A. W. Tourgee
from
David Dudley Field

THE ARGUMENT IN FAVOUR OF

A CODE

CONTAINED IN THE

INTRODUCTION

TO THE

CIVIL CODE OF NEW YORK.

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THE

ARGUMENT IN FAVOUR OF A CODE.

THE works, in their completed forms, of both commissions—that is, of the Practice Commission as it was reorganised in Oct., 1847, and of the Code Commission as it was reorganised in April 1857—are now comprised in six volumes, containing the code of civil procedure (including the law of evidence), the book of forms, the code of criminal procedure, the political code, the penal code, and the civil code.

Whether the task which these two commissions had before them was impossible or useless; in other words, whether it was possible, and, if possible, expedient to reduce into a code "the whole body of the law," had been much debated, both in this country and in England. One view of the subject has been given in the preceding report. Others may be given here. The question, as was there said, is between written and unwritten law; that is to say, between law written by the lawgiver and law not thus written; between law promulgated by that department of the government which alone has the prerogative of making and promulgating the laws, and law not so promulgated.

Whether a general code of the law be *possible* should seem, from the nature of the subject, hardly to be doubtful. The common law of New York, like the common law of England, from which it is in great part derived, consists of a vast number of rules of property and of conduct, which have been applied by the judicial tribunals, and which had their origin either in legislative enactments now forgotten, or in traditions from ancient times, or in the consciences of the judges, as the cases came before them. The decisions of the tribunals have been for ages preserved in writing. If there was ever a time when they were held in the memory alone, that time has long

passed. All that we now know of the law we know from written records. To make a code of the known law is, therefore, but to make a complete, analytical, and authoritative compilation from these records. The records of the common law are in the reports of the decisions of the tribunals; the records of the statute law are in the volumes of legislative acts. That these records are susceptible of collation, analysis, and arrangement might have been assumed beforehand, even if we had not the proof in our libraries, in digest upon digest, more or less perfect, to which we daily resort for convenience and instruction. The more perfect a digest becomes, the more nearly it approaches the code contemplated by the constitution. In other words, a complete digest of our existing law, common and statute, dissected and analysed, avoiding repetitions and rejecting contradictions, moulded into distinct propositions, and arranged in scientific order, with proper amendments, and in this form sanctioned by the legislature, is the code which the organic law commanded to be made for the people of this state. That this was possible, was all but proven by what had been already done among ourselves.

In was fully proven by what had been done in respect to the law of other countries. The law of Rome in the time of Justinian was, to say the least, as difficult of reduction into a code as is our own law at the present day. Yet it was thus reduced, though, no doubt, to the disgust and dismay of many a lawyer of that period. The concurring judgment of thirteen centuries since has, however, pronounced the code of Justinian one of the noblest benefactions to the human race, as it was one of the greatest achievements of human genius.

France, at the beginning of her revolution, was governed partly by Roman and partly by customary law. The French codes made one uniform system for the whole country, supplanting the former laws, and forming a model by which half of Europe has since fashioned its legislation. It should seem, therefore, to be quite beyond dispute that a general code of the law is *possible*.

Whether it is also *expedient* is a different question. One of the objections made is, that it is not possible to provide for all future cases. You may, it is said, stretch your foresight to its utmost limit; you may exhaust all the sagacity and ingenuity of the human mind; the future, nevertheless, is a sealed book; you cannot look into its unopened leaves: and, therefore, attempting to provide for what they contain is spending your strength in a vain and fruitless effort. This does not appear to be an objection of any weight whatever. Because we cannot provide for all cases, should be thought a poor reason for not providing for as many as possible. To render the existing law as accessible and as intelligible as we can, is a rational object, though we cannot foresee what ought to be the law in cases yet unknown. To cast aside known rules which are obselete, to correct those which are burdensome or unsuitable to present circumstances, to reject anomalous or ill-considered cases, to bring the different branches into a more perfect order and agreement, may be of immense value, though we cannot look beyond the present to make provision for what has never yet appeared.

The objection, however, assumes more than should be granted without qualification. There are certain departments of the law of which we may affirm with perfect confidence, either that we have provided for every possible case, or that when a new case arises it is better that it should be provided for by new legislation than by judicial decision. Thus, in respect to the penal code it may be affirmed that every act for which punishment may be inflicted ought to be designated beforehand; that no man ought to be punished for an act not thus designated, and that if any act should be committed for which society has prescribed no punishment, it may go for once unpunished, and a new law be made against other like acts in the future. As to the political code, it must by its very nature cover the whole subject. And for the code of civil procedure it is enough to say, that when the first report was before the legislature some of the members were troubled with similar fears about the want of provision for future cases, and to satisfy them this provision was introduced: "If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." But no such case has ever yet arisen.

If a case unprovided for could not arise under the code of civil procedure, much less could it arise under the code of criminal procedure. It may, therefore, be safely affirmed that there is but one of the five codes, that is to say, the civil code, to which, with any semblance of justice, it may he made an objection that it cannot provide for all future cases. This code is, undoubtedly, the most important and difficult of all; and of this it is true that it cannot provide for all possible cases which the future may disclose. It does not profess to provide for them. All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognised, so far as they ought to be retained, with such

amendments as seemed best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the code, it is to be hoped that analogies may nevertheless be discovered which will enable the courts to decide. If, in any such case, an analogy cannot be found, nor any rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield in King *v.* Hay, 1 W. Bl. 640, trusting to future legislation for future cases.

The language of the code in this respect should seem to be sufficiently guarded, thus:

§ 2. Law is a rule of property and of conduct, prescribed by the sovereign power of the state.

§ 3. The will of the sovereign power is expressed:

1. By the constitution, which is the organic act of the people;

2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;

3. By the judgment of the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law.

§ 4. The common law is divided into:

1. Public law, or the law of nations;

2. Domestic, or municipal law.

§ 5. The evidence of the common law is found in the decisions of the tribunals.

§ 6. In this state there is no common law, in any case where the law is declared by the five codes.

§ 2032. The rule that statutes in derogation of the common law are to be strictly construed, has no application to this code.

§ 2033. All statutes, laws, and rules heretofore in force in this state inconsistent with the provisions of this code are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this code provided.

Therefore, if there be an existing rule of law omitted from this code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; while if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same lawgiving department which made it; and if new cases

arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the code, or to some rule omitted from the code and therefore still existing, or by the dictates of natural justice.

Another obection to the expediency of a code is its supposed uncertainty. The argument is this: in the attempt to be systematic and concise, you must of necessity leave the language open to different interpretations. Now, it is quite true that, as a word has often various meanings, and a change in the structure of a sentence may suggest different ideas, it is difficult to frame a section that may not be tortured into a meaning unlike that which its framers attach to it. But it is a great mistake to consider this true only of the concise propositions of a code. Diffuseness is not a help to clearness. The longest judicial opinions are generally the least precise and the least comprehended. As a long document is usually more obscure than a short one; as a statute of many sections is commonly less understood than one of a few; as many words tend to confusion rather than enlightenment, so a single proposition, carefully expressed and made as concise as possible, is more likely to be precise and susceptible of one meaning only, than if the same idea were put into a different form, and a greater number of words.

If it be urged that reported decisions have this advantage in point of certainty, that, being made in each case with reference to a given state of facts, those facts are illustrations of the rule announced, and tend to explain it, the answer is, that the facts of a case reported serve for limitation as well as illustration, and just in that proportion the rule announced is partial and not general, and if acted upon as general tends to mislead; so that, after all, we are brought back to the same point, which is, that the rule of the decision, whatever it may be, partial or general, can be more precisely and accurately stated in a few short sentences than in the opinion more or less diffuse in which it is stated or from which it may be evolved.

So far as reported cases serve for illustration, the present code makes use of them; for the references to adjudged cases which in most instances follow the sections, are intended as much to answer the purpose of illustration as to justify the text. It is a favourite idea with many that, for promoting certainty, the propositions of a code should be accompanied by illustrative examples. Whatever advantage there may be in this method, these references, it is supposed, will afford the best kind of illustration.

A still further objection to the expediency of a code is its

supposed inflexibility. Expressed in formal propositions, and couched in positive terms, it is not as flexible, say the objectors, as the common law. This is the objection most insisted upon by those who oppose a code, and it should, therefore, receive the most careful consideration. It may be first observed that flexibility, in its ordinary sense, is one of the worst qualities which a law can have, or rather that it is inconsistent with the idea of law. As the law is a rule of property and of conduct, it should be fixed. If it be meant that a rule, made for a certain state of facts, may not be applicable to a different state of facts, that will not be disputed; if it be meant that such a rule ought not to be applied to the same state of facts under all circumstances, the objection amounts only to this, that the rule is too broadly stated; if it be meant that a rule ought to be subject to the discretion of the judges, the proposition is unsound, for the judges should not have dispensing power.

Another way of stating the objection is to say that, while the common law is expansive, a code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is, that the common law is elastic and accommodating, and that a code will be the opposite. Now, to say that a law is expansive, elastic, or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any significance, is, that it is better to let the judges make the law as they go along than to have the lawgiver make it beforehand. For if the judges are to decide according to known rules, those rules can be written by the lawgiver as easily as they can be spoken from the bench or taken down by the reporters. And even though in particular cases, the judges should fail to find such rules, and should have to make rules as the cases occur, that, too, can be done as easily when the known rules are placed in a code as when they repose in the breasts of judges or in the leaves of reports. So long as a code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases, it is divisible into two parts, one relating to those cases which are foreseen, and the other to those which are not forseen. Those which are foreseen the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen cannot be provided for, except by directing the courts to decide according to the analogy of existing rules when there is such an analogy, and when there is none then to decide according to the dictates of natural justice. In this last respect the judges will be in the same predicament under a code as under the common law; so

that really the only point of difference respects those new cases which can be foreseen or reasonably anticipated, and if there be persons who think that for such cases it is better that the judges should make the law after the cases arise, than for the legislature to make it as a guide beforehand, then they think that government ought not to be divided, according to the fundamental American maxim, into three separate legislative executive, and judicial departments.

If we look, for example, at any of the leading cases reported, we see the facts given, the conclusion of the judges, and the reasoning by which the conclusion was reached. Whatever legal proposition is necessarily involved in this conclusion is to be deemed an established rule of law. This rule may be written in a code, or it may be left in the reports. Is it any more flexible in the one form than in the other? Certainly not, unless the judges feel themselves at liberty to depart from it, so long as it remains in the reports alone. But that would be to declare that the decision is not law.

It is possible that the idea of flexibility in one form and inflexibility in the other has arisen from not sufficiently attending to the distinction between general and partial rules. It may be perfectly safe to lay down a certain general rule, but not at all safe to undertake the enumeration of all the particulars to which the rule may be applied. A code which should attempt to do the latter would fail, not because it would be inflexible, but because it would be defective. Take, for example, the rule that implies a promise to pay over money which the party ought not to retain, as announced by Lord Mansfield in Moses *v.* McFarlane, 2 Burr. 1005, in this language: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money.*" This, as a general rule, could be introduced into a code with perfect safety, while it would be certain and inflexible. But if their should be an effort to go into details, and to enumerate all the particular cases to which the rule has been or could be applied, the enumeration would be defective, inasmuch as it would be impossible for human foresight to discern all the occurrences to which it might be applicable. It might be possible to collect and enumerate all the instances in which the rule has been applied, and to state the circumstances; it might also be possible to mention many cases likely to arise in the future to which it would also be applicable; but it would never be safe to pronounce absolutely that it should only be applied to the cases enumerated, for the obvious reason that others may occur just as urgent, which human foresight has

failed to discover. The objection to a code which should attempt this would be, not that the rules given were inflexible, or that the code itself was inflexible, in any other sense than that it attempted too much, and was fashioned upon a false principle.

Even in the case supposed, a code and the common law would stand upon the same footing, unless something was put into the former which was not in the latter; for neither in one form or the other are either the general or the particular rules flexible; the general rule is comprehensive, the particular rules are not comprehensive; the latter would be of little value except as pointing to the former, and if that is once given it covers as many cases when inserted in a code as when left in the common law at large.

There is, for instance, a rule of the common law that a contract is void which is against public policy. What is or is not against it is left for the courts to decide, since the policy changes from generation to generation, and almost from year to year. The judges are not thereby invested with power to change the law, but to apply established law to the circumstances of each case as it arises, and is then compared with the policy of the state for the time being, or with the general policy of nations. The power to decide the question of compatibility in such a case between the act and the policy is not a legislative, but a judicial power, as much as to decide whether a bye-law of a corporation is or is not reasonable, or whether, in considering the effect of an act performed, the time of performance was reasonable or unreasonable. It may, indeed, be affirmed that certain acts are against public policy, and so far the present code has attempted to go; but it has not attempted, and could not safely attempt, to define all the acts by which men might hereafter seek to countervail that policy, or to foresee what the policy itself should be in ages to come.

If by flexibility be meant susceptibility of progression, then it may be affirmed with confidence that a code upon the theory on which this is framed not only adapts itself to the present wants of society better than the existing common law, but that it contains within itself in a greater degree the elements of future progress; not because its rules are any more or less flexible than those of the common law, but for the reasons which will now be stated.

The first of these reasons is, that while the judicial department has been unable, or if able unwilling, to make necessary amendments of the law, the legislative department, to which the power of amendment of right belongs, has been embarrassed, first, by the disjointed and comparatively inaccessible form in

which the great body of the law has lain, and secondly by that maxim of the common law by which the judges were taught that every statute in derogation of it was to he strictly construed. The first cause of embarrassment is removed so soon as the legislature and the people have before them the whole body of the laws in an accessible and compact form, by which the relation of the several parts to each other and to the whole can be better seen, a defect in any part sooner discovered, and the particular amendment indicated which ought to be made. The second cause is removed by the declaration that the maxim of strict construction has no application to a general code.

Nothing is more conspicuous in the history of jurisprudence than the tenacity with which the Judges of America and England, unlike those of continental Europe, have adhered to precedents, even though the reason for them has ceased, and their mischiefs have become palpable.

Take for example the practice of the courts as it existed before the Code of Civil Procedure. If any part of the common law should have been flexible, that should have been, for it was made almost entirely by the judges. And yet both here and in England, while they expressed their regret at the state of things, they were compelled to declare that the evils of the system were too deeply rooted to be removed by any power short of the legislature. Whenever the legislature did interpose, the courts refused to go beyond the strict letter of the statute. No fact of early English history is more certain than that the existence of equity, as a separate system, was owing to the rigid adherence of the common law judges to form, in other words, to the iron inflexibility of the common law. Equity itself soon fell into the same predicament. It would not at any time have been thought proper or safe for the courts to disregard an established precedent at law or in equity, upon the idea that the circumstances of the community had so changed as to make the precedent oppressive. Decisions have been frequently overruled, it is true, but upon some such excuse as that they were made by a divided court or an inferior one, or with reference to particular circumstances or without sufficient consideration.

In almost every instance where an improvement has been made in the laws, it has come from the legislature. Had society been left to the dicipline of the common law, whether it be called flexible or inflexible, the most cruel and bloody of criminal systems would still have shamed us; feudal tenures with all their burdensome incidents would have remained; land would have been inalienable without livery of seizin, and wives

would have had only the rights which a barbarous age conceded them.

Even in the matter of contracts, that portion of the common law where the attribute of flexibility would have been, if ever, desirable, what do we still see? While it cannot be denied, that in nine instances out of ten, tenants hire houses in the belief that landlords must repair them if necessary; that tenants who agree to repair, have no suspicion that if the house is burnt they are bound to rebuild; that when a creditor accepts part payment in full satisfaction, the bargain is supposed to be binding; that an instrument under seal, signed by an agent in his own name, but expressly declaring that he signs for his principal, is considered by both parties to be obligatory upon the principal; yet upon each of these points the common law holds otherwise, and has obstinately refused for hundreds of years to accommodate itself to the undoubted intentions of the parties whose rights it determines.

Either the common law had within itself the flexible, elastic, and accommodating elements, which would have enabled the courts to adapt it in these respects to the expanding exigencies of society, or it has been greatly misunderstood or misrepresented by the opponents of a code.

The second of the reasons for considering a code more favorable to progress than the common law, is, that in all those particulars in which the common law does take hold of the business and usages of society, and make use of them in its jurisprudence, it does so not so much by way of incorporating those usages into the law, or indeed making any change in the substance of the law itself, as by way of interpreting the acts and intentions of parties, and applying fixed principles to the ever changing concerns of human life; in all which respects, a code may and should be more liberal than the common law. Thus it is, that by the present code, not only are the particular anomalies rectified, which have just been mentioned, but by sections 801, 802, 809, 811 and 1829, the details of the law of contracts are made subordinate to the intentions of the parties, ascertained not by inexorable rules of legal construction, but by all the light which can be thrown upon them by law, usage, and surrounding circumstances, except in those few cases, where for reasons of public policy, an absolute rule has been established.

Section 1829, it will be seen, is in these words:—

"Except where it is otherwise declared, the provisions of the foregoing fifteen titles of this part in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, were ascertained in the manner prescribed by the chapter on

the *Interpretation of Contracts*, and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy."

The usages of society vary with its wants and its pursuits. The law refers to those usages because the parties contract with reference to them, and they must be taken into account when it considers what these parties ought to do and what they ought not to do. In this way, and in this alone, has the common law adapted itself to the exigencies of society, and in this respect the present code goes not only as far but farther than the common law.

Having thus considered the principal objections to the codification of the law, it should next be considered whether there are advantages in it. Assuming that it is possible to have a body of written law in a convenient form, and in scientific order, containing the materials and framed in the manner already described, what benefits will it confer? In the first place, it will enable the lawyer to dispense with a great number of the books which now encumber the shelves of his library. In the next place, it will thus save a vast amount of labour, now forced upon lawyers and judges, in searching through the reports, examining and collecting cases, and drawing inferences from the decisions, and so far facilitate the dispatch of business in the courts. In the third place, it will afford an opportunity for settling, by legislative enactment, many disputed questions, which the courts have never been able to settle. In the fourth place, it will enable the legislature to effect reforms in different branches of the law, which can only be effected by simultaneous and comprehensive legislation. Thus, for example, the closer assimilation of the law of real and personal property, and the changes in the relation of husband and wife, as to property, cannot be effected by any other means so wisely and safely, as by a general code. The making of a code involves a general revision of the law. It is, indeed, in this way alone that such a revision seems practicable. The occasion is thereby afforded to look at the law of the land as a whole, to lop off its excrescences, reconcile its contradictions, and make it uniform and harmonious. In the fifth place, the publication of a code will diffuse among the people a more general and accurate knowledge of their rights and duties, than can be obtained in any other manner. This is an object of great importance in all countries, but more especially in ours. If every person can have before him, in an authentic form, the laws which are to affect his property, and govern his conduct, he can have an additional guaranty of his rights, and a better acquaintance with his duties. Here more than any-

where else, all classes of citizens interfere in all the affairs of the State. They elect, directly, nearly all the officers who make, administer, or execute the laws. If in Holland, or in Germany, or France, a civil code has been found beneficial, much more is it likely to be beneficial to us.

So far as the choice lies between law, to be made by the legislature, and law to be made by the judiciary, there cannot be a doubt that whatever may be the determination elsewhere, the people of this state prefer that theirs shall be made by those whom they elect as legislators, rather than by those whose functionit is, according to the theory of the constitution, to administer the laws as they find them. Hence, the idea of a code has taken such hold of our people that they have made provision for it by their organic law.

Besides the changes to which attention was particularly directed in the preceding report, relating to the rights of married women, the adoption of children, and the assimilation of the laws of real and personal property, there are others, of less importance, which ought not to be overlooked. They will be found, with few exceptions, in the following sections:

30, 32, 89, 90, 97, 135, 136, 139, 151, 170, 176, 182, 243, 331, 390, 392, 394, 395, 396, 397, 398, 399, 422, 486, 621, 623, 625, 626, 627, 628, 629, 647, 673, 705, 709, 713, 717, 720, 723, 735, 741, 743, 755, 781, 785, 830, 831, 832, 833, 836, 862, 864, 886, 887, 924, 941, 943, 977, 990, 991, 992, 998, 1013, 1065, 1071, 1109, 1140, 1141, 1162, 1166, 1198, 1213, 1263, 1296, 1301, 1302, 1315, 1352, 1353, 1376, 1401, 1406, 1416, 1422, 1439, 1608, 1620, 1623, 1632, 1641, 1643, 1646, 1648, 1651, 1652, 1660, 1729, 1737, 1750, 1751, 1752, 1759, 1762, 1768, 1779, 1781, 1783, 1789, 1791, 1793, 1817, 1847, 1852, 1893, 1901, 1928, 1931, 1936, 1939, 1940.

It remains to take notice of what there is novel in the classification of the subjects treated in this code. The reasons for the changes in this respect are generally set forth in the notes. It will be observed that there has been some departure from the ordinary arrangement, resulting principally from the desire of the commissioners to confine each title to a single branch of a general subject, and not to permit the repetition of a principle once stated. In the first part of the third division, that which treats of obligations in general, many provisions are placed, particularly in respect to the extinction of obligations, which have generally been referred to contracts alone. The subject of bailments is not treated by itself, but under different titles, as deposit, loan, hiring, service, carriage, trust, agency and pledge. The matters usually treated under the title of

principal and agent, are here treated under service, trust and agency. The principles governing all confidential relations are brought together under the head of trust. In the title upon insurance, the general rules are collected into one chapter. Suretyship is treated under the title of guaranty. Mortgage, equally with pledge, is treated under the head of lien, an effort having been made to clear the law of mortgage from the confusions and contradictions which have been produced by the counter action of law and equity for so many years. And in treating of relief, compensatory, specific and preventive, the general principles which determine the measure of damages, and which fix the limits of specific and preventive remedies, are so arranged as to reflect upon and explain each other.

Faithfull and Head, Printers, 1a, Princes [illegible] Gate, Westminster.