

Law Reform in California

A froward retention of custom is as turbulent a thing as an innovation, and they that reverence too much old times are but a scorn to the new. Bacon's Essay, "Of Innovations", quoted in Broome's Legal Maxims.

"WHAT a caption and what a quotation!" remarks the reader. Rubbing his eyes to see whether he has read aright, he conjures up the Railroad Commission Law, the Workmen's Compensation Law, the Blue Sky Law, the Corrupt Practices Law, the Direct Primaries Law, and other laws that are progressive or radical according to one's point of view. Then he smugly declares that California leads the country in up-to-date laws, as well as in education, material resources and climate. Now that the times that tried men's souls in the fight against the invisible government are over, the honest citizen will hear no more about laws and reforms. "A plague on both your houses", is his sentiment. And if one be so bold as to assert that in matters of consequence to every man who has a contract to be drawn or a civil suit to be litigated, the laws of California are sadly out of joint with the times, he is apt to be asked to prove his assertion by resort to ordeal or trial by battle, rather than be invited to give a bill of particulars. Nevertheless, despite the unfavorable dramatic background, as it were, I am going to have the hardihood to call attention to what seems to me the need in thoroughgoing reform, in the branches of the law governing business relations, property rights and civil procedure.

It will perhaps be a mild surprise to lawyers to be told that the need for law reform is greater in California than it is in almost any state in the Union. Generally speaking, the problem of American law reform is a problem of reform of procedure, a simplification in the machinery of the administration of justice. It is only the uninformed both in and out of the profession, that regard the law as a body of hard and fast rules. As Justice Holmes of the United States Supreme Court, probably our greatest American jurist, said a few years ago

in a characteristic passage:¹ "I thought it dangerously near a platitude to say a dozen years ago that the law might be regarded as a great anthropological document. . . . Any man who is interested in ideas needs only the suggestion that I have made to realize that the history of the law is the embryology of a most important set of ideas, and perhaps more than any other history tells the story of a race. . . . An argument that would have prevailed in Plowden's time and perhaps would have raised a difficulty to be gotten rid of in Lord Ellenborough's, now would be answered with a smile." Indeed the flexibility of the common law, (and in the common law I include the principles of the equity jurisdiction), is such that while the courts necessarily lag a little behind the advanced thought of the country, the law is dynamic and adapts itself to changing conditions. "The law should follow business", said an eminent English judge.² This flexibility may be called the genius, as it is the grandeur, of Anglo-American law. Occasionally, however, social and economic conditions change so rapidly that the courts are not able to keep apace. The old bottles will not hold the new wine. Legislation then becomes necessary to prevent maladjustment. We have recently had a striking illustration of this in the inappropriateness of the common law rules of fellow servant and assumed risk to the conditions of modern industry. In England and many of the great states of this country, including California, this vexing situation has been dealt with by well-considered legislation. But such situations are rare and unusual. So in most states few, if any, sound lawyers would advocate a general overhauling of that great body of rules of conduct enforced in the courts, which represents the crystallized judgment of the ages,—although Maitland thought that the English law of real property was a century behind the German. Why is the situation different in California? Because some forty years ago the State of California attempted to reduce the common law to writing by adopt-

¹ *Continental Legal History Series*, pp. xlv-xlvi.

² Bigelow, *Bills, Notes and Cheques*, 2nd ed. 'Law' then 'should follow business'. In these words the author quotes a serious remark made to him by the late Lord Bowen, in a conversation concerning the decision of the Court of Appeal in the great case of the *Mogul Steamship Co. v. McGregor* (1889), 23 Q. B. D. 598 (affirmed [1892] A. C. 25), in which his Lordship (then Lord Justice Bowen) had just delivered his well-known opinion. The words quoted, it is confidently believed, contain the very substance of sound legal theory.

ing a so-called "civil code", which was halt and lame at the time, and by the march of events has become obsolescent.

A moment ago I suggested that the general problem of American law reform consisted in meeting a demand for the reform of procedure. This is by no means a universal problem, but it is a problem that California shares with most American states. In this respect California lags behind Kansas and Missouri, not to mention Connecticut and New Jersey. So much has been written in these last few years about reform of procedure, that he who runs may read. I shall accordingly dismiss this part of the subject summarily. England led the way about fifty years ago. The principle of the English legislation was that instead of enumerating rules to cover every situation that the draftsmen could foresee, which is the theory on which the California Code of Civil Procedure is framed, the statute should state only the general principles underlying the law of procedure, and the details and minutiae of practice should be left to be regulated by rules of court. Kansas has the distinction of being the first American state to adopt the English system. New Jersey has followed suit, as has Ohio in the Cleveland Municipal Court Act, and the United States Supreme Court in prescribing the New Rules in Equity for the Federal Courts. Professor Pound of Harvard University, an expert on law reform, has summarized the advantages of the English system over the "code practice" as it prevails in states like California, as follows:³

"(1) The exact workings of a detailed rule of practice cannot be anticipated and as change and adaptation to the exigencies of judicial administration are inevitable this change and adaptation should be left to the judges who are best qualified to determine what experience requires and how rules are actually operating.

(2) The opinion of the bar as to the working of a rule may be made much more effective where the details are to be settled by the judges through framing new rules or improving old ones than where the legislature must be applied to. The judges are necessarily better able to judge how far complaints are well founded, how far they represent the sentiment of the bar generally and not that of one or two disappointed practitioners, and they know better whose opinions are entitled to weight and whose not in matters of procedure.

³76 Central Law Journal 211.

(3) Experience has shown that small details of procedure, which sometimes are very irritating in their effects, do not interest the legislature so that it is almost impossible to correct them by enactment.

(4) In state legislation with respect to procedure it has very often happened that details in which some member of the legislature has a personal interest are made the subject of enactment under circumstances where there is no real advantage to procedure.

(5) Above all, there ought to be a possibility of speedy adjustment of the details of procedure to the exigencies of administration. Only rules of court can bring this about."

Coming now to the consideration of the California Civil Code, let us first glance at its history. In the early part of the nineteenth century there lived in England, a polemist named Jeremy Bentham, who made terrific onslaughts upon the common law. He berated it as irrational and unscientific, and saw the remedy for all its alleged shortcomings in codification. Bentham was ignorant alike of the principles of historical criticism and legal philosophy, and was equally ready to draw a code gratis for the English crown, the President of the United States or the Gaekwar of Baroda. Bentham's ideas met with scant response among the hard-headed English lawyers, and he turned to the United States. First he offered President Madison to draw a code for the United States gratis, but Madison, being a good lawyer, would have nothing to do with the proposal. Bentham then made a similar offer to the Governor of Pennsylvania, which was submitted to the Pennsylvania legislature and rejected. He then addressed a circular letter to the governors of all the states, but without results. Finally in 1817 he wrote and distributed a pamphlet entitled "Jeremy Bentham, an Englishman, to the citizens of the several American United States" in which he made the most astounding claims for his proffered code. "Accept my services in the book of laws, my friends", he wrote, "and so long as the United States continue the United States, among you and your posterity, in every such accepting State, shall every man, if it so please its appointed legislators, find, for most purposes of consultation, his own lawyer; a lawyer, by whom he can neither be plundered or betrayed. Accept my services; no man of tolerably liberal education but shall, if he pleases, know more—and without effort—much more, than at the end of the longest course of the intensest effort it is possible for the ablest lawyer to know at present."

Bentham's propaganda had no immediate results, but the evil that he did lived after him. In the middle of the century there was a strong movement in the United States for codification along Benthamite lines. In 1849 the New York Constitution commanded the legislature to appoint commissioners to codify the law. The next year an attempt was made to start off the new State of California as the first common law jurisdiction with a civil code. It failed, the committee appointed to look into the project reporting:⁴

"We know it to be a favorite theme of some men that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be and ought to be, reduced within the compass of a common sized spelling book—so that every man might become his own lawyer and judge—so that the farmer, the artisan, the merchant, with his *vade mecum* in his pocket at the plough, in the workshop, or in the counting-house, might be enabled, at a moment's warning, to open its leaves and point directly to the very page, section and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the chimeras of ignorance and folly, or the fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly conjoined. . . . To undertake by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man must forever remain equally impracticable and absurd. In truth, all the provisions of constitutions, and statutes and codes are but pebbles on the sea shore—the vast ocean of legal science lies beyond."

About 1857 the New York Code Commission, made up of three lawyers in active practice, was created. The most prominent of the commissioners was David Dudley Field, a leader of the bar, but an avowed disciple of Bentham. The commissioners worked upon the draft of the proposed "civil code" intermittently for about eight years, when they reported to the legislature the convenient *vade mecum* that they claimed would dispense with law libraries, and for most purposes make a man his own lawyer.

⁴ See 1 Cal. Rep., appendix.

These specious claims appealed to the uncritical legislature, and the code was adopted. About that time the New York bar awoke to what had happened, and prevailed upon the governor to veto the law adopting the "civil code". The legislature was not able to override the governor's veto. Thus might have ended the first attempt to codify the common law in America, had not the Territory of Dakota, where distances were great and law books scarce, seized the opportunity and adopted the New York draft Civil Code verbatim. A few years later—in 1872—California adopted the same code with some changes, few of them very radical, except a number relating to the law of husband and wife, for which the Spanish law was largely drawn upon. Broadly speaking the New York draft Civil Code remains substantially unchanged, and is the basis of a great body of the private law of the State of California.

What kind of a code was this New York draft Civil Code? Clearly its foundations were insecure. But may it not, like the image of Nebuchadnezzar, have had a gold head along with its feet of clay?

Several years ago I visited a session of the Judicial Committee of the Privy Council in London. It was as tiresome as only an English court of appeal could be. Being restless, but reluctant to leave, my eye wandered about the room, and I spied a copy of Pollock's Indian Contract Act within easy reach. Being unfamiliar with the book, I proceeded to read the preface. My attention was almost immediately arrested by the following:⁵

"Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from *the draft Civil Code of New York, an infliction which the sounder lawyers of that state have been happily successful so far in averting from its citizens. This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced.* It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything, than the average badness of the whole—were most unfortunately adopted in the Indian Con-

⁵ Pollock's Indian Contract Act, 3d ed., p. ix.

tract Act. Whenever this Act is revised *everything taken from Mr. Dudley Field's code should be struck out*, and the sections carefully recast after independent examination of the best authorities."

(The italics are mine).

I might rest here, but I prefer to make my criticisms more pointed, although in a popular article and with the limited space at my disposal, I cannot hope to do more than touch the high places. Let me first enumerate the counts in the indictment. They are: (1) The arrangement is defective; (2) No provision is made for growth; (3) The draftsmanship is bad; (4) The principles of the common law are often misapprehended.

Taking up these counts in the order given:

(1) *Arrangement*. A little over a year ago Professor Sherman of Yale University in an article on codification remarked:⁶

"Almost at the very outset of the nineteenth century revival of Roman Law study, Sheldon Amos published in 1873 his 'English Code', in which he laid down the essential principle of English law codification, namely accurate classification—the rock on which the hopes of David Dudley Field and the movement toward codification started by him were wrecked. What a pity Field did not try to make a thorough use of Livingston's magnificent work so full of accurate classification—the famous Louisiana Code!"

But what difference does it make whether the arrangement of the code is systematic or hap-hazard? To say nothing of leading to confusion in statement, defective arrangement makes it next to impossible to find many provisions of the code. There are not a few decisions of the Supreme Court on matters covered in the code which do not refer to the pertinent code provisions, and some of the decisions are at variance with the code. This of course means uncertainty, not to say confusion. It also means that in litigation important enough to go to the Supreme Court, attorneys on both sides, as well as the trial and appellate judges, have not found the controlling code provisions. More than that, it means that a lawyer, trying to pilot his client in advance of trouble, must occasionally have a haunting fear that he may have given counsel at variance with the law as laid down in the code. The results may be serious, but they are sometimes ludicrous. A lawyer friend told me the other day of a case before the Supreme Court some few years ago, in which counsel, upon having it suggested to him

⁶25 Greenbag 460, at p. 461.

from the bench that there were decisions contrary to his contention, called attention to a plain provision of the code which had been overlooked in the decisions referred to. One of the justices is said to have replied: "What you say is true enough, but we have disregarded that provision so long, that if we were to follow it now titles would be disturbed." And this is the code that was going to make the law understandable to the layman without the luxury, or the inflection, of a lawyer.

(2) *No provision for growth.* As has already been suggested, the law is an "anthropological document". The law as it is today and as it was forty years ago are radically different. It is perhaps not too much to say that the methods and researches of Sir Henry Maine, Professor Maitland, Sir Frederick Pollock, Professor Dicey and Mr. Justice Stephen, in England, and of Mr. Justice Holmes, Professor Langdell, Professor Ames, Professor Thayer, Professor Wigmore and Professor Pound, in this country, have almost revolutionized legal thinking. Whole topics have grown up that were almost unknown forty years ago. A good illustration is found in the law of what is now called "quasi contract", the cardinal principle of which was laid down by the great Lord Mansfield about a century and a half ago, as being the duty to account for money or property that in equity and good conscience belongs to another. This topic, although it had been developed by the Roman jurists centuries ago, and was systematically covered in the Code Napoleon, lay fallow in our law until about thirty years ago, when it came under the fructifying influence of Professor Ames and his disciple, Professor Keener. It has recently been re-expounded in an able treatise by Professor Woodward, of Stanford University. What says the Civil Code of California, as amended up to 1913 upon the subject of quasi contract? It is hard to know, but this much is certain, the code does not attempt to give a systematic statement of that branch of the law. There are, however, two sections attempting to generalize on the subject,⁷ which have, apparently, never been discovered by

⁷ Cal. Civ. Code, §§ 1712-1713. See note New York draft Civil Code, (1865) p. 266. Compare California Code provisions with provisions of Indian Contract Act, §§ 68-70; Jenks' Digest English Civil Law, §§ 707-721; French Civil Code, Wright's Eng. translation, §§ 1370-1381; Louisiana Civil Code, §§ 2292-2314; German Civil Code, Wang's English translation, §§ 812-822; Institutes of Justinian, Moyle's translation, Title XXVII; see also Sohm's Institutes of Roman Law, Ledlie's English translation, 2nd ed., pp. 423-431.

the bar or the courts of review of this state, or of the states of Montana and North and South Dakota, which have the same code. In forty years these sections of the civil codes of four states have, it seems, not been cited once in any court of review! I might add that I know that these sections deal with quasi contract because the draftsmen of the draft New York Civil Code from which they are taken *verbatim* say so by indirection in notes appended to the sections. Otherwise I am not at all sure that any uninitiated person could fathom their purport.*

It might be suggested with some warmth by worshippers at the shrine of the god of things as they are, "How do you expect codifiers to look forty years ahead of the times?" Frankly, I do not; but is that the end of the matter? By no means. The real suggestion lies in this, that the code should not be deemed the final word of wisdom, but should contemplate, and make provision for growth. This can be done by establishing a permanent commission of lawyers to report needed changes in the code to the legislature at each session. The French did this over a century ago when they adopted the Code Napoleon. Can we not, with profit, establish such a commission?

(3) *Draftsmanship defective.* If Macaulay's justly celebrated schoolboy had worked in a law office for six months he probably would have been well aware that only the bungling amateur and the testatrix who draws her own will, enumerate in a contract or will when a matter can be covered in general terms. Why? Because the enumeration may not be sufficiently extensive. Courts have acted upon this principle since time when the memory of man runneth not to the contrary. For example, courts of equity have refused to define fraud for fear that some crafty scoundrel might devise a new species of fraud and circumvent the definition. The civil code constantly violates this principle. For example, it enumerates the instances when "trusts" may arise, though "trusts" were invented to prevent fraud, and that is still the office of the "constructive trust". There are other defects in draftsmanship; but I must hurry on to the next point.

(4) *Misapprehends principles of common law.* When the New York legislature created the Code Commission, it enjoined the commissioners to codify the common law with such modifications as occurred to them. Either consciously or unconsciously, the

* New York draft Civil Code (1865), p. 266.

commissioners observed the second part of this injunction more religiously than the first. Indeed in many places they did not follow the then prevailing rule of law or any other authoritative statement of the law, and we have slavishly accepted their work. Take for example the rule against restraint of trade. That rule has recently been the subject of exhaustive examination and is fresh in the minds of most of us. It will be recalled that in medieval times the rule was one of absolute prohibition, because the guild system prevailed, and under it, if a man restrained himself by contract from carrying on his business he would probably deprive himself of the means of livelihood, to the injury of himself, his family, and the state. Later when conditions of trade became free, a merchant selling his store in London might restrain himself from carrying on his trade in London but not throughout the kingdom. Why? Because, in the quaint language of the early eighteenth century, if one engages in business in London, what booteth it him that his vendor carry on the same trade in Newcastle? At the present time, inasmuch as business has become national and international in scope, the restraint may extend to the whole world if it is necessary to the protection of the buyer and does not run counter to the public policy aimed against monopolies. This latter application of the rule has been definitely established since the New York draft Civil Code was drawn. The same principle, however, runs through the cases in the various stages of development, namely, that if the restraint is not against the public interest, it is valid to the extent that it is necessary. What says the New York draft Civil Code of 1865, and the *California* Civil Code as amended to 1913? They declare that the *restraint must be confined within a specified county*. Apropos of this rule, the New York commissioners piously observed:⁹

“Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. . . . In *Whittaker v. Howe* (3 Beav. 387), a contract not to practice law anywhere in England, was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the state of the services of its citizens.”

And these views have been transmuted into the law of California. Is not this like harking back to David's sling?

⁹ New York draft Civil Code (1865), p. 255, § 833.

I venture to believe that almost any competent lawyer who takes the trouble to look into the matter will agree with me that our civil code is fatally defective, both in form and content.¹⁰ What is the remedy? Two courses are open: the repeal of the civil code and the return to the common law, or a new code. Powerful arguments might be suggested in favor of the first course, but as a practical matter it is too much to suppose that a generation of lawyers who have grown up under the code will permit its abolition. The force of inertia is too great.

If we are to have a new code, on what principle should it be drawn? Without going into detail, which is obviously impossible here, I might suggest that if the code is going to constitute a working system it must confine itself to the statement of principles, and not try to prescribe rules for every situation that may arise in the varied relations of life. Such is the theory on which the new German and Swiss codes were drafted. If the new code is to be dynamic and not static, it should also make provision for a body of experts to keep it up to date, as is done in France.

By whom should such a code be drafted? It needs no great acumen to perceive that no three or four active practitioners, regardless of their attainments, are equal to the task of reducing the whole body of private law to systematic statement. A code prepared as our present code was prepared is doomed to failure. Even a comparatively small branch of the law cannot be successfully codified by a small committee of lawyers. Some years ago a sub-committee of the Commissioners of Uniform Legislation drafted a proposed Uniform Negotiable Instruments Law, which has been adopted in nearly all the states; not however, in California. This law has not only been a flat failure, but it has also been a source of confusion. On the other hand, a very

¹⁰ I take the liberty of suggesting that there is no critique of the civil code to which to refer my learned readers. Those caring for further examples of the inadequacy of the code may look at Sir Frederick Pollock's *Indian Contract Act*, 3d ed., and the following articles in the *California Law Review*: *The Need of Remedial Legislation in California Law of Trusts and Perpetuities*, by Prof. W. N. Hohfeld, written before recent amendments, 1 *Cal. Law Rev.* 305; *The Law Merchant and California Decisions*, by Prof. A. M. Kidd, 2 *Cal. Law Rev.* 377; and *Mutual Assent in Contract under the Civil Code of California*, by the present writer, 2 *Cal. Law Rev.* 345. Further examples of decisions inconsistent with plain provisions of the code may be found in an article, *Contract Distinguished from Quasi Contract*, by the present writer, 2 *Cal. Law Rev.* 177.

satisfactory negotiable instruments law has been enacted in England, but it was the result of the joint labors of one of the highest authorities on the subject working with a select committee of merchants, bankers, lawyers and law lords. When the Commissioners of Uniform Legislation came to prepare the Uniform Sales Law, they profited by English experience and engaged as draftsman Professor Samuel Williston of Harvard University, one of the foremost authorities on the law of sales. Professor Williston made a provisional draft, which was submitted to many lawyers, discussed in committee, and re-drawn several times before it was finally adopted. If such care is necessary in codifying comparatively small portions of the law, how much more so is it in case of general codification?

The greatest code the world has ever seen was adopted in Germany in 1896 to take effect in 1900. The Germans had a problem so difficult, due to the many varieties of law in the empire,—Roman, Canon, Germanic, Danish, French, as well as Austrian and Saxon codes, and what not,—that in comparison our problem seems simplicity itself. The Germans set themselves to their task with the system and thoroughness that characterize all public work in that "nation of damned professors". First a committee of five prominent, practical jurists was constituted in 1873 to plan the work. Next, a committee of eleven of the leading university professors of law and judges was appointed to prepare a provisional draft. The actual work of draftsmanship was assigned to five members of the committee, who worked individually on the branches severally assigned to them for seven years. Then the committee came together and prepared several drafts, which they reported, together with arguments pro and con. These drafts and arguments were printed broadcast, and subjected to the severest professional criticism for several years. A new committee of twenty-two was thereupon appointed, that re-drafted the proposed code in the light of all the criticism and discussion. After twenty-three years of painstaking labor by the finest legal minds in the empire, the civil code was completed,—and it is a little book that any one may easily carry around in his coat pocket.

I am far from suggesting that the drafting of a new civil code that would meet the needs of California would involve anything like the labor expended on the German Civil Code. On the other hand it must not be forgotten, to quote a learned judge of the Pennsylvania Supreme Court, that "Laws seem to be born full

grown about as often as men are". If I were asked by a council of elder statesmen to sketch a *modus operandi* for the preparation of a new civil code, I should submit something like this: Let the subject of revision be discussed as widely as possible for the next two years. Let the next legislature create a Code Commission with a life of about four years, composed of judges, law professors, and lawyers in practice. Let the commission be instructed to plan the work, and then engage the best expert talent available to draft the various titles,—men like Professor Williston of Harvard, for Contracts; Professor Mechem, of Chicago, for Agency; Professor Woodward, of Stanford, for Quasi Contracts; Professor Jones, of Berkeley, for Torts; and Judge Lindley for Mines and Waters, if they could be secured. Let the commission be further instructed to then engage the best draftsmen to be had to co-ordinate the various titles and work them into an articulate whole. Let about three years be given to this work. After the draft is prepared, let it be published with explanatory notes and distributed broadcast among the members of the bar, the business community, and the teachers of law. Invite the most searching criticisms. In the light of these, prepare a final draft for submission to the legislature of the following year, that is, six years hence. Let the legislature confine its changes to matters of policy, and leave the details alone. Let the code then be gone over again by the draftsmen, and have it take effect a year later. Then provide for keeping it abreast of the times by creating a permanent commission—with a changing membership—to report biennially to the legislature on needed changes. If this plan were followed the code produced would not, of course, be perfect; but what human institution is perfect?

As a last word let me assure the learned reader that I am not so innocent as to imagine that within the next few years the people of California or the lawyers of California are going to take steps to set their house in order. I must confess to sharing the rather cynical view of an eminent jurist who once observed that there is little hope of law reform to be expected either from laymen or lawyers, because "those who make the shoe do not feel its pinch, and those who feel its pinch do not know how shoes are made".

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