THE PROVINCES

OF

THE WRITTEN AND THE UNWRITTEN LAW.

AN ADDRESS

DELIVERED AT THE ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION, AT WHITE SULPHUR SPRINGS, JULY 25, 1889,

BY

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NEW YORK AND ALBANY:
BANKS & BROTHERS, LAW PUBLISHERS.
1889.

PREFATORY NOTE.

Some years since, at the request of a committee of the Association of the Bar of the City of New York, appointed to oppose before the Legislature of that State the adoption of what was styled a "Civil Code," I prepared a paper upon the subject of Codification. Subsequent reflection, with the advantage afforded by a perusal of several essays, designed as answers to the one prepared by me, had more firmly convinced me that the positions I had taken were correct, and suggested some particulars in which, as I conceived, my former argument might be advantageously enlarged and re-shaped; and, as the edition of my paper had become exhausted, I was contemplating the publication of a new and revised one, when I received an invitation to deliver the Annual Address before the Virginia State Bar Association, at its Annual Meeting for 1889.

Having accepted this invitation, I could think of no subject which would be more likely to prove acceptable to my audience than that to which my former essay had been devoted. I therefore determined to take that up *de novo*, and treat it, so far as I could, without adopting my former method or language; but, in repeating some illustrative views, I have chosen to employ the same language rather than to make a studied effort to avoid repetition.

Inasmuch as my audience could not be supposed to take any special interest in the Civil Code proposed for New York, and

for the sake of brevity as well, I thought it best to omit my criticism upon that measure.

The new aspect now given to the argument is to lay down as its foundation the proposition that human transactions, especially private transactions, can be governed only by the principles of justice; that these have an absolute existence, and cannot be *made* by human enactment; that they are wrapped up with the transactions which they regulate, and are *discovered* by subjecting those transactions to examination; that the law is consequently a SCIENCE depending upon the observation of *facts*, and not a *contrivance* to be established by legislation, that being a method directly antagonistic to science.

I do not mean that legislation is itself free from the operation of scientific principles. There is, indeed, a science of legislation; but, though allied to the science of jurisprudence, it does not include it, and is quite different from it. It is the science of *making* absolute political regulations, not of *discovering* the rules of justice. Legislation is, in one aspect, the *opposite* of jurisprudence, according to the more precise import of the latter term.

These views lead to the conclusion, to establish which has been my main purpose, that the written and the unwritten law have their separate and distinct provinces, and that each should be confined to its own province.

J. C. C.

NEW YORK, September, 1889.

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Mr. President and Gentlemen of the Virginia State Bar Association: —

When I was invited to address this Association which so well represents the Bar of this ancient Commonwealth, upon the occasion of its Annual Meeting, I was somewhat perplexed to determine what particular topic, if any, should form the theme of my discourse. I might have sought to amuse, without taxing your attention, by some slender chain of discursive allusion to the trials, the labors, the satisfactions, the disappointments and the humors which diversify our professional lives; or I might have attempted a discussion of some questions of greater moment upon which all lawyers ought to hold opinions.

It finally seemed to me that in speaking, as I was to speak, to a Bar always and still distinguished for learning, skill, and eloquence, pre-eminently illustrious for its contributions in the past to statesmanship and legislation, I should most fitly evince my appreciation of the high honor which had been paid to me by accepting the latter suggestion.

At every step in our professional lives, and from the beginning of our preparatory studies, we find ourselves under the

necessity, in seeking to ascertain the law, of prosecuting our inquiries in two quite different directions. On the one hand we are told that the legislative body of the State is the only agency which is clothed with the authority of making laws; and the natural inference from this is that if, upon a question arising in any particular case the statute book is silent, there is no law by which it can rightfully be decided. But we find, upon the other hand, that in far the greater number of cases the statute book is silent, and yet the judicial tribunals are in some manner able to find laws, or rules, by which all controversies may be determined.

To some minds this apparent incongruity has seemed a great imperfection in jurisprudence, and, looking chiefly to the supposed necessity, or desirability, that the people at large should know, and know beforehand, the laws by which their actions are to be governed, and have a participation in making them, they have insisted that this imperfection should be forthwith remedied, and that all our laws should be reduced by the legislature to the form of statutes.

Others, on the contrary, looking to what they conceive to be the difficulty, if not the impossibility, of this task, and the obvious unfitness of our ordinary legislators to frame a complete system of jurisprudence, would confine the action of the legislature to the cases in which it seems necessary that the law should be expressed in writing, and in which no difficulties are presented with which men of ordinary intelligence and learning cannot cope.

The especial champions of written law are indeed obliged to admit that *all* law cannot be reduced to writing; for, after it is written, it must still be interpreted in order to be applied, and such interpretation necessarily involves a resort to unwritten rules. We may indeed enact rules of interpretation; but these must themselves be interpreted; and thus those most opposed

to unwritten law find themselves unable to wholly dispense with its aid. And so also those who would restrict the area over which statutory law should be extended fully admit that a large part of human affairs can and should be submitted to the dominion of written rules.

I cannot help thinking that much of the contention upon this subject has been misdirected; and that inasmuch as both parties admit that our law must continue to be in part written, and in part unwritten, the principal effort should be aimed to elucidate the precise advantages and disadvantages which respectively belong to these different modes of making, or declaring, law. It may be that such an inquiry may result in a conclusion that there are certain parts of the legal system of a State which can be best dealt with by written laws; and that others are of a nature which can be successfully treated only by allowing the courts to deal with them unfettered by statutory enactments. It is my purpose to offer some suggestions in this direction; and, if my theme is worthy of a name, it may be styled "The Provinces of the Written and the Unwritten Law."

There are some obscurities which should first be cleared away in order that the real nature of the problem may be well understood. What is this thing which we call "*the law*," and about which we debate whether it should be written, or left unwritten? Is it something which exists only when men *create* it, and as men create it, or has it existed from all eternity, and from time to time revealed itself to satisfy the aspirations, or the needs of the human race? Or is it in part the one, and in part the other?

Undoubtedly, in a very large sense the term *law* embraces every rule which society enforces upon its members, and properly includes all those statutes, more or less arbitrary in their nature, which men are constantly engaged in making, and as

constantly in changing, for the good order, peace, and comfort of the State. These are political regulations, and constitute but a small part of what is really comprehended under the word *law*. Nor do they make up that department or realm of law which principally engages the attention of lawyers, and is held in a sort of veneration by men. What we have chiefly in mind when we speak of *the law* is that body of rules for the regulation of the conduct of men *in their ordinary transactions with each other* which is enforced by the State. These rules make up by far the larger part of our jurisprudence; and it is in relation to these that I start with the inquiry, what is this thing which we call "*the law*"? Upon subjecting these rules to scrutiny, we at once perceive that they are affected with a *moral* character, — that they are, or ought to be, *just*. The judge, in the performance of his function of declaring the law, seeks for that rule which is dictated by what is called *justice*. The office of the legislator in *making* the law is not essentially different. He is at liberty, morally speaking, to make that rule only which is in conformity with *justice*. And what is this *justice* which sits enthroned behind all human enactments and judicial decrees? The answers are as various as the theories of morals. Some tell us that it is what is agreeable to reason; others, that it is what tends to secure the greatest happiness to the greatest number; others, that it is what a Moral Sense originally implanted in us prescribes. It is here that the ultimate identity of Law and Ethics asserts itself, and it is as difficult to perceive and state the original foundation of the one as of the other. We may push back our inquiries as far as our feeble powers sustain us; but we are soon lost among the kindred Infinities of the True, the Beautiful, and the Good. The masters of human thought, after ages of endeavor, are able to carry us but a single step in advance; but the steps are nevertheless gradually taken, and we thus approach, by slow and

almost imperceptible stages, towards that knowledge of abstract and absolute justice which human reason will never reach, but after which it forever aspires. We may in despair abandon the search into this hidden reality; but let us never forget that it is a reality, or become insensible to its transcendent importance. Some ability to understand and apply it is given to all; and we share the possession in proportion to the earnestness and fidelity with which we cultivate the higher faculties of our nature, and seek to hold converse with the spirit of justice. Poor, indeed, will be the law-giver or the judge who does not at every step draw inspiration from this fountain, and acknowledge that he is not a *maker*, but a *seeker*, among divine sources, for pre-existing truth. The Bible legend, that the laws which the children of Israel were to obey were proclaimed amid the thunders of Sinai *before* they were written upon tables of stone, was not a device to secure obedience, but an expression of truth, which has been re-echoed by the law-givers and jurists of every age. Demosthenes, filled with this lofty conception, gives fine expression to it in one of his orations. "The object "and end of laws," says he, "is to ascertain what is just, honor- "able, and expedient; and when this is discovered, it is declared "as a general ordinance, equal and impartial to all. This is the "origin of law. It is the invention and gift of the gods, the "resolution of wise men, the general conviction of the State; "and hence it behooves every individual in society to live in "conformity with it."[1]

The brilliant fancy of Cicero whenever touched by this theme rises into sublimity. With him law is the voice of reason and conscience everywhere summoning men to the performance of what is right, and commanding them to abstain from fraud and wrong — "not one thing at Rome and "another at Athens, one thing now and another hereafter,"

[1] Orat. 1, Contra Aristogit.

but the same in all places and at all times; not something which springs into existence for the first time when it is written, but which existed before it was written, its origin being coeval with the Divine Intelligence. "Therefore," says he, "the true and fundamental law — whose voice is to com- "mand and to forbid — is the right reason of Supreme Jove." [1]

The law of which I am thus speaking, and which is the subject of these rapturous descriptions, is abstract law, — perfect justice. We never behold it set down in words. Our most carefully elaborated propositions will at some point exhibit their human imperfections.

> "Guest of million painted forms,
> Which in turn its glory warms,"

this subtle essence animates a multitude of formulas, but is grasped and held by none. What may be called justice in the *concrete* — that which is actually administered among men — is so much of this absolute justice as human society is able and fitted at the particular period to comprehend and apply. This is one thing with one people, and another with

[1] "Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, con- "stans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat, quae "tamen neque probos frustra jubet aut vetat nec improbos jubendo aut vetando "movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque "tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege pos- "sumus, neque est quaerendus explanator aut interpres ejus alius, nec erit alia lex "Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore "una lex et sempiterna et immutabilis continebit unusque erit communis quasi "magister et imperator omnium deus: ille legis hujus inventor, disceptator, lator, cui "qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas "poenas, etiam si caetera supplicia quae putantur, effugerit." (De Republica, Lib. III. Cap. XXII. § 33.)

"Erat enim ratio profecta a rerum natura et ad recte faciendum impellens et a "delicto avocans, quae non tum denique incipit lex esse, quum scripta est, sed tum, "quum orta est: orta autem est simul cum mente divina. Quam ob rem lex vera "atque princeps apta ad jubendum et ad vetandum ratio est recta summi Jovis." (De Legibus, Lib. II. Cap. IV. § 10.)

another. It is one thing in one state of civilization, and another in another. It is exhibited in every degree of rudeness or refinement, from the nearly arbitrary decisions of a Turkish Cadi to the enlightened judgments of Eldon or Marshall. It grows and becomes refined *pari passu* with the moral and intellectual progress of a people, and in its turn reacts upon, and accelerates, this progress. All systems of law, therefore, are marked by the peculiar traits which distinguish the character of the nations by which they are framed. No standard of justice can be upheld in any nation which its people cannot comprehend and be willing to enforce. None will satisfy it which is not fairly on a level with its existing state of moral and intellectual progress.

I answer therefore the inquiry with which I began by saying that what we call "*the law*" is, in any political society, that body of rules which springs from and rests upon *the social standard, or ideal, of justice.* And this accords with the approved definition of the civil law, "*Nam quod quisque populus "ipse sibi jus constituit, id ipsius civitatis proprium est, vocatur- "que jus civile, quasi jus proprium ipsius civitatis.*"[1] The fact that such a standard exists is sufficiently proved by the circumstance that we are able to argue with and convince each other concerning the rightfulness of suggested rules, which could not be unless there was an agreed standard to which our arguments could be referred; and if it be asked how this standard is ascertained, the answer is, so far as written laws are concerned, by the acts of the legislature. These embody the convictions of the representatives of the people. And in respect to the unwritten law the social standard of justice is ascertained and declared by the judges, who are the *experts* selected by the people for the purpose. It is their function not only to imbue themselves with the principles of abstract and

[1] Just. Inst. I. ii. 1.

theoretic justice, but to become familiar with the limitations of these principles springing out of the nature and constitution of men — their passions and tendencies — their ignorance and weaknesses — their occupations, cares, and anxieties — their thoughts, studies, and aspirations. They must know how the principles of justice have been before applied, how the application has been received, both among the people at large, and the thoughtful and cultivated few. The wisdom and usefulness of a great judge are manifested in the skill with which he adapts the processes of right reason and justice to the limitations and needs of human society, never declaring a rule so far in advance of the public intelligence as to be incomprehensible, but aiming always to maintain the highest practical standard, and to inspire the popular estimate of law with the sentiments of respect, obedience, and reverence.

The real function of the judge is indicated even by the way in which it is sometimes abused, or thought to be abused. It is not uncommon that courts even of the highest rank and character are criticised for a supposed deference to popular opinion. That natural reverence for the law implanted for the wisest purposes in all human breasts inclines men to invest the judicial office with an awful sanctity. It erects it into an oracle, and expects from it responses unaffected by human passions and strifes. This public sensitiveness is natural and salutary; for the social standard of justice, though resting upon public opinion, does not rest upon the opinion of the present moment, or that of a few, or a class, or even the whole, when heated by passion or swayed by interest. It is that settled opinion which belongs to the state of moral and intellectual progress which the nation has reached, from which men may be occasionally diverted for a moment, but to which they will ever return.

I do not, of course, mean to imply that the judge in ascertaining and declaring some particular rule of law, makes any

direct inquiry into public opinion, settled or otherwise, upon that especial subject. The fabric of the national law is a vast system of rules which are the product of that opinion, gathered from time to time by the labors of his predecessors, aided by the skill and learning of a numerous professional body — all of them representing the most advanced thought and culture of the time; and all of them in close intercourse and sympathy with the mass of the people. It is here that the social standard of justice stands ascertained and declared; and the function of the judge is to apply it, as it has been applied before, or, when new questions arise, to determine them according to the analogies which the system reveals to him.

I have defined the law (meaning of course the municipal law) as being that body of rules for the regulation of human conduct which is enforced by the State; and have shown that it possesses as an essential feature a *moral* character; that it springs from and reposes upon that everlasting and infinite Justice which is one of the attributes of Divinity; and that it is so much of that attribute as each particular society of men is able to comprehend and willing to apply in human affairs. I should now turn your attention to the form in which we find these rules, or, perhaps I may better say, the method by which we ascertain them. I need go no further at this point before an audience of lawyers than to say that they are either reduced to writing, or left unwritten; and that in the former case they are ascertained by consulting the statute book, (although this simple act is not always of itself sufficient for the purpose) and in the latter, by a resort to reported decisions, to authoritative text writers, and by the employment of the rules of right reason. It is quite necessary for our present purpose that a correct general notion should be had as to how much of this body of rules is now actually written down in the statute books. It will be found to be much less than is commonly supposed.

In proceeding with this inquiry I must of course direct attention to particular States; but I leave out of view at present such as may have adopted to a greater or less degree the scheme of codification; for the expediency of adopting this scheme is the main question. Taking up the statute books of New York — the State with which I am most familiar, although I suppose those of Virginia would exhibit substantially the same features — I find a great deal of space occupied by laws making what are called legislative grants, sometimes of land, sometimes of corporate franchises, or other privileges, or property, over which the State has ownership or control. It will at once be perceived that these are not *laws* in any proper sense, — at least, not in the sense in which I am now employing that term. They prescribe no rules of conduct whatever, and justice or injustice has no more relation to them than it has to the contracts which individuals choose to enter into with each other.

A further scrutiny discloses the fact that many more of the enactments are of a character not essentially different. We find that some consist of ordinances dividing the State into various political districts, and creating a governmental machinery general and local; others provide for the creation of a great variety of officers, State, County, City, Town, and Village, and point out their respective duties; others prescribe the times and methods of electing or appointing such officers; others provide for the establishment and maintenance of highways and bridges; others for the support of paupers and the confinement of criminals; others for the establishment of courts and the regulation of their modes of procedure; others for a system of taxation. In short, we perceive that the great bulk of these statutes is occupied with provisions for the organization of that complex structure which is called the State. They are, in fact, like those first referred to, simply

corporate acts, and do not in their nature, differ from the by-laws and ordinances of any other corporation. The State is a gigantic and complicated corporation, having a vast variety of concerns to manage, which require an elaborate organization and elaborate provisions for the benefit of its members. All this mechanism is arranged and kept in motion through the instrumentality of what are called *laws;* but very few of them are laws for the regulation of conduct, and very few have any direct relation to the science of jurisprudence. They do indeed create rights and impose duties; but so do the private contracts and transactions of men, and the one no more than the other.

We do, however, find one class of enactments which establish rules of conduct, and are, in every proper sense, laws. I mean those which relate to crimes. But even in respect to these it may be said that the direct object is not to establish rules by which justice may be enforced in the ordinary transactions of life, but to impose penalties in order to secure the peace and good order of the State. In addition to the rules which define and punish crimes, those which regulate the transmission of the title to property are laid down with some detail, and some few provisions are found relating to the rules of civil conduct, and which, therefore, belong to the law properly so called; but they embrace but an exceedingly insignificant part of the contents of the statute book. It is scarcely an exaggeration to say that nearly the whole of that body of law which really prescribes rules of civil conduct, which is stamped with the moral quality of justice, and which governs the private transactions of men with each other, is substantially untouched by the statute book.

The great bulk of the statutory law may be justly described, as it is described by the Roman jurists, in terms derived from its principal and pervading features, as *public* law, because it relates immediately to the organization of individuals into that

great public corporation known as the State, and provides for the management of its concerns. And, on the other hand, that other body of the law which is not found in the statute book, may, from its general character and purposes, be designated as *private* law. We find it therefore to be substantially true that according to the *actual* division of the provinces of written and unwritten law, as they have arranged themselves in the natural growth and progress of society, public law alone is in writing, and is always in writing; and private law is left unwritten. And what we thus find to be true in respect to the law in most of the States of our Union I believe will be found to be true in respect to the law of every other civilized State, either of ancient or modern times, the records of which are open to us, so long as independence and national homogeneity were preserved in them. Where nations have been conquered, and the vanquished has been incorporated with the victor, the latter has sometimes deemed it necessary to consolidate its realm by compelling uniformity of laws, and this could be done only by displacing the unwritten private law of both States by a written code which should be common to both. And in the natural growth of great kingdoms and states, by the union and consolidation of different provinces, the same motives of policy have led to similar results. I must not pronounce with confidence upon a question which can be certainly answered only by a wider and closer scrutiny than I have had the leisure, or have the ability, to make; but I do not believe that an independent and homogeneous people can be found, who, so long as they preserved those qualities, did not have their whole public law in writing, and leave their whole private law substantially unwritten. I say substantially, for there are occasions in the life of every State for making abrupt changes in the body and policy of private law, and such changes can be effected only by legislative intervention.

Has this striking phenomenon that in the natural growth of the law of a nation its written statutes are so wholly confined to its public law, and its private law is left to be shaped by its judicial tribunals, any significance, and what is its significance? Is this the result of chance, or caprice, or neglect, or is it the unconscious observance by statesmen and legislators of an order and method which nature dictates and which science should therefore follow? If it be a wise policy to reduce, so far as possible, all law, private as well as public, to a statutory form, why has this wisdom not been generally recognized and acted upon? And if this has not heretofore been a wise policy, is there anything in the present state of civilization, or in our present condition and circumstances, which makes its adoption expedient now?

The question, it will be observed, is not whether we shall leave any part of the public law unwritten, but whether private law shall be reduced to writing. That public law must be expressed in writing is clear at the start, for otherwise it could not exist at all. As I have shown, its essential nature is the performance of corporate acts, such as can be evidenced only by writing. The doing of corporate acts, the organization of the State, its political divisions, its officers and their duties, its methods of taxation, its system of highways, could never be evolved from the principles of justice by the exercise of reason. They are new creations brought into existence for the first time by written legislation. The real and only question is whether the *private* law, now unwritten, should be reduced to writing.

The importance of this question to the general and permanent interests of society will not be doubted. It is a question which involves the fundamental principles of legislation; and it is one upon which all men who have at any time occasion to take part in the business of legislation, or in interpreting and

applying its results, and especially therefore all lawyers, should hold correct opinions. It cannot be possible that we may choose indifferently the one method or the other in framing our jurisprudence. The differences between them are broad and fundamental, and grave consequences must necessarily flow from the adoption of the one or the other.

Those who think that private law should be reduced to writing are not agreed as to the extent to which the process should be carried. Some go the length of insisting that *all* law ought to be reduced to statutory form, so that, should a case arise which should turn out not to be covered by some enactment, it should be declared by the courts that there was no law applicable to it, and it should be left undecided! Others think that the reduction should be carried as far as the law is now settled by judicial decisions; and that any cases hereafter arising not covered by any written rule should be left to be decided by unwritten law, as novel cases are now decided; and finally, there are others who think that a codification should be limited to those rules which have been so long established that settled forms of expression not likely to encounter any necessity of change, have become appropriated to them.

On the other hand those who think that the private law should be left in its unwritten form do not deny that there are from time to time occasions when legislative interference with it is necessary. From time to time, progress and change in social conditions require corresponding changes in the law, which can be effected only through the instrumentality of statutes; and there are some branches of the law which have both private and public aspects, and which must consequently be dealt with to some extent by legislative action. Therefore, between many who say that they are in favor of codification, and others who profess opposition to it, there may be little difference of opinion, all agreeing that written law should be

substantially confined to public law. The contention lies between those who insist that written law has a general superiority for all purposes, and should be extended generally over the province of private law; and those who believe that its proper province is confined to public law, and that it should not be extended to private law except where special exigencies make it necessary. Between these parties the difference is irreconcilable.

The real question being thus developed, it remains for me, I have not the presumption to say, to solve it, but to offer my humble contribution towards its solution.

The first step in an inquiry of this character is to ask what advantage would be gained by the suggested change; for I need not say that unless it would be reasonably certain to bring about very substantial benefits, it would be very unwise to make an attempt so laborious, expensive, and hazardous. We should therefore first assure ourselves that we have formed no exaggerated estimate of probable advantages; and this makes it necessary that I should devote a few words to what are commonly suggested as the benefits which would flow from the general codification of our unwritten law.

One ground upon which the advocates of this scheme usually place themselves is this; they say that if the State intends to compel its citizens to obey any rules, it is but simple justice that a fair opportunity should be given to know *beforehand* what they are, so that men may govern their conduct and shape their transactions in accordance with them; but that, as it is now, the mass of men do not know, and can not be made to know, even where to look for a knowledge of those laws which are not in writing, otherwise than by seeking professional advice; and that this is often wholly impossible, and always unreasonable and unjust. They do not pretend that if the laws were written, the difficulty would be wholly removed.

They admit that many would be unable even to read them, a still larger number to comprehend them, and that many who could comprehend them would neglect to make even the effort. But they insist that a great duty of the State would be discharged by thus furnishing to all the opportunity of knowledge, and that many would gladly avail themselves of the privilege.

I would not by any means assert that there is no weight in this argument; it has indeed much plausibility; but this perhaps tends to exaggerate its real importance. We all know that the great bulk of mankind never read the laws which are written; and that when any layman feels a real necessity for knowing what the law is he is quite as apt to seek professional advice in the cases where it is written as where it is unwritten. Moreover, there are now abundant means of gaining a general knowledge of the unwritten law in books especially adapted to ordinary unprofessional minds; but how few there are who give them any attention. What good reason have we for a belief that laymen would, to any considerable degree, seek to learn the law from statutes, when they wholly neglect the means already in their hands for gaining that knowledge?

Another ground upon which the extension of written forms over the whole body of law is sometimes urged is that there are many public officers, like Justices of the Peace and others, both judicial and administrative, selected from the body of the community, whose duty it is to administer many parts of the law, and who are not competent to acquire, and have not the books which enable them to acquire, a knowledge of unwritten law. Here again it should be said that the importance of this consideration should not be over-estimated. In most of the cases referred to the law which such officers are called upon to administer is public law, and that is already in writing. And in relation to others where there may be occasion to administer

private law, as in trials of civil cases before petty magistrates, I think it will be found that an unlearned man will be far better able to make a correct decision by giving his attention to the simple principles of justice as they are understood by ordinary men, than by attempting to apply statutory rules stated in the precise formulas in which such rules must be expressed.

Again, it is sometimes said that the acquisition of a knowledge of the law by students and younger members of the profession would be greatly facilitated if the suggested change should be adopted. But I need not say to this assembly that there is no short road to the science which we profess; that a real knowledge of the law — that alone which makes a lawyer — is a knowledge of its purpose, its reasons, its philosophy, its methods, its limitations, its spirit; and an age employed in the reading of dull statutes would not produce the results which would spring from a single year's intelligent study of the actual cases in which we find the law discussed, reasoned out and applied to the real transactions of men.

It is insisted also that the prodigious and rapidly increasing number of books which are now requisite in the practice of the law is an evil of great magnitude which of itself necessitates the suggested change. This evil is vastly exaggerated. The number of law books does rapidly increase; but so does the number of books relating to all other sciences. It is necessary to consult but a small part of them. The best workman is not he who possesses the largest number of tools, but he who knows how to use most skilfully the comparatively small number of necessary ones.

The suggested advantages of codification which I have thus far rapidly sketched are not of extreme importance, and it is very doubtful whether they would be realized, even if the enterprise were a practicable one; but there is another of a far different character. It is insisted by the especial advo-

cates of codification that written law has an intrinsic advantage over unwritten in this, that it is *more certain;* and, consequently, that the suggested change would lead to a diminution in the number of suits, and make it easier to decide those actually brought. I need not say that if any change in the form of the law affords any rational prospect for such a blessing it should be welcomed.

All these suggested advantages assume that it is *practicable* to effect a *complete* codification of the unwritten law; not simply that *some* of its general principles may be expressed in writing, but that the whole body of it can be so expressed without impairing any of the present excellence of our jurisprudence, *so that* the citizen may know beforehand the rules by which he is to govern his conduct; *so that* the present multiplicity of law books may be dispensed with; and *so that* the judge, inferior or superior, may find in the single volume, or half dozen volumes, of the Code the certain rule by which any controversy may be decided. *Practicability* therefore, and practicability to this extent, becomes the main question.

It has some times been urged that if practicability is the real and only question it may be speedily determined by an appeal to the actual fact. It has been asked "did not Rome have a Code of private law? Has not France a Code? And Prussia, and many other European States?" If those who make this appeal were asked which example they prefer to rely upon as an instance of the successful accomplishment of the task, they would, with one voice, name that of France. But will they rest the question upon that example? If so, it would be quickly decided. No one of the advantages which I have enumerated as being those asserted for codification by its advocates has been gained in France; and there is no unprejudiced observer who would not admit that

the jurisprudence of England, and of the older States of America, was far superior to that of France, and pre-eminently so in the cardinal point of *certainty*. Says Mr. Sheldon Amos, himself an eminent advocate of codification, "The "greatest possible uncertainty and vacillation that have ever "been charged against English law are little more than in- "significant aberrations when compared with what a French "advocate has to prepare himself for when called upon to "advise a client."[1]

And Austin, generally regarded as the most distinguished advocate of codification, confesses his inability to find anywhere in human experience a successful example of it. This circumstance is sometimes explained by saying that the codes which have thus far been framed are very imperfect ones; and that this does not prove that good ones cannot be made. But it certainly does dispose of the assertion that the practicability of reducing the private law to writing can be proved by a reference to actual experience. Whatever else the codes referred to may be, or do, they are not successful reductions of the unwritten law. I am arguing about things, not names. There is no doubt that what is *called* a Code of the unwritten law has been written, and the same thing may be again done; but what is the real nature of such a Code after it is made? That is the important question. When any controversy arises for determination will there be found in the Code a rule for its decision, or would it still be necessary to resort to some unwritten law? And if it should be found that the Code furnished a rule, would it be the same which enlightened justice would declare without a Code? If it would, then indeed the unwritten law has been reduced to writing; but if it would not, then it still remains unwritten, or has been superseded by an enactment

[1] An English Code. By Sheldon Amos, M.A., p. 125.

inconsistent with justice, and therefore one which ought never to have been made.

Perhaps the example of California may be invoked. Such an appeal would be still less effective. Look, if you will, through the Reports of the judicial decisions in that State, and you will find that the Courts there, for the most part, seek for the private law just where we seek for it, and the Code is rarely appealed to, except in cases where it may seem to declare a conflicting rule. This circumstance is easily explicable on examining the California Code. It will be found not to contain the law, but in the main only a few general rules, which furnish little aid in the solution of controversies.

But though ineffective for good, is it equally so for evil? Upon this point we have the weightiest evidence. The late Professor Pomeroy, the distinguished jurist and head of the Law School of the University of California, had made, as was his duty, the operation of the California Code the subject of close observation; and, although originally inclined to give his assent to the project of codification, he became persuaded from actual experience that this Code was having a most pernicious effect upon the integrity and certainty of the law, and in a series of articles published a few years since in the *West Coast Reporter*, he sounded the note of alarm.[1] He pointed out that the errors and uncertainties of this scheme were such that they were gradually undermining the law, and that the consequences would be very grave unless some corrective should be applied. His recommendation was that a rule for its interpretation should be concerted by the Courts and unhesitatingly applied to it to this effect: to assume a pre-existing law to have been in force, prior to the Code, covering all cases, and that the Code was an attempt to reduce that to writing and not to change it in any respect, except where an intent to make a change was

[1] *West Coast Reporter*, Vols. III. and IV.

manifest upon the face of the provisions. What a commentary is this! It directly advises the assumption that there is another and a better source for ascertaining the law, even where it has been reduced to statutory form, than the statutes themselves; in other words, that it is the part of wisdom to *disregard*, so far as possible, the solemn written law of the State!

So far therefore as the appeal to actual experience goes, it is wholly unfavorable to the notion that the reduction of private law to writing is practicable. The feat never has been accomplished; but this does not, of itself, prove that it may not be accomplished. If it be within the limit of human capacity, it might be wise to make the effort. If it be beyond that limit, all attempts must prove worse than abortive. In our endeavors to improve the law — and we should never cease these — practicable methods only should be employed. True science points to these alone. All others will be found productive only of the usual fruits of error, ignorance, and charlatanry. Let us then see whether the work is, *in its nature*, practicable.

What is the task which the codifier of the unwritten law proposes to perform? It is to put in writing the rules of private law. It is to do generally for the whole law what the judge does for a very small part of it in deciding any particular case, or what the jurist does in composing a treatise on some particular branch of the law. The procedure is necessarily the same in all cases. There is one method only which can be pursued. We must, therefore, closely scrutinize this, and ascertain what the intellectual process really is. The judge in determining any particular case starts with an already acquired knowledge such as the law in its then existing condition supplies to him. This consists of a body of rules which have been ascertained and declared by his predecessors from time to time as the result of operations precisely the same as that which he is about to perform in relation to the

transaction before him. His task is simply *to examine the transaction;* that is, to scrutinize closely all the facts of which it is made up. If he finds that the transaction is not materially different from some similar class which has before been subjected to judicial examination, he assigns it to that class, and his work is done; for this class is distinguished by some legal rule which really forms it. If, for instance, the case is one of an ordinary contract, he assigns it to that class, and the legal consequence that it must be performed at once attaches to it. If it appears that the contract was made by an infant, he assigns it to another class composed of exceptions of that nature from the first, and the legal consequence that it is a voidable contract at once attaches to it. What did the judge do to whom the case was first submitted of a contract made by an infant and ratified after he became of age? He observed that it was an infant's contract, and therefore at first it seemed assignable to the above-mentioned excepted class; but he noticed the new feature of ratification after full age. He recurred to the instances which made up the class of infants' contracts. He found that none of them exhibited this feature. He then inquired whether that feature was a *material* one; that is to say, whether the case ought to go into the same class with the others, or into a new class to be made for it with different legal consequences for its characteristic. In this inquiry the action of his predecessors supplied him with no controlling guide. He was obliged to determine for himself. And what was the real problem which he had to solve? Simply this: what does justice require? He was to apply to the case the social standard of justice; not simply to repeat what had been done before, but to make an original application of it. He was not, however, without aids which his existing knowledge supplied. He found indeed that there was no new consideration for the ratification; but he also found

that, in prior cases, the courts had enforced promises in the nature of ratification. He found that the original consideration was perfect, and the subsequent ratification sufficient evidence that the original contract was not tainted with any unfairness or imposition. *Justice*, as he understood it (and his understanding presumably represented that of the society in which he lived), required that this contract should be performed; in other words, that a new class be made for such cases.

What would the codifier have done in reducing to writing the law as it was prior to the occurrence of this transaction of a contract made by an infant and ratified after maturity? He would have made a rule to the effect that all contracts should be deemed binding obligations, thus creating a large general class. He would have made another excepted class of infants' contracts, declaring these void; and have stopped there. His imagination might have suggested to him that at some time in the future a case would arise where an infant had ratified his contract after coming of age; but this is not probable. How would the Courts administering the written rules thus framed by the codifier deal with this new case when it arose? One side would appeal triumphantly to the rule, clear as human language could express, that contracts made by an infant were void. The other would insist that such a doctrine applied to that case would be gross injustice. The answer would be that the Court had nothing to do with justice or injustice, but must administer the law as it was written. It would be argued upon the other side that the written rule did not apply to the case; that the class was not really intended by the legislature to embrace such a case. But the answer would be "is not this an infant's con-"tract? If it be so, it matters not how many other features it "contains. The law has made one class embracing *all* such "contracts and the courts cannot take it out of that class

"and make another without repealing, *pro tanto*, the written "law."

Such would be the argument; what the decision would be, who could tell? Utter uncertainty attends all such controversies. The *logical* result is clear. The written rule embraced and decided the case; but the protest of violated right would be very likely to be triumphant, and result in expounding away the law in the interest of justice.

We now perceive that the procedure of making or declaring the law of private transactions, whether undertaken by judge, codifier, or jurist, consists simply in the examination, arrangement, and classification of human actions according to the legal characteristics which they exhibit. It follows that it is an indispensable condition of this procedure, without which it cannot even be begun, that there should be some particular actual transactions to be subjected to observation. *The fact must always come before the law.* Apart from known, existing facts, present to the mind of the judge, or the codifier, he cannot even ask, and still less answer, the question, what is the law? Hence the truth which I respectfully submit to you as one which will be found entirely decisive of the main question, that private law does not consist in a series of logical deductions drawn from original definitions and capable of existing independently of the material, or moral world, but is simply the arrangement and classification of facts, — that is to say, it is a *science* founded upon the observation of facts, and subject to the conditions which attach to such sciences.

One conclusion, therefore, is easily demonstrable; and that is that it is impossible to write down the law applicable to *any future* transaction, because it is impossible to know the law applicable to any future transaction. This can be discovered only by subjecting the features of the transaction to scrutiny, which cannot be done until it is actually present to

the mind. Our power to subject objects to a scientific classification being necessarily limited to those which are submitted to observation, the jurist, or the codifier, can no more classify future human transactions, and, consequently, can no more frame the law concerning them, than the naturalist can classify the *fauna* and *flora* of an unknown world.

We may indeed *imagine* future transactions, and, by classifying them, make the law for them; but the world we thus deal with is an imaginary world, and the law we thus create should be regarded as imaginary law. If we attempt to make it *real* law by *enacting* it, it will prove just and efficient in its operation precisely in proportion as our imaginary world shall correspond with the real one as the future reveals itself; and I need not argue to intelligent minds that it will not be likely to thus correspond in any instance. We may indeed attempt to force this imaginary law upon the future transactions of an actual world; but it will not be law in any just or respectable sense. It will not be justice. It will be a mere arbitrary rule. It will not be an application of the social standard of justice to the transactions of men which, as I have many times pointed out, is the end and aim of jurisprudence. So far, therefore, as future transactions are concerned, codification is not simply morally impracticable, but philosophically impossible.

We now perceive more clearly the radical distinction between unwritten and statutory rules as applied to private law. They both assume to be the rules by which the private transactions of men are to be governed. The former takes the transactions of the past, and, by classifying them, makes its rules; but it makes them *provisionally* only. It declares that they are binding upon the courts only so far as respects transactions substantially like those from the examination of which the rules have been framed. In respect to future cases which may wear different aspects, it suspends judgment. It leaves

these to be examined and classified as they arise, when and when only, their features can be subjected to examination. But written law affirms that it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied. It refuses to proceed any further with the scientific method of examining and classifying transactions according to their actual features. It insists that however useful that process may have been in the past, it shall now cease. It declares that science has finally performed her task — is now *functa officio*. It says to that desire — the highest and holiest which inhabits the human breast — the yearning to do justice — "Be still!" Reason, Science, and Conscience, so far as they are operative in the law — their native, especial, and supreme realm — are struck with instant and absolute paralysis.

These are, I am aware, strong assertions; but, unless what I have said is erroneous, they are called for and justified. If the various schemes for codification do really purport, and have the effect, to make rules for human conduct operative upon future cases, the legal and moral features of which have not been, as they cannot be, subjected to scrutiny, I have not misrepresented them. But some may say that reasonable codifiers intend to so frame their rules that it may be seen that they are not designed to apply to novel cases, and that an opportunity is thus given to the courts to limit their application. But this suggestion ignores the radical distinction between written and unwritten law. It is, indeed, the characteristic of the latter that its rules are provisional only, and do not govern novel cases presenting materially different aspects; and if the codification is designed to effect nothing more, it accomplishes nothing. It would be simply a *digest*.

But the characteristic feature of a written and enacted rule is that it governs *all* cases falling within the scope of its language, whether they are novel or otherwise. If the design should be that they should not thus apply to all cases, how is it to be known what cases were intended to be excepted from them? Certainly it cannot be supposed that it was contemplated that *no* cases happening in the future should be governed by them, for that would deprive the rules of their whole character as laws. Laws are made for the future, not for the past. If it be suggested that the rules are to be limited to such cases as are similar in all material respects to past ones, I agree that, by such limitation, if it can be made, much of the mischief would be obviated. But how are we to know that this was really the legislative intent? There is no indication of it on the face of the enactments. And how is the similarity to be ascertained? And if, by such a limitation, the principal mischief apprehended by the opponents of codification would be obviated, how much of the benefit which its friends expect from it would be gained? We should stand at the same point where we were before codification, except that we should have introduced a new rule for the interpretation of written law, which would throw that law into utter confusion, and rob it of its supreme excellence in its own true province, — that of public law; for it is essential there that written law be interpreted and applied exactly according to its language, without reference to any consideration of novelty in the cases. And such application works no injury there, for public law is not concerned with rules of conduct, nor does it depend upon exact justice.

But, if those who propose to codify the private law are really sincere in the suggestion that they do not intend to touch novel cases, but to leave them to be decided as they would now be decided, they will certainly agree that it is highly

important that this intent should be plainly expressed in the law itself, and they could not object to the addition of a clause something like this: "This Code of law is not to be inter-"preted as applying to future cases when they differ in "material respects from those which have been made the "subject of judicial examination!" This is the *reductio ad absurdum* of codification. The process has been carried as far as it can be, and yet the law is left in the same condition in which it stood before; provided the rules as resulting from past transactions have been correctly expressed in the written forms, which, to a greater or less extent, will be found not to be the fact. No; those who insist that the body of the private law shall be expressed in writing really *seek* to make rules for all future cases. Their real purpose is to stop the processes of reason and to substitute in the determination of particular cases the simple inquiry "what has been written?" in the place of "what is right?" Their great apostle Jeremy Bentham had the courage of his convictions. He clearly perceived that a Code of private law could not co-exist with any permission to a judge to look outside of the Code for a rule, even when deciding novel cases. His view was, hit or miss, to force a statutory rule upon mankind and compel submission to that. His notion was that if he could only get rid of that disposition to decide controversies as the common law decides them, a written Code would work and be a blessing. In his own language, "All plain reading; no guess work; no argumentation; your "rule of action — your lot under it lies before you." He addressed a long letter to the People of the United States and advised them thus: "Yes, my friends, if you love one "another — if you love each one of you his own security — "shut your ports against our *common law* as you would shut

"them against the plague. Leave us to be ruled — us who "love to be thus ruled — by that tissue of imposture."[1]

And the following are his views of what should accompany a Code in order to preserve it. There can be no doubt of the necessity of such safeguards: —

"For this purpose it will be necessary *to forbid the introduc-* "*tion of all unwritten law.* It will not be sufficient to cut off "the head of the hydra; the wound must be cauterized that "new heads may not be produced. If a new case occur, not "provided for by the Code, the judge may point it out, and in- "dicate the remedy; but no decision of any judge, much less "the opinion of any individual, should be allowed to be cited as "law, until such decision or opinion have been embodied by the "legislature in the Code."[2]

Here we have it that every case falling under the rules of the Code is to be decided rigidly according to such rule, whether the case was in the mind of the codifier or not; and novel cases for which the Code furnishes no rule, are to be *left undecided!* A controversy left undecided! This is anarchy pure and simple. But bad as anarchy is, it is not so bad as to decree that a case shall be decided by a rule plainly contrary to justice.

It may be suggested, however, that even Bentham and the codifiers do leave some room for the operation of science and reason by indulging the notion that as defects in the Code are discovered, the legislature can be appealed to to make amendments; and thus that science and reason, otherwise indeed silenced, might be employed in watching over the operation of the Code, and, where the classifications effected by it were found to be erroneous, in suggesting amendments to the letter of the law. I am well aware of the imperfection of all human contrivances and of the frequent need of amendment in which the best of them stand. But desperate indeed must be the neces-

[1] Bentham's Works, Edin., 1843, Vol. IV. p. 504. [2] Vol. III. p. 209.

sity for legislation which justifies the passage of a bad law merely because it may be amended. Every written law prescribing rules for conduct carries with it the assertion that it is just, and refuses to be questioned. So far as its operation goes, it sternly silences the voices of science and reason. Those voices can be heard only in *opposition* to the law; and if they succeed through the operation of *amendment* in being heeded, it is but for a brief moment, and then only upon the hard condition that they condemn themselves to an indefinite future silence. But, further than this, the remedy of amendment always comes too late. The mischief is done, and cannot be repaired. The judgment has been rendered and must be satisfied; or, if not rendered, it must be determined according to the unamended law. All that the amendment effects is the prevention of future wrong of that precise nature, leaving however the possible stock of future wrongs wholly undiminished and equally irreparable when they arise.

But some, while admitting these views concerning the inability of making right provision for future cases by written law, may still be inclined to think that the evil which would flow from an attempt in this direction is exaggerated. They may ask, "is it, after all, true that the number of future cases "which would be ill disposed of by written rules would be "very large? Is it not true that human experience has "nearly exhausted the possibilities of social life in the exhi- "bition of phenomena? Are not the transactions of men "substantially repetitions of each other, not indeed in every "minute particular, but in their material features — those "which stamp them with their legal character? And there- "fore will not rules drawn from a classification of known facts "work out justice in nearly every instance, leaving the occa- "sional miscarriages so small in number as to amount only

"to one of those minor imperfections from which no human "institutions are exempt?"

A greater error than that which is thus suggested could scarcely be indulged. It is in *new cases* that nearly all the difficulty in ascertaining and applying the law arises. The great mass of the transactions of life are indeed repetitions of what has before happened — not exact repetitions, for such never occur — but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance. It is not that the case is generally wholly new; but that the grouping of facts of which it is made is new. It is not that no rule is known which is applicable to the transaction; there may be many which have a bearing upon it. Several different rules — all just in their proper sphere — are competing with each other for supremacy. The question is not whether the rules are right or wrong; they may all be right; but which must give way to the other; or whether a modified and partial operation must not be given to all, or some. It would be a fatal error to force upon such transactions a rule which had arisen out of different ones. It would be sacrificing justice for the sake of uniformity, whereas diversity is everywhere the characteristic of justice. The standard of justice must be applied to human affairs. This means that it must be *adapted* to human affairs; for otherwise it is not applied.

Systems of law must be shaped in accordance with the actual usages of men. It is a folly to suppose that unbending

rules can be made beforehand, and men be disciplined to learn them and adapt the business of life to them. Just and beneficent law makes itself the servant, not the master, of human intention. It is to a very limited extent only, and in respect only to matters in which the question of justice or injustice is comparatively unimportant, that men can perceive and recognize the superior advantage of a rigid and uniform rule. They have never endured, and they never will endure, that the important questions which affect liberty, property, and reputation should be decided upon any other rules than those based upon the everlasting foundation of truth and right; or so much of that everlasting foundation as the wisest and best of mankind are able to comprehend and apply. No; it is in respect to *future transactions* that the great mass of uncertainty in the law is met with. It is with these that the courts are incessantly engaged, and it is here also that the infinite superiority of unwritten law is manifest. Both systems are based upon the wisdom of the past; but unwritten law *uses* that wisdom as a *guide;* written law erects it into a *dictator.* The one is in chains; the other is free.

The notion that society ever has reached, or ever will reach, a state of equilibrium and rest, so that the transactions of to-morrow will be mere repetitions in substance of the transactions of to-day, is a vain illusion. There is no part of the universe which is not forever under the dominion of change, and no where does it proceed with such activity as in the realm of man. The discussion of codification began something like a century ago, but what previous epoch in the history of mankind has been so crowded with the phenomena of change and the achievements of progress?

It is a habit not merely of ignorant men, but of some who ought to know better, to rail at this necessary uncertainty of

the law, as if it were the fault of lawyers or judges, or of the system of our jurisprudence, and not inherent in the order of nature. Where is certainty found? Is the science of ethics certain, or of politics, or of religion? If the highest human intelligence should frame to-day a definitive code of morals, or of politics, how much would it aid us in solving the many problems which the future would continually unfold? There is indeed no department of moral science in which there is less of uncertainty than in the law; none in which the solution of new questions by different minds would exhibit so much of uniformity.

Nor is this uncertainty to be deprecated. It is rather to be welcomed, met, and surmounted. It is the discipline of human nature. It furnishes the conditions upon which moral and intellectual progress are possible. "Progress is the child of "struggle, and struggle is the child of difficulty." What would become of science, reason, and morals, if new problems were not incessantly presenting themselves for solution. What progress would be possible in law, if justice could be frozen into a rigid body of unchangeable rules?

It can scarcely be too often repeated that the office of private law consists in applying the social standard of justice to *known* facts, and that in respect to future transactions, there is, in human apprehension, no such thing as *law*, except the broad injunction that *justice must be done.* On the morning of creation the obligation of this precept was felt by the first man. It is the only one we can now truly feel in relation to the unknown facts and conditions which are to arise in the future, and which may present aspects different from any which have been exhibited in the past. Everything which has occurred may be made the subject of judicial contemplation, and the rule of justice in respect to it may be declared, and the declaration may be fitly applied to all like cases which may arise in the

future. But here human intellect finds its absolute limit. There is One Infinite Mind to whom the future is already present, and whose omniscience alone can prescribe its laws. The attempt of the codifier to imitate this attribute is as futile and miserable as the effort of the scenic artist to mimic the thunder of Jove.

> "Demens qui nimbos et non imitabile fulmen
> . . . simularat. . . ."

In statute law when limited to its proper province, that of public law, there is no attempt to make rules for *unknown* conditions of fact. The conditions are indeed to arise in the future, but they are nevertheless known, or, which is the same thing, *contemplated* as known, for they are, as it were, *created* by the statute and are particularly specified in it. When these specified conditions arise the statute has an operation; otherwise it has none. It is true that there is a possibility that the conditions specified by the statute may arise together with other *unforeseen* conditions which render its operation unjust. Had the legislator *foreseen* them he would have framed his statute differently. Nevertheless the statute must be enforced as it is written. This is an occasional evil inseparable from written law; but it is reduced to a small and endurable *minimum* when that law is confined to its proper province of *public* law. It is swollen into magnitude just in proportion as the attempt is made to extend it over the province of private law. To enact rules of private law is but an attempt to *make* or *mould* justice; but justice refuses to be either *made* or *moulded*. It *exists* as absolutely as the law of gravity; and we might as well endeavor to shape the operation of that law according to our wishes as to enact our own opinions, and give them the name, and expect them to do the work, of justice. The law of gravity, and the law of justice as well, are the faithful servants of human intention,

so long as we confine our efforts to ascertain and obey them; but if we attempt to displace them by any substitutes, we shall reap the fruits of our folly in manifold disorder and inconvenience.

It is curious to observe how utterly written law loses even its boasted merit of *certainty* as soon as any effort is made to press it into a service which it is not fitted to perform. When any part of the private law is attempted to be covered by statutory enactments, the keenest intelligence is inadequate to clearly foresee the future conditions. Injustice and inconvenience at once begin to disclose themselves, and opposition to the statute arises. If the injustice is gross, the moral sense is shocked. The injured party exclaims against the wrong. The courts recoil from the office of enforcing the wrong. Doubts are started as to the meaning of the statute. The plain sense of the words is insisted upon by the one side; the improbability that such injustice could have been intended, by the other. The difficulty is usually resolved by the employment of the subtle arts of interpretation, and the obvious meaning of the language is *expounded* away in favor of the interests of justice. Of all the sources of doubt and uncertainty in the law, none are so fruitful as those which arise from the attempts to subject private law to unbending written rules. Fifty volumes would scarcely contain the record of the efforts of judges to interpret the Statute of Frauds and reconcile it with the dictates of justice. The Statute of Uses was in great part absolutely nullified by the decisions of the courts in order to preserve trusts from destruction; and the legislature did not presume to question the utility of this judicial action. In New York, prior to the Revised Statutes of 1830, the common law had established a simple and natural rule to prevent perpetuities. That rule was to limit restrictions upon alienation to lives in being.

The Revisers, very wise and learned men, thought to improve it, by limiting such restrictions to the arbitrary number of two lives. The difference between two lives in being and any number is quite unimportant as a matter of policy; but what was the result? In the whole of the judicial history of that State prior to 1830, but one case arose in which a disposition of property was assailed on the ground of remoteness. Since that time one hundred and seventy cases have perplexed the courts arising out of alleged failures to comply with this statute; and I can affirm that after all this controversy there is no task which so much affects the lawyer in that State with trembling solicitude as that of drawing a will which seeks to restrain for a time the power of alienating property.

Bentham was right in his clear perception that no written law which sought to establish rules for conduct could long stand against the protests of reason and justice; but his notion that those imperial voices could be silenced was the folly of a recluse who had not well studied books, and was wholly ignorant of men. A knowledge of men would have told him that, when a dispute arises, each contending party makes up his own mind by asking himself which has justice on his side. And this means justice according to the common conceptions of justice. It is that issue which they are willing to submit to a judicial tribunal. The decision of that, and no other, will content them. All men rely upon this. When about to engage in transactions, they do not consult books to see what they may or may not do; nor would they whatever laws might be printed; but they act in the full confidence that the rules of law which would govern their transactions, should they ever be challenged, would be the simple dictates of justice and common sense intelligently ascertained and applied. And a knowledge of history teaches the same lesson. The early legislation of Rome sought to reduce all law to writing,

and to petrify justice in the Twelve Tables; the rigid forms of actions in the early English law, unbending as a statute, in like manner, obstructed the function of judicial administration, which is the first of the great offices of government. In both cases the necessities of society rebelled against the restraint, and the Prætorian Law in Rome, and Equity Jurisprudence in England — the majestic creations of reason — revindicated the everlasting sovereignty of Justice over the transactions of men.[1]

There is in some minds a feeling that inasmuch as unwritten law in new and doubtful cases is not known until it is declared by the courts, the office really performed by the courts is in truth that of *making* the law, and that the notion that they only *declare* pre-existing law is a pretence, or at least a fiction;

[1] Nothing can exceed the felicity with which Gibbon has sketched the manner in which the rules of reason and justice were gradually made by the Roman jurists to prevail over the rigid language of the written law. The brilliant paradox which closes the following citation compresses into a sentence what might be expanded into pages: "A more liberal art was cultivated, however, by the sages of Rome, "who, in a stricter sense, may be considered as the authors of the civil law. The "alteration of the idiom and manners of the Romans rendered the style of the "Twelve Tables less familiar to each rising generation, and the doubtful passages "were imperfectly explained by the study of the legal antiquarians. To define "the ambiguities, to circumscribe the latitude, to apply the principles, to extend "the consequences, to reconcile the real or apparent contradictions, was a much "nobler and more important task, and the province of legislation was silently "invaded by the expounders of ancient statutes. Their subtle interpretations con-"curred with the equity of the Prætor to reform the tyranny of the darker ages. "However strange or intricate the means, it was the aim of artificial jurisprudence "to restore the simple dictates of nature and reason, *and the skill of private citizens "was usefully employed to undermine the public institutions of their country.*" (Milman's Gibbon, Boston, 1858, Vol. IV. p. 327.)

The Koran, which is the written Code of civil law in Mohammedan countries, has met with the same fortune. The following is the manner in which it is treated when found ill adapted for the solution of novel cases: "On these occasions the "Cadhi respectfully places upon his head the sacred volume, and substitutes a "dexterous interpretation more apposite to the principles of equity and the manners "and policy of the times." (Ibid. Vol. V. p. 168.)

and that as the legislature is really the only law-making body, to allow this office to be performed to so large an extent by the judges is an incongruity in republican government. But these impressions will be seen, upon reflection, to be quite erroneous.

If there were any truth in them — if the suggested incongruity really existed — it could not be corrected by any scheme of codification. I need not argue before this assembly that no legislature such as now exists, or which has ever been known in history to exist, could really make a Code of private law. The wildest advocates of codification do not assert such a capacity in any legislature. In the language of a very eminent man to whom they are fond of referring, John Austin, "A legislature "can no more make a Code than it can paint a picture." All that the legislature can do is to formally adopt a Code really made by other persons, Code Commissioners, they would usually be styled. But what would these commissioners do in performing their task? So far as we are able to learn from any example as yet afforded, they simply take the rules which they think have already been laid down in judicial decisions; that is, they take this very law, sometimes derided as *judge-made* law. Or, if they do anything more, it is to make what seems to them improvements upon that; and this they do — there is no other possible way — by re-shaping rules, or adding new ones, according to their views of justice and expediency; that is, by doing exactly the same thing which they insist nobody should do, except the law-making power! The complaint therefore really amounts to this, that *judges* make the law instead of *commissioners*. And in which of these two ways is the law likely to be best made, when it is made *per saltum* by a Board of Commissioners, without actual facts before them, without the argument of counsel, and without revision on appeal, or by a body of judges enjoying all these advantages?

But the suggested incongruity has no existence. That judges

declare, and do not *make*, the law is not a fiction or a pretence, but a profound truth. If courts really made the law, they would have and feel the freedom of legislators. They could and would make it in accordance with their own views of justice and expediency. They would not in fact be *bound*, or *feel* that they were bound, by any pre-existing law. I need not say the case is precisely contrary. They must follow the law as it has been before declared; or, if the case has new features, they must decide it consistently with established rules. A tribunal of last resort may, in a plain case, depart from prior doctrine as erroneous; but the instances of the exercise of any such power are rare. Any judge who assumed to possess that measure of *arbitrary* power which a legislator really enjoys would clearly subject himself to impeachment.

It has often been remarked by good lawyers that the principal difficulty which they encounter is, not in ascertaining the rules of law, but in *applying* them to facts. This is an expression, though not a happy one, of the truth upon which I am insisting. The real difficulty in what is thus termed *applying the law* is that the *facts* are not sufficiently apprehended. We are wont, in considering novel cases, to wade with wearisome diligence through reports and text-books to learn the various modes in which the rules of law relating to the subject are expressed, and to but little purpose, when suddenly a new circumstance in the facts engages our attention, and all becomes clear at once. We find that we were fully provided with legal rules, but did not know under which we should place the transaction. This was because we were not fully acquainted with the transaction; and every well-trained lawyer will assent to the observation that in cases of difficulty the first necessity is to devote the closest attention to the *facts of the transaction.* In the great majority of cases this method will solve all difficulties. This is because the law is a

science consisting in the observation and classification of human transactions. The *principles of the classification, — the scientific order,* — that is, the *law,* already exist; the task is to ascertain the true features of the fact, or groupings of fact, and when this is done, the transaction seems, as it were, to arrange itself in its appropriate class.

But some will say that while it must be admitted that any attempt to enact in writing precise and particular rules of private law would be mischievous for the reason that they would not be found adapted to the exigencies of particular cases, yet this evil begins to arise only when the attempt is made to be precise, and to provide for minute details, and that it is practicable to enact the more broad and general rules without running any serious hazard. Undoubtedly, the less we have of a bad thing, the better. But, if this limited form of codification were practicable, what good would it accomplish? It must be very plain that it would furnish none of the benefits asserted as the grounds upon which the utility of codification is defended by its friends. A sort of horn-book of the law would thus be produced which would not satisfy any professional need, would not enable men to know beforehand any better than they now know the law by which their conduct is to be governed, and which would leave the law to be made, or declared, by the courts just as much as now. On the other hand, how could we be sure that such an attempt would be free from mischief. It is very certain that it would not be. The argument involves a confession that codification is an erroneous method, but suggests that the mischief does not begin when the process begins. This is very fallacious reasoning. Mischief begins the moment the cause producing it begins to operate. A written rule of law must necessarily govern every case falling within its terms; and however guarded those terms may be, and however justified by the broadest

induction from a multitude of cases in the past, there is yet a probability that they will in the future be found to embrace a case which ought to be excepted from them, — a danger which begins the moment codification begins, and increases precisely in proportion to the minuteness and detail to which the process is extended. And who will be found wise enough to draw the line up to which we may go with safety, but beyond which there is peril. The part of wisdom is not to venture upon enterprises where the possible perils are great unless there is at least a certainty that some very substantial benefits will be gained.

There is a view sometimes put forward which makes a marked impression upon some minds in favor of schemes of codification. It is said we do at least know a great deal *about* the law, and that it must be possible that this knowledge should be arranged in a concise and systematic form so as to be made more accessible to professional men, and especially to those who cannot command the aid of extensive libraries, and also to the people generally, so far as they may seek to learn it. If this were all that what is called codification attempted, no one could reasonably say, or do, anything except to encourage it. But the existing want which is thus suggested does not arise from any imperfection in the law itself, but from the insufficiency, real or supposed, of treatises about the law. Can the legislature, or Code Commissioners, write better ones? Fortunately those who perceive this want are at full liberty to supply it without the aid of legislation. A statement of the whole body of the law in scientific language, and in a concise and systematic form is precisely what is understood by a good Digest; and such a work, at once full, precise, and correct would be of priceless value. It would not indeed supersede special treatises upon the different branches of the law, or the books of reports; but it would,

by facilitating, *save* labor. It would refresh the failing memory, reproduce in the mind its forgotten acquisitions, exhibit the body of the law so as to enable a view to be had of the whole, and of the relation of the several parts, and tend to establish and make familiar a uniform nomenclature. Such a work, well executed, would be the *vade mecum* of every lawyer and every judge. It would be the one indispensable tool of his art. Fortune and fame sufficient to satisfy any measure of avarice or ambition would be the sure reward of the man, or the men, who should succeed in conferring such a boon. It would not indeed be suitable to be *enacted* into law, for even *it* would wholly fail were its rules made rigidly operative upon future cases; but statutory enactment, while it would convert it into an instrumentality for mischief, would not, in any degree, be necessary to its real value. It could proudly dispense with any legislative sanction. Let those, therefore, who think that what is known of the whole body of the law may and should be arranged in a concise, orderly and systematic form, direct their efforts to the accomplishment of this great work. It may cost prodigious labor; but no more certainly than would be involved in making a Code which should attempt to accomplish the same object. Whoever can make a Code can accomplish this smaller task.

My main purpose — that of demonstrating, so far as my humble powers enable me, that written and unwritten law have separate and distinct provinces, and especially that unwritten law is a science to be cultivated by study, and not a subject for legislation — has now been accomplished; but I cannot quit the theme without pointing out a few of what I regard as the pre-eminent merits of our present unwritten law, which would be inevitably sacrificed were the scheme of codification adopted.

1. I first call attention to *the overwhelming force of the*

guaranties we have of the truth of its principles. When a controversy between men is carried into the courts, the question raised by it is first considered and studied by rival professional advocates, each animated to the highest endeavors by the most powerful motives, — a sense of duty, professional ambition and pecuniary reward. It is argued by them before judges selected for their skill and learning, and their conclusions are subjected to the review of other tribunals, constituted for the final determination of controversies. In these discussions all the reasons which considerations of justice supply, all the rules and analogies which prior decisions furnish, are scrutinized and weighed. The final determination is the result of this thorough and repeated examination. If human intelligence is capable of a correct conclusion, this determination must be sound. It is then placed among the finished results of the law, and deemed worthy of being appealed to as such in all future discussions. The guaranties of its accuracy are complete. We may be reasonably sure, if the question is again mooted, that no single mind is competent to review the decision; and hence the apothegm that "the wisdom of the law "is wiser than any man's wisdom," expresses no superstitious veneration, but a just estimate of the value of conclusions reached through such exhaustive examination. How is it possible that a body of written law, constructed originally by Code Commissioners, or legislatures, and amended from time to time by the same hands, without the aid of these pre-eminent advantages, can exhibit results at all comparable in value? I may fitly repeat here the language of involuntary homage which Bentham himself was compelled to pay to the system upon which he habitually poured forth his abuse.

"Traverse," says he, "the whole continent of Europe — ran-"sack all the libraries belonging to the jurisprudential systems "of the several political States — add the contents all together,

"you would not be able to compose a collection of cases equal "in variety, in amplitude, in clearness of statement — in a word, "in all points taken together, in *instructiveness* — to that which "may be seen to be afforded by the collection of English *Re-* "*ports of adjudged cases*, on adding them to the *abridgments* "and *treatises*, by which a sort of order, such as it is, has been "given to their contents."[1]

Strange that the man who could thus clearly perceive the intrinsic excellence of English jurisprudence, pre-eminent over that of any other civilized State, was not even moved to inquire whether it did not proceed from some corresponding superiority in the method — the *rationale* — by which it had been built up!

2. I next call attention to *the self-development of private law — its true method of growth* — which is possible only when left to be shaped and moulded by judicial decisions. I must repeat that the practical business of administering private law consists in the application by the courts of the social standard of justice to the business and dealings of men. This social standard is something which cannot be embodied in written rules, or set down in any form of words. It is the product of the combined operation of the thought, the morality, the intellectual and moral culture of the time. Under our present system of unwritten law, it is ascertained and made effective by the judges, who know it and feel it because they are a part of the community. And moreover it is placed before them in a blaze of light by the animated debates of thousands of other professional men belonging to the same community, whose vocation is to study and apply it. This social standard of justice grows and develops with the moral and intellectual growth of society, and through the operation of judicial decision the progress is transferred to the province of law. Hence a gradual

[1] Bentham's Works, Edin., 1843, Vol. IV. p. 461.

change unperceived and unfelt in its advance is continually going on in the jurisprudence of every progressive State. The question is, shall this growth, development, and improvement of the law remain under the guidance of men selected by the people on account of their special qualifications for the task, aided by the whole of a learned profession, or be transferred to a numerous legislative body, disqualified by its constitution and character for the discharge of this supreme function?[1]

[1] The thought here presented has been happily expanded by an able and temperate writer, the late J. A. Dixon, a distinguished lawyer of Glasgow, Scotland. "This "slow and gradual evolution, or spontaneous growth, from judicial decision, and the "slow operation of custom in determining organic changes in all the departments of "the law, explain how it is that there is a continuous process of refinement going on "in the Common Law of a country in all ages. As institutions undergo a silent "modification, as morality progresses, as new needs and new modes of satisfying "needs come to the surface, and as the countervailing facts of new modes of fraud, "oppression, and of crime also present themselves, a demand for suitable laws or "modifications applicable to the ever-new circumstances makes itself felt on every "side, and is instinctively responded to by the judges, at once the sharers and regu-"lators of public sentiment. The change in laws so brought about is so exceedingly "minute from day to day that it will only be noticed by comparing classes of decisions "made at tolerably long intervals of time, on the same states of fact, and when no "positive legislation has intervened. You see whole sections of law silently trans-"formed; you see new regions arising and others disappearing, not by violent revo-"lutions, but by the astonishing operation of some slowly working causes whose "existence becomes visible, and whose effects are to be measured only by generations "or centuries — like the stupendous geological changes — that continuous formation "and destruction of strata — the submersion of ancient continents — the upheaval of "new — not by cataclysms and earthquakes, but as the result of forces which are in "active operation around us day by day, and which produce so little disturbance that "their very existence is unperceived till we contemplate their vast results over epochs "of time.

"What has been the great factor in the creation of Mercantile Law? Not legis-"lative intervention. Our Mercantile Law has been the product almost entirely of "custom and judicial decision; and in the various stages of its history it has moulded "and adjusted itself with the most remarkable sensitiveness to the progress of com-"merce and civilization. The progress in this particular department of law is per-"haps nowhere better observed than in such a book as Mr. Langdell's collection of "Cases on Contracts from the earliest period of English law down to the present "day. Another great region or tract of law which has undergone in a very remark-

3. I next instance the importance of *stability* in the administration of law. Next to absolute *right*, stability is the chief excellence in jurisprudence. So long as the law remains in the custody of the courts, it will possess this merit. It never can be secured if private law should be reduced to statutory form. Whenever a statute is found to work injustice it must be changed. Society never has endured, and never will endure, except in trivial matters, any dealings by courts with private rights not in accordance with the social standard of justice. So also where uncertainty is found, amendments of the statutes must be made to remove the doubts. To effect such changes the legislature must be appealed to. The appeals will and must be frequent. The habit of making changes will render the task more and more easy. Unnecessary and unwise changes will be sought from personal and unworthy motives. The experience of the State of New York in relation to its Code of Procedure furnishes ample warning of the intolerable mischiefs which would be sure to follow upon incessant legislative changes, if our substantive law were embodied in statutes.

"able manner this process of silent and imperceptible change is the whole region of "doctrines pertaining to trusts and fraud, — the prominent matters of equity jurisdic- "tion in England. The whole doctrines of equity, both as avowedly administered in "the equity courts, and as they have in a less obtrusive way crept into and pervaded "the decisions of the courts of Common Law, all these doctrines have evolved them- "selves into the state of high moral refinement in which they at present exist, not so "much by the special moral elevation of particular judges as by the concurrent on- "ward impulse of the whole community, which all the judges have shared and felt "the influence of. The history of the analogous prætorian jurisdiction and of the "prætorian doctrines of the Roman law is another instance — particularly in ques- "tions of *bona fides*, *culpa*, *dolus*, *fidei-commissa* — of the same process by which the "unwritten law of a country absorbs into itself the whole gradual refinement and "elevation of advancing civilization; how, with the general advance in moral sensi- "tiveness on the part of the community, there comes a demand in matters of contract "and ownership and legal duty for fine and still finer shades of faithfulness, for abso- "lute purity of intention, for the repression of all indirectness of aim and duplicity "of purpose, for what has been called a superior refinement of moral scrutiny into the "duties which the law will enforce, the negligences which it will punish, the frauds

4. I have time to mention only one other advantage of our present system, and that shall be *the tendency of the private law of all English speaking States to a unity.* Few will question the extreme importance of this object. That a private transaction between men in Virginia should be governed by a different law from that which would rule the same transaction in New York is a great evil. The social standards of justice in different States, although generally alike, sometimes lead to diversities in practice. Right, reason, and justice are however everywhere the same, and in proportion as the popular standards of different States are cultivated they are brought more and more into unison. The progress of society acting upon the courts under our present system is continually aiding this approach to unity. The opinions of the courts, appealing, as they now appeal, to the same principles, are not only cited as authority in the jurisdictions where they are pronounced, but are listened to with respect in all others. Truth is welcomed from whatever quarter it may proceed. This reciprocal influence of the intellectual

"which it will defeat. The Prætorian Jurisprudence and the Equity Law of England "developed themselves under widely different auspices, and I think the growth "of both systems in gradual niceness and delicacy of perception of the subtlest "shades of legal and moral distinctions is a proof that an unfettered, unwritten law "grows with a nation's growth, and refines itself with the national refinement. The "writings of the Roman lawyers and the history of English equity jurisdiction alike "exhibit the exquisite accuracy and balanced moderation with which, in the hands "of competent lawyers, an unwritten law succeeds in doing, by the slow process of "adjustment and refinement of which I have been speaking, what no legislative "effort ever could accomplish, — I mean the work of reducing into scientific form, "of fixing, circumscribing, limiting, getting into practicable shape as instruments of "justice the apparently indefinite and indefinable principles of morality, — of seizing, "appropriating, and applying, day by day and year by year, the insensible increment "and product of the deepening moral sense and conscience of the nation. This is "what Savigny means when he says, in his remarkable Treatise on the Vocation of "Our Age for Legislation, that the largest portion of the unwritten law of every "nation is the exact product and measure of the national character and temper, — "a reflex of its life and progress." (*Journal of Jurisprudence*, Edin., 1874, p. 312 *et seq.*)

and legal culture of independent States which thus tends to bring all private law into unison must of necessity cease when the courts, instead of founding their judgments upon principles which must be everywhere the same, are obliged to base them upon the language of statutes which may everywhere be different. What more desirable condition, what more impressive spectacle can there be, than that of fifty States of a great continent, and empires beyond the seas, all appealing to the same law, and aiming to drown all dissent in one concurring voice? And what more mischievous condition than that all these States and nations should have codes, each differing from every other, without any conceivable agency for bringing them into union, but gravitating by a law of their being into infinite diversity?

It is not the least of the merits of the doctrine which makes the provinces of the written and unwritten law, respectively, conterminous with those of public and private law, that the boundaries are so clearly discernible. They are indeed naturally and unconsciously observed in most cases by ordinary legislators, who may not be aware of the scientific foundation upon which the distinction rests. Hence, as I have already remarked, where a State has long remained homogeneous and free, and the legal system has been enabled to develop itself by a natural growth, we find the public law in writing and the private law left unwritten. There are, however, occasional exceptions to the most rigid rules, and cases will sometimes occur where it may be necessary or expedient to reduce some special doctrine, or rule of private law, to writing. Such cases will, however, be found to be extremely rare. But three such instances occur to me:—

(1) The first is when some occasion arises for making *a sharp and direct change* in private law. In the progress of society, rules which were just and necessary at one period of time, and

which have been firmly established, become outgrown, and different ones are needed, better accommodated to existing wants. These occasions are not frequent for the reason that our unwritten jurisprudence, by its inherent flexibility and capacity for gradual change and growth, naturally accommodates itself, by insensible gradations, to the corresponding insensible gradations in the progress and changes of human affairs; but sometimes a rule becomes established which is rigid in its nature, and courts are not at liberty to abruptly supersede it. The legislative function may here be interposed and the requisite change be brought about through the instrumentality of a statute. But this interference should properly be confined to the making of the precise change which the courts are incompetent to effect.

(2) Again, some social or political question may be agitated in society which involves, directly or indirectly, some doctrine or rule of the unwritten law. When such questions arise each party insists upon its own view, and it is right that it should. The question is decided by votes. All must acquiesce in superior power, manifested through the law, and the successful party reaps the fruits of the victory by the enactment of a statute. This instance happily illustrates the true theory of the unwritten law and the relation to it which the courts sustain. It is the social standard of justice, and the function of applying it is *delegated* to the courts. Their wisdom is, in general, their only guide. They are not, however, the masters, but the agents only, of society, and where the latter wishes some particular view of its own carried out, it *instructs* its judges to that effect, in writing, and they are bound to follow the instruction.

(3) There is also an instance in which it may be expedient, and to some extent necessary, to put some special parts of private law in the form of written enactments. In general

it is the prime object of private law to do *justice* between man and man; and to do it in each particular case. But yet, while this is and should be the constant aim, *stability* and *uniformity* are important considerations; and, in order to secure these, general rules are necessary which sometimes involve a slight sacrifice of absolute justice in particular cases. Judicial wisdom finds one of its highest employments in so shaping the rules of law as to best reconcile these sometimes competing objects. The instances of which I speak are those in which it is not of so much importance what rules are prescribed, as that they should be simple, constant and uniform. In the natural course of the business of men there is a tendency to create artificial rules for such cases, and courts wisely encourage and enforce them. The law of Bills of Exchange and Promissory Notes has thus been built up. And those rules of law which require transactions to be *evidenced* in writing, and prescribe the mode in which the writings should be authenticated are of the same character. These rules are essentially *arbitrary;* and what is arbitrary is of course *known*, and may be stated with certainty in writing; and where a desirable rule of this character has not already been established by custom, so that it can be enforced as such by courts, it can be created only by written enactment; for courts have no power to create law. The instances thus referred to show that written law has a function in supplementing and assisting unwritten law. Courts, in applying the social standard of justice, sometimes need *artificial instrumentalities*. These are often furnished by the customs of business; but must sometimes be supplied by the legislature. On these grounds it may not be mischievous, and perhaps may be expedient, that some of the rules of the law of Commercial Paper and of Real Property should be reduced to statutory form. But the attempt should be made with caution. So far as the rules are *technical* and

arbitrary, the process may be safe and useful; but when they cease to be such — when *justice* becomes of more importance than simplicity and uniformity of method — the experiment becomes hazardous.

I need not speak of the Criminal Law, for although it prescribes rules of conduct, it yet prescribes them for public purposes, and the penalties are essentially arbitrary; and many offences — those which are mere *mala prohibita*, as distinguished from *mala in se* — are of the same character. This whole department belongs to the province of public law.

Nor need I speak of the Procedure of courts, for although it is largely employed in enforcing private law, it is yet one of those instrumentalities which must be supplied by the legislature. The subject is therefore one properly belonging to public law. I cannot, however, help observing that the power to frame the great body of the rules of procedure should be *delegated* by the legislature to the courts. They who exercise the function of administering justice best know what rules are necessary to the efficient performance of that function. The State of New York furnishes an illustration of the mischiefs which are sure to flow from entrusting to legislative bodies those tasks which no legislation can properly perform. Prior to the adoption, in 1848, of a Code of Procedure contrived by a Board of Commissioners, the system of Pleading and Practice in force in that State was, in its main features, that of the common law, supplemented by a chancery system. Doubtless these could have been improved by suitable amendment; but the paucity, prior to that year, of litigation turning upon questions of procedure is sufficient proof of its intrinsic merit. The effect of the passage of the Code referred to was to throw the whole subject into the hands of the legislature. Amendment, change, and revision have been the constant phenomena since; and at last

the dimensions of the enacted body of rules have swollen into most unwieldy proportions, and they are filled with uncertainties and crudities which perplex the understanding and try the patience almost beyond endurance. More than six thousand controversies concerning this unintelligible and shifting system have already been decided by the courts, and the decisions are full of conflict and inconsistency. They constitute by themselves a library of no small magnitude. The commentary is many times larger than the ponderous text; and the lawyer is left more uncertain and perplexed than he was at the start.

If the views I have advanced are well founded, they are necessarily fatal to any projected schemes for the general codification of the law. I have not made codification my express theme, partly because I deemed the one I have selected more precisely descriptive, and partly because the term *codification* is often used in a sense in which it is in no way inconsistent with the views I have endeavored to maintain. I am well aware that our statutory law, altered, amended, and enlarged, as it from time to time is, sometimes with diligence and caution, at others with haste and neglect, becomes confused and embarrassed with uncertainties, omissions, and redundances, which make the study and application of it difficult. It consequently demands from time to time a thorough revision; and it may be occasionally wise to have the confused mass re-arranged, reduced to a harmonious and orderly system, and re-enacted as a unit. This may, without much impropriety, be styled, as it sometimes is, a *codification;* but it is not the species of codification to which I have made objection in this address.

I offer no apology for selecting a topic upon which so much has already been written. My special incentive has been a conviction that the true considerations which determine the

merits of the questions involved in it have not heretofore been adequately developed, if, indeed, they have been perceived. If I have succeeded in so far impressing those who have done me the honor of such patient attention as to induce them hereafter to consider the reasons I have advanced, I shall have accomplished my utmost desire.

I should very much regret if any of my hearers should derive an impression from anything I have said that I entertain any sentiment of disfavor towards endeavors for the reformation and improvement of any department of the law. It is my sense of the importance of such efforts which has both dictated my subject and the mode of treatment. But, above all things, let us not, from any impatience with the imperfections of our jurisprudence, lose sight of its transcendent excellence, nor run the hazard of impairing it by ill-conceived and misdirected efforts for improvement.

Whoever seeks to reform the existing law, should, first of all, acquaint himself with the *source* and *nature* of the evil he aims to remove. He should remember that disorders of some sort and degree are inseparable from all human contrivances, and he should inquire whether the mischiefs which he observes are the necessary results of human imperfection, and therefore inherent in the constitution of society, or are abuses proceeding from some cause which can be reached and extirpated.

The alleged *uncertainty* of the law is the evil which ambitious reformers usually deplore; but the candid inquirer, after careful reflection, will find that much the largest part of this mischief, so far as it is a mischief, proceeds from causes quite beyond human control. The interpretation of laws, written or unwritten, must forever depend upon *human opinion*, and variety, uncertainty, and conflict are, and must be, inseparable attendants upon this condition. They have afflicted every

form of society from the beginning. They cannot be wholly avoided. The most that can be done is to reduce them to the smallest possible *minimum*. At the same time it is some consolation to know that the law is, after all, the most perfect and certain of the moral sciences. Neither in religion, or politics, or morals, or the fine arts can we find so near an approach to co-incidence of belief and action.

Most of the doubt and uncertainty in the law does not arise in consequence of any failure to settle old questions, but from the perpetual springing up of new points of controversy. In the feudal state the courts and society were perplexed with questions growing out of feudalism; and these are scarcely put at rest when feudalism, with all its questions and all its law, quits the scene, and growing commerce and industry, with a multitude of new problems, engage the attention. No sooner are these in some degree settled when the great scientific discoveries and appliances of recent times, the railroad, the steamship, the telegraph, the telephone, and the enormous aggregations of capital and industry under corporate organizations make a new series of most exacting demands, and produce, in their turn, a new mass of doubt and uncertainty to be removed only by the gradual advances of opinion toward uniformity.

Who can indulge the vain hope that it is possible to frame a system of written law which shall meet beforehand the new problems unceasingly raised by the activity and progress of the race, and relieve their solution from uncertainty and doubt? What genius could have constructed a law of railroads and telegraphs before the railroad or telegraph was known? Or who would view the legal uncertainty which ever accompanies the march of discovery and progress as an evil? So far from being an evil, it is one of the highest of blessings; for it supplies the conditions under which alone the highest faculties of our nature can be kept in healthy

activity. It is thus that moral and intellectual advancement are inseparably linked with material progress. There is no discovery which human genius contributes to human wants which does not at the same time bring uncertainty and doubt into the realm of law, the resolution of which furnishes a new stimulus for the exercise of the moral and intellectual powers of man.

These considerations indicate the lines upon which all reformation and improvement of the law should be attempted. I know of but three requisites necessary to the prosecution of the work: First; that legislation should be restricted to its just province, that of *public law*, and should not attempt to deal with those scientific problems of *private* law which are beyond its power to solve; and that, while operating within its just province, its action should be expressed in statutes drawn in clear, concise, and orderly language: Second; learned, incorruptible and diligent judges, aided by a learned, faithful, and diligent bar: Third; the employment of men of the highest ability and attainments in law schools, and in the literary work of preparing treatises and digests.

With agencies such as these the written public law of the State would assume a clear, consistent, and orderly form. The private unwritten law would present a well-digested body of just and accurate rules, under which the great bulk of the private transactions of men would be carried on without giving rise to controversy, or engaging the attention of courts; and the new problems which spring from human activity and enterprise — the real and just field for juristic contention — would be resolved in conformity with justice.

Gentlemen of the Virginia bar: however simple the requirements of this work may be, the task is by no means an easy one. By whom is it to be accomplished? By ourselves alone. We do not live under a despotism where the sovereign, with

the aid of his ministers, has the power to create and direct the agencies by which the public administration may be improved and perfected. With us public improvement can be brought about only by the voluntary efforts of the people themselves; and in the realm of the law the people at large are wholly incompetent to the task. The members of the legal profession alone are able to contrive the methods by which the administration of justice can be best secured. Sciences can be advanced only by the labor of experts, and we are the experts in the science of the law. The work must be done by us, or not done at all; and it will be well or ill done as we shall well or ill play the part which the legal profession ought to fill in a democratic State. That we have not been wholly wanting to our duties and opportunities the general excellence of our unwritten law is a sufficient proof; but the glaring defects of our legislation also prove that much has been neglected. The reason can not be that we have not had a sufficient opportunity to exercise our powers, for our legislatures have at all times contained a large representation of lawyers. If we have not sufficiently succeeded in guiding and shaping legislation, it is either because we have not well qualified ourselves for the work, or have not fully secured the public confidence. I fear that this last conjecture may have more foundation than we are willing to admit. There is in the popular estimate of lawyers an element of distrust which seems, at first, strangely inconsistent with the absolute confidence which is, within certain limits, reposed in them. This is sometimes deemed one of the comicalities of society, like the calumny and detraction which were mingled with the shouts of praise in the triumphs decreed to Roman generals. I am glad to believe that there is less of this sentiment now than at former periods of history; but there is still more than could be wished. It is safe to say that there is always a measure

of truth in popular estimates. The confidence which our clients repose in us is absolute; and this is for the reason that it is never, or very seldom, betrayed. The confidence which the public reposes in us is far less; not less than it reposes in other men, indeed much greater; but much less than that which we ought to attract. The reason is plain enough. We do not sufficiently recognize the truth that the relation of counsel and client subsists between the legal profession as a body and society. It should exist. We should feel that our education, our advantages, our position — the great fact that we, alone of all, can exercise supervision over the great function of the administration of justice — impose upon us all the duties of that relation.

If this truth were more present to the minds of lawyers and made manifest in their conduct, I cannot help thinking that it would work a most beneficial improvement in law and legislation — indeed in all public business. The public would repose in us the same confidence which our individual clients never hesitate to give. Our advice would be taken in the selection of judges, and we should select the best. Political questions would be settled as the people choose to settle them; but the results would be embodied in well conceived legislation. Written law would be confined to its true province. We should meet with no attempts to accomplish by legislation what science only can effect.

I am not insensible to the self discipline which a recognition of this relation would enjoin. If the public is our client, it cannot be sold, or deceived, or intrigued against, by us. In the race for public honor and promotion those odds must be allowed to him who is willing to accept them. It so happens that they are the weapons which lawyers are well able to use, if they will. The arts of persuasion include the arts of deception. The study of human nature in which

we are constantly engaged, reveals the points where intrigue may be employed with advantage. These instruments must be discarded. Place and power gained without them bring blessed opportunities for good; but when purchased by means of them, are found destitute of that public confidence which is the indispensable condition of public usefulness.

Gentlemen, in this work of harmoniously developing and improving the written and the unwritten law a principal part should properly be taken by you. The achievements in the past of the great men of your bar justify high expectations. It was by Virginia lawyers that the philosophy and principles of free government were at an early period studied and developed. It was from this ancient Commonwealth that the first immediate impulse which led to the formation of our Federal Constitution was communicated. It was by Virginia lawyers that the leading features of that instrument were first conceived and suggested; and where have its principles and spirit been so fully developed and applied as in the immortal judgments of your own *Marshall?* Permit me and others to hope that you are hereafter to make large additions to this great inheritance of renown.