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The First Half-Century of the California Civil Code

WE SHALL reach within the next few months the fiftieth anniversary of the adoption of the California Civil Code; and because this enactment was the first attempt on the part of an English-speaking community of considerable size to codify comprehensively the substantive common law, the result of our experience under it should be of interest to us, not merely as practitioners who consult it daily, but also as students of our juristic system. In the year following the enactment of the California codes, Justice Stephen J. Field described them as being "perfect in their analysis, admirable in their arrangement and furnishing a complete code of laws." On the other hand, Sir Frederick Pollock has said that the code was in his opinion, and in the opinion of most competent lawyers who had examined it, "about the worst piece of codification ever produced." Was Justice Field or Sir Frederick Pollock nearer the truth in their several characterizations of the code? How have the courts of California dealt with and interpreted this novel legislation? What relation does it bear to the general body of our law? Has it contributed anything of value to the development and rationale of our legal system? We should be prepared to answer these questions with some definiteness on the basis of our experience since 1872.

Usually codification has had for its chief purpose the unification of discordant elements in the law of a particular country; in France, in Napoleonic times, the reconciliation of the Roman law obtaining in the south with the customary law of the north; in the Germany of Frederick II, the assimilation of the customs and laws of the various parts of a greater Prussia; and in our own day, the commercial codes framed by the Commissioners on Uniform Laws have for their object the substitution of uniform

rules for the varying laws of the several states. But our code was born of no such impulse. The primary object of its chief author and advocate, David Dudley Field, was to restate in systematic and accessible form the common law as it had been modified to suit American conditions, to settle questions upon which disputes had arisen and to introduce such reforms as might seem necessary to make the legal system harmonious and free from anchronism.

Field began his agitation for the adoption of a Civil Code in the year 1839, when the nineteenth century legislative reform movement was at its height. The New York Revised Statutes which had remodeled the law of real property, were only ten years old. Other American states had followed its example by adopting legislation which abolished common-law rules that were considered to be out of harmony with American conditions. Livingston had recently completed his task of drafting and revising the codes of Louisiana. Meanwhile, in England, the same movement for legislative reform was in full swing, and the agitation of Bentham and his followers was bearing fruit. The English law of property was being transformed by the Wills Act and the Fines and Recoveries Act and similar legislation, and the complacent attitude of Blackstone and Eldon was definitely discredited. The French code had spread over the greater part of Europe and was about to penetrate the new republics of South America. Under such conditions it is not surprising that Field found a receptive attitude towards his suggestion of codification, and was able to secure the insertion in the New York constitution of 1846 of a provision calling for the reduction into a written and systematic code of the whole body of the law of the state.

One result of this constitutional provision was the first New York Code of Civil Procedure, which has been the model for the procedural system which has obtained in most American states since the Civil War period. The credit for this reform is due almost entirely to Field himself; nor should this credit be abated because of the lack of sympathy which many courts manifested towards his reform in administering the code, or because of the need of further change at the present time.

The proposed civil code did not meet with the same success. In 1850 a commission appointed by the New York legislature to draft a code of substantive law reported against the project. In 1857 a new commission was appointed, with Field as one of its

members. Critics of the civil code drafted by this commission have been too ready to assume that its work was hastily done. In fact, the final draft was not published until 1865, with the ninth report of the commission, and during the eight intervening years the draft had been submitted for suggestions of change to the judges, leading members of the bar and prominent men of business of the state of New York, and many important changes had been made. Unfortunately, however, the draftsmen themselves were busy lawyers who were unable to give to their task the study and attention which it deserved. When the draft civil code was presented by Field in 1865, the legislative reform movement had, to a large extent, spent its force, and for thirteen years the New York legislature took no action upon the proposal, in spite of Field's continuous activity in its behalf. In 1878 he persuaded the legislature to adopt the civil code, but the vigorous opposition of many of the leaders of the bar caused the governor to veto it. Field continued to urge its adoption, and it was not finally rejected in New York until 1887.

Meanwhile the prophet of American codification was not without honor in states other than his own. In 1865, the very year of the submission of the Field civil code, it was adopted by the legislature of Dakota Territory. The popularity of the code in a frontier community, and its lack of popularity in the older states of the east, is not surprising. A young state, without any local legal tradition, confronted with the problems of pioneer life, would naturally welcome a legislative summary of the experience of the eastern states in reconciling the rules of the English common law to American conditions. When the Field code was published, American law had just completed the period during which judges and text-writers, such as Kent and Story, had fixed the general principles of American private law. The Field code was an epitome of this reaction of a community still largely imbued with the frontier spirit to a system of law which had developed in an older civilization under different conditions. Since its drafting, it has been adopted, with minor changes, in five Western states: in North and South Dakota, in California in 1872, in Idaho in 1887, and in Montana in 1895.

The Civil Code as originally adopted in this state, was the Field draft code, with some changes to adapt it to previous California legislation. But it was found to contain many provisions which unnecessarily conflicted with the prior statutes and decisions

of the state, and in 1873 it was submitted for revision to a Board of Code Examiners, consisting of Stephen J. Field, Jackson Temple and John W. Dwinelle. This board, after calling for and receiving suggestions from California judges, lawyers, and business men, submitted an extensive series of amendments, which were adopted in 1874.

The enactment of the Civil Code presented a novel problem to the courts of California. Statutes dealing with governmental affairs and public law generally were familiar enough; statutes of a special nature, designed to correct particular abuses, had been frequently before them. But they had never had to do with a statute which purported to codify the common law of private rights. They might conceivably have treated the code as taking the place of all previous law and as furnishing by itself the sole guidance for all future decisions. This was the traditional French attitude towards the Code Napoleon, which the terms of that code attempted to impose. The code was considered to be the sole source of all rules of law. This theory involves the decision of every case by reference to the express provisions of the code; or, in case no controlling provision is found, then a rule is deduced by a purely logical process either from other provisions of the code, by analogy, or from the presumed intent of the legislature as disclosed by its arrangement, classification and legislative history; or, finally, if no controlling principle can be deduced from such a literal analysis of the code, then the case is to be determined by the judge's sense of natural justice, unhampered by any rules or principles. Upon this theory the traditional school of French jurists has built an elaborate system which, however, has been modified during the past century by two influences: first, by a partial recognition of the binding force of judicial decision, and secondly, by the rise of a school of jurists, under the leadership of Professor Gény, which insists that in the interpretation of the code the courts should not confine themselves to a system of purely logical deduction and analogy, but that, where the letter of the code does not control, the judge should be free to base his decision upon considerations of legislative policy, including prevailing custom and social needs. But whatever variations of the general theory happened to be in vogue, it has been agreed that the primary basis of the interpretation of any of the continental codes has been and still is the terms of the code itself. This we may refer to as the continental system of interpretation.

Of course, no one has seriously urged the adoption in California of the extreme view that the code is the exclusive source of our private law; for such a theory would fall to the ground as soon as any court decision was given effect as a precedent governing the application or interpretation of our code. But the question remained as to the extent to which the code was to supersede common-law principles as the foundation of the system of private rights which were to be recognized and enforced by the courts. This question first received careful consideration in a series of articles by Professor Pomeroy, published in the third and fourth volumes of the West Coast Reporter.[1] Pomeroy contended—and his view has now been adopted by California courts—that the continental theory of code interpretation was entirely inapplicable to a code such as ours and that the code must be treated as merely a supplement to the common-law system, altering its rules only to the extent that the intent to do so clearly appeared.

At the outset of his discussion, Pomeroy insisted that in order to avoid confusion and uncertainty some uniform rule for the interpretation of the Civil Code should be established and followed. He then proceeded to show, with a wealth of illustration, that the code departs from the terminology theretofore used by judges and text-writers in stating common-law doctrines, and substitutes new and unfamiliar expressions, which have no definitely settled legal meaning. Furthermore, the Civil Code, as he states, "does not embody the whole law concerning private relations, rights and duties; it is incomplete, imperfect and partial." It does not attempt to state the mass of special rules which constitute the body of our law; but it deals with each subject by the enactment of a few general and abstract definitions, followed sometimes by a few special rules, which in most cases were plainly introduced to settle some question upon which there had been a difference of opinion or conflict of authority. He proposed as the remedy for the difficult questions of construction resulting from the novel terminology and the incompleteness of the code, that "except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions,

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[1] 3 West Coast Reporter, 585, 657, 691, 717; 4 ibid., 1, 49, 109, 145.

statements of doctrines and rules contained in the code in complete conformity with the common-law definitions, doctrines and rules, and as to all the subordinate effects resulting from this interpretation."

The rule of interpretation thus expressed by Pomeroy is a statement, perhaps overemphatic, of the attitude which our appellate courts have generally adopted in considering various provisions of the code. In a case arising soon after Pomeroy's articles appeared, the Supreme Court referred to the code rules for the interpretation of wills as being a mere re-enactment of the rules already established by the courts.[2] Again, the code statement of the duty of lateral support seems to be entirely different from the common-law rule upon the subject; yet the courts held, in effect, that the common-law rules were not altered, except as to the obligation to give notice of an intended excavation. Examples could be multiplied indefinitely. Although sometimes decisions have been rendered which overlooked a pertinent provision of the code, yet in most cases the courts have without discussion of the proper method of interpretation, followed the rule proposed by Pomeroy.

This rule of interpretation was discussed and expressly adopted by the District Court of Appeal for the Third District in the case of Siminoff v. Goodman Bank, decided in 1912.[3] Plaintiff sued a bank for its failure to honor his check. The defendant bank contended that under the code rule, since the action was brought for breach of an obligation to pay money, the measure of damages must be the amount of the check with interest. Plaintiff, on the other hand, claimed that the common-law rule entitled him to all damages done to his business as the result of the dishonor of the check, and that he was not restricted to a recovery of its amount. After quoting from and approving the discussion of Pomeroy, the court held for the plaintiff, on the ground that although the literal terms of the code seemed to cover the case, they were not to be deemed as altering the common-law liability, because no such intent was clearly apparent from its terms.

The method of interpreting the code was discussed by the Supreme Court in a still more recent case, in which a surety claimed the right to be subrogated to his principal's claim of offset. The code section dealing with the surety's rights defined

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[2] Rosenberg v. Frank (1881) 58 Cal. 387, 404.
[3] (1912) 18 Cal. App. 5, 121 Pac. 933, Ann. Cas. 1917-C 628n.

these rights as including subrogation to the remedies of the creditor, but said nothing about his being subrogated to the equities or claims of the principal. But the court held that in view of the partial and incomplete character of the code, it was not to be interpreted as cutting off a right which had been established by courts of equity and had not been expressly abolished. In these cases the courts not only followed, but definitely announced as the basis of their decisions, a general theory in the interpretation of code provisions.[4]

But any method of interpretation should be a general guide rather than a fixed rule; and Pomeroy's theory is subject to some very definite qualifications. For instance, it is not applicable to the provisions of the code with regard to estates and future interests, which were taken by Field from the New York Revised Statutes of 1829. The purpose of this revision of the laws, as is clearly shown both by the comprehensiveness of its terms and the notes of the revisers, was to supersede completely the common-law system. The distinction between this and other parts of the code is recognized in the decisions dealing with the suspension of the power of alienation, which reject altogether the authority of cases from other states which enforce the common-law rule against perpetuities.[5] In discussing a case of this kind recently, Justice Sloane said: "For the very purpose of avoiding the subtleties and technicalities of the common law as to real property, there has been enacted into our Civil Code what appears to be intended as a complete scheme or system on the subject."[6] So it has been held that the Statute of Uses and the technical rules thereunder which still obtain in many states, although never expressly repealed, are no longer in force in California. Nor is this method of interpretation impaired by the recent New York decisions under almost identical provisions of the revised statutes, which hold that future estates must vest, as well as become alienable, within the statutory period; for these decisions are justifiable as having been based upon a legitimate interpretation of technical words used in stating the complete statutory scheme.

In the second place, Pomeroy's rule is not by its terms applicable where the code language shows a clear intent to depart from the common law. Sometimes it is a difficult question to determine whether or not this intent is shown, because mere incompleteness,

[4] Estate of Elizalde (1920) 182 Cal. 427, 188 Pac. 560.
[5] Blakeman v. Miller (1902) 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120.
[6] Strong v. Shatto (1919) 30 Cal. App. Dec. 903, 187 Pac. 159.

or even inaccuracy in stating the common-law rule, will not suffice. In deciding this question, the courts have given remarkable weight to the annotations of the Code Commissioners of California, which to a large extent are a repetition of the notes of Field himself. In his introduction to the draft Civil Code, Field stated the purpose of his notes as follows:

> "The reference 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 favorite idea of 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 illustrations."

A recent and striking example of the consideration accorded by our courts to the notes of the commissioners is the case of O'Hara v. Wattson,[7] where the Supreme Court was called upon to reconsider its holding that in suits for specific performance there must be substantial adequacy of consideration, as a condition of granting relief. It was claimed that the requirement of adequacy, as stated in the code, was no more than a partial and incomplete declaration of the equitable rule under which relief is denied only where the inadequacy is so great as to amount to evidence of fraud. But the court held that the contrary view, as stated by the Chancellor Kent in a New York decision, was adopted by the code; that upon this point the code was not declaratory of the general law and that this interpretation was "established beyond controversy" by the notes of the California Code Commissioners.

The commissioners' notes were again given controlling force in a recent case where a sub-lessee sued his immediate lessor for breach of the implied covenant of quiet enjoyment. The defendant contended that the common-law rule obtained; that under the common law there was no implied covenant of quiet enjoyment after the termination of the estate of the lessor; and that although section 1927 of the Code stated an unlimited liability, this was merely an imperfect and partial statement of the common-law rule. But the court said that "the notes of the commissioners who prepared the Civil Code indicate that the section was not intended to be a re-enactment of the common law, but that it was borrowed from the civil law," and it was held that a common-law

[7] (1916) 172 Cal. 525, 157 Pac. 608.

rule had been changed, and the liability of the lessor thereby enlarged.[8]

This section 1927 is only one example of the large drafts which Field made upon the French and Louisiana codes in the preparation of his draft. The whole arrangement of the code is surprisingly similar to that of the Code Napoleon. No lawyer imbued with the principles of the English common law would classify the subjects of Trusts and Agency under the law of obligations, rather than under that of Persons or Property; and yet Field followed in this and many other respects the civil law theory, to such an extent as to deprive the code of much of the capacity for stimulating legal progress which it might otherwise have had. But the contribution of the civil law is not confined to matters of classification. The chapters on accession to personal property and accretion to real property were taken almost literally from the French code. We had already adopted the community property system before the code; but the olographic will, the extinction of obligations by deposit in bank for the creditor, the validity of a written release without consideration, and many other specific rules, were deliberately adopted from the civil law. To these provisions the Pomeroy rule has of course no application. And it is interesting to notice that California is the only common-law state of the Union which has been subjected to all three influences which have tended to infuse civil law principles into the American common law; for although it shares with all the other states in the civil law contributions contained in the texts and opinions of Kent and Story, it shares only with the states of the southwest the effect of the Spanish and Mexican occupation and only with the Dakotas, Montana and Idaho, the civil law element in the Field codes.

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The question remains whether the effect of the code upon our law has been harmful or beneficial; and in this connection we may consider first the prophecies of evil which were so freely made while it was under consideration in New York. James C. Carter and his followers, who procured the rejection of the code in that state, based their opposition upon two grounds: first, that private law is incapable of conscious improvement by legislative action, and that it must develop through the enforcement of changing custom as recognized and carried into effect by the decisions

[8] Baranov v. Scudder (1918) 177 Cal. 458, 170 Pac. 1122.

of the courts; and secondly, that the adoption of a code unduly hampers the flexibility and elasticity of the common law. The first objection we may definitely reject. In spite of the huge volume of hastily prepared and ill-considered legislation, the experience of the past ten years will suffice to show that private law can be changed, and consciously and effectively changed, by legislative means. For instance, the common-law rules of contract have been altered in important respects by the Public Utilities Act. And the Workmen's Compensation Act has materially modified the common-law rule which makes liability dependent on fault, and has altered the law to make it conform to changed conditions in a manner that the courts, bound down by precedents and common-law principles, could not.

But the other objection of the opponents of codification is far more serious. The adoption of a code does unquestionably make for a less elastic system, because the very certainty which the code attempts to bring about is inconsistent with the adaptability and power of development which is one of the chief merits of the common-law system. But judicial precedents as well as legislative enactment may impede juristic progress and the extent to which a code impairs the development of the law depends to a large extent upon the character of the code and the spirit in which it is administered. In the case of our own code, we may safely venture the assertion that during the past fifty years it has not interfered with the growth of our law to any serious extent, and that the fears of the opponents of codification in this regard have proved to be without substantial justification. This peril has been largely avoided because the code deals almost exclusively with subjects as to which the rules of the common law had already been settled. It is a partial code, not only in the incompleteness of its rules, but also in the scope of its subject matter. It does not, for instance, mention the subject of rights in underground waters, and since its adoption the courts of California have developed a system of rules governing that subject in harmony with the physical conditions of the state and the needs of its people. It omits all reference to the regulation of public service as affecting the private rights of individuals, and the courts have been free to adjust claims based upon private contract with those based upon public service regulation under newer statutes without being hampered by code provisions. And so the courts have been free to develop, without any substantial code restrictions,

the rules which seemed to them to be sound and just, in the law of contributory negligence and last clear chance, of trade-marks and unfair competition, and in other rapidly developing fields of law. The conservatism of the framers of the code, in thus refraining from attempting to codify those parts of the law which were likely to be the subject of judicial adaptation to changing conditions, has protected us in large measure against the primary disadvantage of the code system.

The cases in which our courts since the adoption of the code have refused to follow a trend of authority in other states in support of some new development of common-law rules, are not usually based upon any code provision. The rejection of the doctrine announced in some decisions that an act otherwise lawful becomes an actionable wrong because of the presence of actual malice, had nothing to do with the provisions of the code. And although the holding in Boyson v. Thorn,[9] that the act of inducing another to break an existing contract with a third person is a tort only in the case of a contract of service, is justified, in the court's opinion, by a reference to the code provisions on the relation of master and servant, the contrary result could with equal propriety have been supported by other parts of the code, and in truth the court based its decision chiefly upon its view of the common-law rule and not upon the statutory declaration.

We have had another corrective of the danger of inelasticity in the very method of interpretation which I have already discussed. If a code provision not clearly indicating a contrary intent is to be deemed a re-enactment of the common-law rule, then it is a re-enactment of the common-law rule with a reasonable flexibility in its application to novel conditions. An instance of the value of this point of view occurred in a recent decision where one of the parties claimed an easement over the land of another for the maintenance of a reclamation system. His opponent resisted on the ground that the easement did not come within the specific enumeration of servitudes contained in the code. But the Supreme Court held that the easement was established, and said that "the ingenuity and foresight of the legislature would be taxed in vain to name and classify all the burdens which might be imposed on land"[10]—a declaration which not only repudiated a narrow and restrictive view of the code provision, but likewise

[9] (1893) 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.
[10] Jersey Farm Co. v. Atlanta Realty Co. (1912) 164 Cal. 412, 129 Pac. 593.

repudiated the narrow common-law view, as announced by some judges and writers, that the common law will not recognize any novel incidents to or burdens upon the ownership of land.

Notwithstanding the favorable view which I have stated of the effect of the code on the growth of case-made law, there are several instances in which the code has fastened upon the California of 1921, rules which can be justified only by the conditions which obtained and the traditions and legal ideas which were in vogue in the New York of 1850. What could be more unsuited to the day of large business enterprise than the rule of the code that contracts in restraint of trade, though made for a legitimate object and in connection with the sale of the good-will of a business, are not valid in so far as they extend beyond the confines of a particular city or county? The courts of other states have been able to deal adequately with this problem in the light of business growth, whereas our courts have been held down by the explicit provision of the code. Again, the code declares that a minor's appointment of an agent, or his contract made under eighteen years of age with regard to real property, is void; and this rule has caused our courts to refuse any effect whatever, by way of estoppel or otherwise, to a minor's misrepresentation of his age, although the courts of other states have had no difficulty in reaching the contrary and juster result.[11] A still more striking case is that of conditions in restraint of alienation. You will remember the recent decision to the effect that a condition forfeiting title in case of a transfer to a colored or Mongolian purchaser was utterly void, irrespective of the question of the reasonableness of the restraint, because the code forbade all restraints on alienation.[12] Yet a few months later the Supreme Court held that a provision which, instead of prohibiting a transfer, forbade only the taking of possession by one of another race, was entirely free from objection.[13] You may charge your land in perpetuity with a restriction upon the taking of possession by any class of persons, no matter how large, but you may not impose the slightest burden on the alienation of the title. If we had no code, the courts might have escaped this anomalous result. But when all is said and done, these are occasional instances of arbitrary and

[11] Lee v. Hibernia S. & L. Society (1918) 177 Cal. 656, 171 Pac. 677.

[12] Title Guarantee & Trust Co. v. Garrott (1919) 42 Cal. App. 152, 183 Pac. 470.

[13] Los Angeles Investment Co. v. Gary (1919) 181 Cal. 680, 186 Pac. 596, 9 A. L. R. 115.

unreasonable rules, which cannot be said to characterize the body of our law.

So much for criticism of the code; there remains to be said what can fairly be said in its favor. Dean Pound has recently stated that the legitimate purpose of a code is to furnish a people with the premises of a new juristic start. It can hardly be claimed that the Civil Code of California has performed its full function in this regard. The decisions of our courts are usually not based on the spirit of the code, or on any deduction of the presumed legislative intent with regard to the classification of the law or the solution of problems which had not been dealt with in common-law decisions. Occasionally the Supreme Court refers to the spirit of our legislation, as it did in holding that estates by the entireties do not exist in this state, because they conflict with this spirit.[14] But occasional references such as this can be duplicated in jurisdictions where there is no code whatever. The adoption of the rule of interpretation advocated by Pomeroy, while it has preserved our law from the dangers of too iron-clad rules, has also prevented us from realizing to the fullest extent this advantage of a re-statement of the law. The imperfections of the code itself are responsible in part for our loss of this advantage. A code which declares that real property is immovable property and then defines a leasehold interest as a chattel real; a code which uses the term "property" in the double sense of the rights of ownership and the subject-matter of those rights, can hardly furnish a comprehensive basis for a more accurate terminology nor for a more scientific classification of legal doctrine. The continental system of logical and analogical deduction, far from being the basis of judicial administration of the code, is practically unknown. The code has not done what could have been done in furnishing the basis for a new and sounder scheme of legal rights.

But it is not to be assumed that the code has been without value. It has done away with many a legal anachronism. Its practical convenience, the basis which it affords the legislature for drafting remedial legislation, the assistance which it has rendered in the settlement of controversies out of court—these benefits need not be dwelt upon. But beyond these more immediately practical considerations, the code has had, I believe—and I express the opinion with deference to those who may disagree—a profoundly beneficial effect upon the development of our local law

[14] Swan v. Walden (1909) 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118.

in two ways: first, by preserving us from an artificial system of legal reasoning, and secondly, by facilitating the elimination of unreasonable distinctions between rules of common law and equity.

Fifty years ago, when our Civil Code was adopted, the legislative reform movement of the early nineteenth century had, as I have already stated, about lost its force. The period which followed was characterized by an intensive study on the part of scholars and jurists of the historical phases of the law. The writings of Maine and Maitland, and the intensive study of English case-law in the university law schools, were reflected to a greater or less extent in the point of view of the better trained lawyers and judges. These historical students made contributions of the greatest value to our knowledge of the scope of common-law principles; but some of them were so carried away by the logical symmetry and historical continuity of the English common law that they lost sight of the necessity that it should conform to the life of the community which it was to regulate. The fact that a rule could be traced to the Year-books was for them sufficient reason for applying it to the United States at the end of the nineteenth century. The assignee's legal position as agent of the assiguor, rather than owner; the purely personal nature of the right of cestui que trust; and similar principles of the common law and equity became the bases upon which legal reasoning was artificially developed and legal problems actually solved. An instance of this attitude may be found in the opinion of the United States Supreme Court in the case of Hart v. Sansom,[15] a case which is now thoroughly discredited—which declares that a state has not the power to enter a valid decree quieting title against a non-resident served with publication, because an equity decree can operate only on the person. This tendency has been admirably described by Dean Pound of the Harvard Law School in his recent work, "The Spirit of the Common Law," as follows:

> "The exclusive reigu (of the historical school) in American juristic thought in the past fifty years brought out its worst side. For the historical school also worked a priori and gave us theories fully as absolute as those of the school of natural law. Each deduced from and tested existing doctrines by a fixed, arbitrary and unchangeable standard. When the historical jurists overthrew the premises of the philosophical school of the preceding century they preserved the method of their predecessors, merely substituting new premises. They were

[15] (1884) 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. Rep. 586.

> sure that universal principles of jurisprudence were not to be found by deduction from the nature of the abstract individual. But they did not doubt that there were such principles and they expected to find them through historical investigations. In the United States we carried this further than elsewhere. . . . Even now, on the whole, the basis of all deduction is the classical common law. No system of natural law was ever more absolute than this natural law upon historical premises. For other systems of natural law gave ideals developed from without. With us, under the dominion of the historical school, the sole critique of the law was to be found in the law itself."

Here in California we have been almost entirely free from the artificial emphasis on the historical phase of the law which Dean Pound describes; and our freedom from this influence has been due in no small measure to the influence of the Civil Code. It has been in force during the precise period when the historical school has been most powerful. Whatever may be its defects in completeness and phraseology, it represents an earnest attempt on the part of an American lawyer of large experience to state in terms of contemporary speech the common law developed in an American state before the historical school had had its day. This code, especially after its revision by judges who had dealt at first hand with the problems of a pioneer state, was not likely to express any extreme of historical pedantry. It has been on the desk of every California judge and lawyer for fifty years; and its constant use has done us a service in preserving us from the danger of dealing with the problems of today in the spirit of the concepts of centuries ago.

If the code had rendered no other service than this, it would surely have justified its existence. But in addition, it has facilitated the elimination of unreasonable distinctions between rules which were developed in courts of law and those developed in courts of equity. The dual nature of our substantive law is due to an historical accident, and no classification or restatement of our law can be successful until the problem of the reconciliation of law and equity has been faced and solved. The Field civil code dealt with this problem in a spirit far more advanced than did the case law of its time. The terms "legal" and "equitable" are studiously avoided in the statement of rules. There is little detailed re-enactment of principles which courts of equity had developed as guides for their discretion rather than as controlling rules. The specific relief granted by way of injunction or specific

performance is classified with the specified relief formerly obtained in ejectment or replevin, and equitable liens with legal liens.

The enactment of a code framed in this spirit has been followed by the development of a local law which is singular, as compared with that of other American states, in its freedom from unjustifiable distinctions with no better reason to support them than a former dual system of courts. The former distinction between the sort of fraud which justifies cancellation and the sort which furnishes a cause of action for damages has practically disappeared. Marketable title has the same meaning whether legal or equitable relief is sought. The code has enacted, as applicable to all contracts, the equitable rule that time is not of the essence unless so intended by the parties. The fiction by which the purchaser of real estate is in most states charged with the risk of loss before receiving his deed has been happily repudiated. And finally, we may call attention to the solution which we have reached, both by court decision and code amendment, of the questions involved in building restrictions and covenants enforceable in equity. Neither the American nor the English courts have answered this question in a manner to accord with any sound and consistent theory; but within the past few years an amendment to the code, fortified by a decision of remarkable brilliance of analysis, has broadened the rigidity of the narrow legal rule so that it conforms to the needs of business transactions, and has curbed the looseness of the equitable rule by a reasonable requirement of formality.[16] There still remain cases in which unreasonable distinctions between legal and equitable rights persist; a promise to make a gift of land, when followed by improvements, will still furnish the basis for an enforcement of the gift, although apparently no recovery can be had in damages for the breach of the promise; and it is still the rule that the vendor suing for the purchase price must or must not prove adequacy of consideration, according as the theory of his action is legal or equitable. And of course it can be said that the same process of amalgamation which I have described in this state may be observed, to some extent, in states which have no code. But when all is said and done, we may fairly claim that the California Civil Code has gone a long distance in rendering the content of our law, in this regard, more scientific and rational.

Jurists are agreed that a system of codified law requires

[16] Werner v. Graham (1919) 181 Cal. 174, 183 Pac. 945.

periodical and systematic revision of the code. The rapidly increasing number of reports has caused a demand for a classification and restatement of the law. If our civil code is to be revised, we shall have the opportunity of contributing to the achievement of this ideal. Fifty years' experience and fifty years' development of our social and industrial life will reveal many incongruities in the code which have not been removed by haphazard amendment; but a successful revision should be conservative in altering the actual content of the law. And if revision is to be attempted, the task should be committed to experts with ample leisure for the task of drafting and with ample opportunity of consulting representatives of the various elements of our people. Only upon these conditions should a remodeling of the code be undertaken.[17]

Writers who have discussed the Civil Code of California have usually emphasized its faults. Yet the fact remains that it has become a living part of our law, and in no jurisdiction where it has been enacted has its repeal been seriously advocated. And as it governs today the business and property interests of a commonwealth of three millions of souls, as it embodies a noble ambition to restate a great system of law, it stands as a fitting monument to the genius of one of the greatest of American jurists—David Dudley Field.

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[17] See the bibliography on the general subject of codification in Pound's Outlines of Lectures in Jurisprudence, third edition, 1920, pp. 99-104. See also Pollock's Indian Contract Act, preface to first edition, reprinted in subsequent editions; the various reports of the New York Commissioners of the Code, particularly the ninth report, 1865; Introduction to Proposed Civil Code of New York, 1865; Report of Stephen J. Field, Jackson Temple and John W. Dwinelle, Code Examiners, 1873, Appendix to Journal of Senate and Assembly, 20th session, reprinted by Melvin S. Dodge, 1916; John Norton Pomeroy, The True Method of Interpreting the Civil Code, 3 West Coast Reporter 585, 652, 691, 717; 4 West Coast Reporter 1, 49, 109, 145.

On the interpretation of the French Code, see, for a summary statement, Baudry Lacantinerie, *Précis de Droit Civil*, douzième édition par Pierre Binet, 1919, pp. 53-57; and for a more extended discussion, see Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*, seconde édition, 1919, passim.