is not a term with any such meaning in the common law of contract. It was acknowledged by Blackstone that our concept of consideration was taken from the Roman law maxim, *ex nudo pacto non oritur actio*, (no action arises from a bare agreement), and he draws heavily on civilian sources, as:

The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration.¹²⁷

Kent also acknowledged this derivation;¹²⁸ but neither author refers to the term "causa" or "cause." Since Field's provision is expressly drawn from article 1108 of the Napoleonic code, at least some possibility exists that he intended the French "cause," which was rather a broader notion of mutuality than our "consideration" and included a reliably proven agreement as such, to be incorporated as an alternative to "consideration;" this of course would have been at least some change in existing law.¹²⁹ The difficulty is not really overcome by the provisions on "Consideration," in secs. 780-788. They do not mention "cause," and they do not provide a true definition of "consideration," but are rather in the non-exclusive form, "such-and-such is a good consideration." It can only be supposed that it was *intended* to render the two terms synonymous for purposes of the code.

Similar possibilities for confusion might have been raised by the Code's use of the phrases "real, or immovable property" and "personal, or movable property" as headings for the parts on these subjects in the Division of Property. These pairs of terms, real/personal from the common law, movable/immovable from the civil law, were not equivalent as traditionally used. However, the definitions of real/immovable property in secs. 163-166 and of personal property in sec. 167, the latter as that which is not real, are sufficiently clear to effectively foreclose the argument that they were not intended to be made synonymous in the code.

Another instance in which adoption of a civilian formulation left some room for potential confusion is found in the provision relating to liability for negligence, sec. 853:

Every one is responsible, not only for the result of his

127. 2 BLACKSTONE, COMMENTARIES *444.

128. II Kent, *op. cit. supra*, 463-4. 2 Kent, *op. cit. supra* note 88, at *463-64.

129. See, e.g., von Mehren, *The Code and Contract - A Comparative Analysis of Formation and Form*, THE CODE NAPOLEON AND THE COMMON LAW WORLD, 111-14 (Schwartz ed. 1956).

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 has, willfully, or by want of ordinary care, brought the injury upon himself."

The first portion of this section was taken, according to Field's notes, from the Napoleonic code, sec. 1383, and the Louisiana Civil Code of 1825, sec. 2295, to both of which it is nearly identical; the latter portion, referring to the problem of contributory negligence, is said simply to be "modified somewhat from existing law." The cases cited by Field for the existing law on the latter point expound the more or less traditional common law concept that contributory negligence defeats recovery altogether, with the embellishments of last clear chance, etc., the phrase "except in so far as," in the Code provisions, suggests apportionment of fault, or limiting the effect of contributory negligence to proportionate mitigation of damages. Neither the Louisiana code nor the Napoleonic say anything about contributory negligence; however, by 1841 Louisiana had opted by judicial decision for the common law rule,¹³⁰ while the rule of mitigation appears to have been the accepted one in France.¹³¹ The most reasonable conclusion to be drawn from Field's rather vague comments seems to be that he preferred the French approach.

SUBSTANTIVE CHANGES

In addition to the instances already mentioned, the New York Code contained a large number of provisions which the commissioners acknowledged as changing the law in particular details. No less than 120 sections are listed in the introduction as containing at least a minor change in the existing law of New York. Most of these were made simply because the commissioners thought the existing rule not the best, while some, as we have seen, were also made because a civilian precedent was available which was more acceptable. There is not space in the present article to discuss these changes in detail, and it must suffice to mention those major changes which are mentioned in the final report to which the draft code is appended. In the first place, the entire title on Adoption is said to be new, because the existing New York law did not make any provision at all for legal adoption; by sec. 116, in addition, it was made possible for an illegitimate child to be adopted by his natural father by acknowledgement, in which respect New York appears to have been rather behind the rest of the country. Further, the title on Husband and Wife is said to be intended to remove many of the

130. *Fleytas v. Ponchartrain Rail Road Co.*, 18 La. 339 (1841).

131. See 2 *PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL*, § 889 (11th ed. 1939, transl. by Louisiana State Law Institute, 1959).

remaining disabilities of a wife, especially the capacity to contract and to own and deal with her separate property, sec. 79. Thirdly, the distinctions between real and personal property were eliminated in two respects, namely, in that pursuant to sec. 638 both realty and personalty pass first to a decedent's personal representatives for administration and distribution, and that in general it was sought to reduce the law of real property (presumably the forms of ownership) to "the simplicity of personal." In this latter respect, it may be doubted that the simplification was very extensive, since the doctrine of estates is reproduced in the part on real property, in many if not all of its tortured convolutions.

CONCLUSION

In discussing the outstanding features of the New York Code, I have concentrated on those aspects which would almost certainly have struck the eye of an American common-lawyer, seeking to evaluate the code as piece of proposed legislation, as strange or foreign or just confusing. Some of these strangenesses must be regarded as defects, in that they introduced potential confusion unnecessarily, without any apparent benefit in terms of other purposes of codification; the use of terms like "cause," "immovable" and "movable" property, and the vagueness of the provision on contributory negligence, certainly fall into this category, unless Field had in mind inducing the adoption of his code in civil law jurisdictions like Louisiana. Other innovations, such as the handling of bailments, mortgages, and some aspects of the law of trusts, were quite justifiable in terms of conceptual economy and of intelligibility to the layman; acceptance, understanding, and working out the consequences of such refinements could be expected to result in real gains for the legal system. Still others may have been unavoidable in the attempt to systematize the common law and rescue it from the narrowness and repetitions of separate partial courses and treatises. On the whole, it must be said that the code, despite many imperfections, went a long way toward rationalization of American law—it should have served as a good rough draft, ready for thorough examination and revision by experts in the various fields, public exposition, and so on.

The fact that it did not receive this treatment anywhere, and that these foreign influences became collectively a rallying ground for more or less successful attacks on the code, should serve at least to illustrate the relative ineffectiveness of one of the arguments for codification, namely that a code should be useful and intelligible to the layman. Certainly lawyers rather than laymen

were its effective opponents, not only where it was rejected but also where it was adopted. How it was opposed, how defended, and how applied, is the next part of the story