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Li v. Yellow Cab Co.—A Belated and Inglorious Centennial of the California Civil Code

Izhak Englard[†]

In Li v. Yellow Cab Co. the Supreme Court of California, although recognizing that section 1714 of the Civil Code codified contributory negligence, nevertheless adopted a comparative negligence system for California. Professor Englard analyzes the confrontation between court and Code and concludes that Li represents the inevitable failure of the 19th-century attempt to codify the common law.

The centennial of the California Civil Code in 1972 passed virtually unnoticed. The utter lack of interest contrasts vividly with the intense emotions that accompanied the Code's enactment. Both the ecstatic praise and the gloomy predictions voiced in the past may surprise the modern reader. Yet the range of emotions clearly indicates that the people had a profound faith in the action of law and a genuine interest in legislation in the private law area. One cannot otherwise comprehend the contemporary panegyric on the California Code: if adopted in all the states it would "save our republic from ruin and decay,"¹ and "with a perfect system of codification . . . such as California has obtained, we might reasonably expect for the coming of that golden period yet hidden in the womb of time, when the universal law of 'Peace on Earth good will to man' shall govern"² Even the sincere apprehensions about codification, which according to one author drove the people to "Kearneyism and a half communistic Constitution,"³

[†] Associate Professor of Law, Hebrew University, Jerusalem, Israel; 1975-76 Visiting Professor of Law, U.S.C. Law Center, Ben Gurion Lectureship Series.

1. Russell, *California System of Codes*, 2 MICH. L.J. 279, 294 (1893).

2. *Id.* at 294-95. The author ends by quoting verses of the "happy poet" on the period when "white-robed innocence from heaven descend." But see the sobering reaction to Russell's view in Brown, *Mr. Justice Brown on Codification*, 28 AM. L. REV. 258 (1894).

3. Miller, *Destruction of our Natural Law by Codification* 8 (1882), cited in

convey a similar belief in the deep social impact of private law legislation.

Today one would hardly find hope for the salvation and redemption of mankind placed in law in general, much less codification in particular. No doubt the demise of romantic notions such as a popular law available to all⁴ and the diminishing influence of private law in the wake of burgeoning public law⁵ are partly responsible for the general disillusionment with codification in the private law field.⁶ A comprehensive analysis of the reasons underlying the disillusionment, however, lies outside the scope of this Article.

The total oblivion of the Civil Code's 100th anniversary reflects its actual position in California's legal system. Were it not for the coincidence of a California Supreme Court decision that appropriately dealt a mortal blow to the Code on its anniversary, even these few lines mentioning it would not have been written.

I

THE SUPREME COURT'S CONFRONTATION WITH THE CIVIL CODE

A. *The Common Law Trend Toward Comparative Negligence*

*Li v. Yellow Cab Co.*⁷ constitutes a landmark in California's legal history in more than one respect. It is to date the most significant judicial attempt to cope with the relationship between the Civil Code and the common law—a problem inherent in the entire 19th-century American codification movement.⁸ Of course the treatment of this

READINGS IN AMERICAN LEGAL HISTORY 523 (M. Howe ed. 1949) [hereinafter cited as READINGS]. The author refers to the enormous growth of the power of corporations under the California Code.

4. For an articulation of the notion of a popular code see D.D. FIELD, *The Codes of New York and Codification in General*, in 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 374, 377 (A. Sprague ed. 1884) [hereinafter cited as FIELD, SPEECHES]. The earlier work of Grimke, though staunchly supporting codification, raises incisive objections to the idea of a popular law. See T. Grimke, *An Oration on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code* (1827), in READINGS, *supra* note 3, at 444, 449. See also Holmes, *Codification and the Arrangement of the Law*, 5 AM. L. REV. 1, 3 (1870); cf. Comment, *The Influence of Bentham's Philosophy of Law on the Early Nineteenth Century Codification Movement in the United States*, 22 BUFF. L. REV. 253, 260-62 (1973).

5. For a general discussion see W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 375-441 *passim* (2d ed. 1972); cf. G. GILMORE, *THE DEATH OF CONTRACT* 102 (1974).

6. This Article is confined to private law; in the field of public law there seems to be confidence in the remedial effects of legislation and codification.

7. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

8. For a renewed discussion of the general problem, as exemplified in recent trends in codification, see Scarman, *Codification and Judge-Made Law: A Problem of Coexistence*, 42 IND. L.J. 355 (1967); Donald, *Codification in Common Law Systems*, 47 AUSTR. L.J. 160, 175-76 (1973) [hereinafter cited as Donald].

jurisprudential question is merely the byproduct of a case whose main point was the judicial adoption of comparative negligence. Notwithstanding the far-reaching practical effects of the decision, its novelty lies less in the merits of tort law reform than in jurisprudence—the construction and application of the Civil Code.

The path had already been blazed for judicial lawmaking in the field of tort liability. The traditional contributory negligence rule had not only been statutorily modified in many jurisdictions,⁹ but precedents had already been set for judicial intervention in two significant Illinois and Florida decisions. The first judicial attempt to introduce a comparative negligence rule, by an Illinois appellate court in 1967,¹⁰ eventually failed when its decision was reversed by the Illinois Supreme Court.¹¹ The majority opinion held that such a fundamental change should be made by the legislature and not by the courts.¹² Yet in spite of the reversal, a first example had been established by a court and as one commentator rightly pointed out, “[A]lthough its daring has been curbed by the decision of the Illinois Supreme Court the very fact of its decision has altered permanently the subtle equilibrium of forces which sets the pace of common law change.”¹³ The next step was accomplished in 1973 by the Florida Supreme Court,¹⁴ the first state supreme court to introduce comparative negligence by overruling its own longstanding rule of contributory negligence.¹⁵

Although the *Li* decision might be what the dissenting judges called an act of “judicial chauvinism,”¹⁶ it could hardly be considered an unpredictable event¹⁷ in the light of the two previous decisions, which certainly must have surprised some commentators.¹⁸ What was novel in

9. For a survey see V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (1974) [hereinafter cited as SCHWARTZ].

10. *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967).

11. *Maki v. Frelk*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

12. *Id.* at 196, 239 N.E.2d at 447.

13. *Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 891, 905 (1968) [hereinafter cited as *Comments*] (comment by H. Kalven); *cf. id.* at 906 (comment by R. Keeton).

14. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

15. On the various attempts made by the judiciary to adopt comparative negligence, see SCHWARTZ, *supra* note 9, at 17-27. Notable are the systems in Georgia and Tennessee. *See id.* at 18-19. *See also* Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304, 313-17, 326-33 (1950).

16. 13 Cal. 3d at 834, 532 P.2d at 1247, 119 Cal. Rptr. at 879 (Clark & McComb, JJ., dissenting).

17. *See* SCHWARTZ, *supra* note 9, at 27, where the California Supreme Court is singled out as the court most likely to follow the Florida example.

18. *See, e.g.,* P. MISHKIN & C. MORRIS, *ON LAW IN COURTS* 256 (1965) (footnote omitted):

Yet it seems clear that there is no substantial likelihood that any court will act today, as a matter of common law development, to substitute comparative

Li was the reasoning of the California court, which had to confront an explicit Civil Code provision. This Article is concerned with the unique California confrontation, rather than with the important practical implications of the new comparative negligence rule, a topic that already has been extensively treated.¹⁹

*B. The Court's Treatment of the Codification of
Contributory Negligence*

The central argument in *Li* revolved around section 1714 of the California Civil Code, which provides:

Everyone is responsible not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.²⁰

Two conflicting interpretations of the pertinent language were advanced. The first argued that section 1714 had codified the doctrine of contributory negligence, thus rendering the "all-or-nothing" rule invulnerable to attack in the courts except on constitutional grounds. Accordingly, any change in the law of contributory negligence must be made by the legislature, not by the courts.

The contrary argument interpreted the language of section 1714 as establishing in specific terms a rule of *comparative* negligence. The use of the compound conjunction "except so far as," it was argued, indicated a legislative intent to adopt a system other than one where contributory fault on the part of the plaintiff would operate to bar recovery. Since section 1714 introduced a rule of comparative negligence, no change in the law was necessary, only a judicial recognition of the original legislative intention that had been disregarded by previous decisions.²¹

Notwithstanding a difference in substance, both arguments raised issues involving the character, function, and proper mode of interpretation of the Civil Code. The court, after expounding its own views on these issues and employing an unusually lengthy discussion of the

negligence for an existing rule of contributory negligence in the general accident field. Indeed, lawyers will not even consider arguing this possibility to a court.

19. SCHWARTZ, *supra* note 9; Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice, The Supreme Court of California 1974-1975*, 64 CALIF. L. REV. 239 (1976); Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737 (1974).

20. CAL. CIV. CODE § 1714 (West 1970).

21. This argument was first voiced in Bodwell, *It's Been Comparative Negligence For Seventy-Nine Years*, 27 L.A. BAR BULL. 247, 267, 272-78 (1952); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 817, 532 P.2d 1226, 1235, 119 Cal. Rptr. 858, 867 (1975).

history of the Code and of section 1714, rejected both arguments as a basis for decision. The court resolved the problem by denying the existence of an original legislative intent to provide for a comparative negligence rule,²² and by affirming its own authority under the Code to take judicial action in *developing* the law *beyond* the provisions of the Code.²³ The court's approach can be likened to the strokes of a double-edged sword: while the razor-sharp blade of precise historical analysis prevented liberal use of the ambiguous wording of section 1714, the edge vindicating judicial creativity slashed the Code's adoption of a modified contributory negligence system.²⁴

This kind of ambivalent judicial activity has its own fascination, posing a problem involving the psychology of the judicial process. Why did the opinion so painstakingly elaborate the assumed original intention of the legislature if the court nevertheless had decided to depart from that very intention?

It is unlikely that the court felt a need to assert the power of judicial lawmaking merely to sustain its reputation as a progressive court. A more plausible explanation lies in the tradition of common law judicial process. The court probably felt uncomfortable about using the liberal construction device and considered it more honest to admit openly that they were pursuing a course of judicial lawmaking. This candor is well in the line of what Llewellyn called the "Grand Style" of the common law tradition.²⁵ Yet despite the frankness of the opinion, the inherent ambiguity of the court's function remains. Even assuming that the "Grand Style" is part and parcel of the common law,²⁶ the question remains whether it has a proper place within the framework of a civil code.²⁷

22. 13 Cal. 3d at 813-23, 532 P.2d at 1232-39, 119 Cal. Rptr. at 864-81.

23. *Id.*

24. The court concluded its analysis of legislative intent by noting, "[T]he intention of the Legislature in enacting section 1714 of the Civil Code was to state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance." *Id.* at 821, 532 P.2d at 1238, 119 Cal. Rptr. at 870.

25. See W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 227-29 (1973) [hereinafter cited as TWINING]. Leflar was another proponent of judicial action and invoked Llewellyn's notion of the "grand style of the Common Law" in his comment on *Maki v. Frelk*. *Comments, supra* note 13, at 929.

26. This statement should be confined to the specific context of openly acknowledged judicial lawmaking. Llewellyn's concept of judicial styles is much broader. In his major work, K. LLEWELLYN, *THE COMMON LAW TRADITION* 35-45 (1960), the Grand Style and the Formal Style are analyzed, both historically represented in the common law, albeit, in his opinion, at different periods. Furthermore, Llewellyn recognized an emerging modern style and a possible mixture of styles. See K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 187-89 (1962). For a good schematic description of Grand Style and Formal Style as theoretical models, and a pertinent critique of Llewellyn's analysis, see TWINING, *supra* note 25, at 210-15.

27. Again, for purposes of this Article, the question is limited to one context:

The propriety of judicial lawmaking raises issues going to the root of the codification idea, issues that bedeviled the 19th-century codification movement from its beginning. The problem was articulated in various concepts like "flexibility of common law vs. rigidity of code" or the general relationship between common law and code.²⁸

II

THE RELATIONSHIP BETWEEN THE CIVIL CODE AND THE COMMON LAW

The problem of the Civil Code's relationship to the common law received special attention in *Li*. The codifiers, who were much troubled by the problem, tried to solve it by inserting sections 4 and 5 in the Code. Yet the *Li* court all but ignored the historical sources and made no serious attempt to gather the original legislative intent of sections 4 and 5. The court's insouciance for historical accuracy here contrasts vividly with its thoroughness in dealing with the crucial proviso of section 1714.²⁹ Rather, the court acquiesced, without further inquiry, to the views of Professor Pomeroy,³⁰ who hardly was a great partisan of

the California Civil Code. Llewellyn himself, the master architect of the Uniform Commercial Code, clearly believed in the possibility of a general positive answer. He naturally assumed an appropriately drafted code. "The [Uniform Commercial] Code was drafted in the expectation that it would be interpreted by common law trained lawyers and judges and in the hope that they would adopt 'the Grand Style' in their approach to it." TWINING, *supra* note 25, at 312. On Llewellyn's ideas on codification in general see *id.* at 307-13. More to the point are Llewellyn's critical remarks on Field's codificatory work. JURISPRUDENCE, *supra* note 26, at 187-88. One can only speculate about Llewellyn's possible reaction to similar judicial lawmaking in derogation of an explicit statutory section in the framework of the Uniform Commercial Code. Cf. UNIFORM COMMERCIAL CODE §§ 1-102(1)-(2).

28. The argument was a central point in the protracted polemic on codification between Carter and Field. See J. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW (1884) [hereinafter cited as CARTER (1884)]; Carter, *The Province of the Written and the Unwritten Law*, 24 AM. L. REV. 1 (1890); FIELD, SPEECHES, *supra* note 4, at 330-36, 347, 353-55, 366-70, 378-80; cf. D.D. FIELD, *Codification Once More*, in 3 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 411 (T. Coan ed. 1890) [hereinafter cited as FIELD, *Codification*]. See also C. LINDLEY, CALIFORNIA CODE COMMENTARIES 12-15 (1872) [hereinafter cited as LINDLEY]. On the Carter-Field controversy see E. PATTERSON, JURISPRUDENCE § 4.33 (1953); Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 17, 46-48 (A. Reppy ed. 1949). For a broader discussion of the 19th-century codification movement, see Fisch, *Civil Code: Notes for a Uncelebrated Centennial*, 43 N.D.L. REV. 485, 487-99 (1967); Fisch, *The Dakota Civil Code: More Notes for an Uncelebrated Centennial*, 45 N.D.L. REV. 9 (1968) [hereinafter cited as Fisch]; Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2 ST. LOUIS U.L.J. 335 (1953); cf. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938); Smith, *The First Codification of the Substantive Common Law*, 4 TUL. L. REV. 178 (1930).

29. See text accompanying notes 113-15 *infra*.

30. 13 Cal. 3d at 815, 532 P.2d at 1234, 119 Cal. Rptr. at 866. Pomeroy expounded his views in a series of articles under the same title. Pomeroy, *The True*

the idea of codification in general³¹ and certainly made no secret of his genuine dislike of the California Civil Code in particular.³² More specifically, the opinion accepted Pomeroy's basic contention that courts should regard the Code as primarily a declaration and enactment of common law rules. As a result, given the incomplete and partial character of the Code, its sections were to be construed in light of common law decisions on the same subject.³³ In support of Pomeroy's view, the court relied on its own 1920 precedent in *Estate of Elizalde*.³⁴

Method of Interpreting the Civil Code, 3 WEST COAST REP. 585, 657, 691, 717 (1884) [hereinafter cited as Pomeroy 3]; 4 WEST COAST REP. 1, 49, 109, 145 (1884) [herein after cited as Pomeroy 4].

31. See his praise of the "peculiar excellencies" of the common law and his apprehension over losing them by codification. Pomeroy 4, *supra* note 30, at 110-13. His attitude toward codification was one more of resignation: "It is, perhaps, inevitable that the system of codifying the private civil jurisprudence, the common law and equity—shall finally prevail in this country and in England." *Id.* at 114. Pomeroy's hope was that the ideal code would retain the qualities of the common law. One can therefore scarcely agree with Field's contention, in his reply to Carter, that Pomeroy was a most pronounced advocate of the codification of private law. FIELD, *Codification*, *supra* note 28, at 421.

32. His series of articles, Pomeroy 3 and 4, *supra* note 30, are replete with sweeping deprecation. The whole Civil Code is taxed over and over again as uncertain, ambiguous, imperfect, obscure, defective, inaccurate, and apt to create confusion. There is no doubt that many of his critical remarks concerning specific sections are justified but much of his criticism was based on a mistaken view of the nature of codification. See Fisch, *supra* note 28, at 29-30, who correctly remarks that Pomeroy tended greatly to overstate his case in pointing out provisions of the Code that would need judicial interpretation, a need which only the Code's opponents supposed was intended to be obviated. Fisch recognized the internal contradiction in Pomeroy's criticism that the Code's style was on the one hand too technical and on the other too simple and concise. *Id.* at 31. Pomeroy revealed his inadequate acquaintance with codification by likening the style of Anglo-Indian codes to the French codes. Pomeroy 3, *supra* note 30, at 658. For his view on the ideal code see Pomeroy 4, *supra* note 30, at 151.

33. Typically, Pomeroy did not base his contention on any particular provisions of the Code. He never even mentioned sections 4 and 5, which provide a basis for the Code's construction. His main argument was that, given the basic defects of the Code and the impracticability of a complete revision and reconstruction, the only possible way to remove the defects is through a uniform method of judicial interpretation. Pomeroy 4, *supra* note 30, at 5-6, 149-50. Only once did he rely on the supposed design of the codifiers, stating that "the authors of the code were, in reality, to be compilers, rather than creators of law." *Id.* at 114.

34. 182 Cal. 427, 433, 188 P. 560, 562 (1920). The decision paraphrased Pomeroy's view without mentioning his name, but it did rely on *Siminoff v. Goodman & Co. Bank*, 18 Cal. App. 5, 11, 121 P. 939, 941 (1912), where the court extensively quoted from Professor Pomeroy's "illuminating article." The importance and impact of Pomeroy's series of articles on the canons of interpretation have been considerably exaggerated. Contrary to the court's opinion in *Li*, 13 Cal. 3d at 815, 532 P.2d at 1234, 119 Cal. Rptr. at 866, the articles did not solve the inherent problem of the Code's interpretation, which is, as will be seen, insoluble. Pomeroy's articles, more likely, merely enhanced the already existent and unavoidable tendency to integrate the Code into the common law. Fisch was therefore incorrect in defining Pomeroy's attack on the Code as "the most significant single event in the history of the Code in California." Fisch, *supra* note 28, at 29; cf. Van Alstyne, *The California Civil Code*, in CAL. CIV.

Only after discussing Pomeroy's thesis did the court, in referring to Civil Code sections 4 and 5, state: "In addition, the code itself provides explicit guidance as to how such construction shall proceed."³⁵ Relying heavily on an article written by Professor Van Alstyne,³⁶ the court concluded that analysis of the Civil Code as a continuation of the common law "imbued it with admirable flexibility from the standpoint of adaptation to changing circumstances and conditions."³⁷ The two sections provide as follows:

4. RULES OF CONSTRUCTION. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.³⁸

5. PROVISIONS SIMILAR TO EXISTING LAWS, HOW CONSTRUED. The provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.³⁹

Since the rules of construction contained in these two provisions are contradictory, it is difficult to understand the *Li* court's assertion that they provide "explicit guidance."⁴⁰ Indeed, it is difficult to reconcile the establishment clause of section 4 and its liberal construction rule with the continuation of common law concept in section 5.⁴¹

The ambiguity is further compounded by two other sections of the Code that bear upon the basic problem, but were unmentioned in *Li* and have been ignored by most writers. The first section provides, as pertinent:

20. EFFECT OF REPEAL. No statute, law, or rule is continued in force because it is consistent with the provisions of this Code on

CODE ANN. 36 (West 1954) [hereinafter cited as Van Alstyne]. For Fisch's own description of the similar Dakota experience see Fisch, *supra* note 28, at 41-44. Pomeroy's articles, however, were used in the New York dispute over adoption of Field's Civil Code. Cf. J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 308-09 (1907). For further analysis of Pomeroy's attack on the Civil Code, see Harrison, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 189-93 (1922); A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 120 n.45 (1971) [hereinafter cited as EHRENZWEIG].

35. 13 Cal. 3d at 815, 532 P.2d at 1234, 119 Cal. Rptr. at 866.

36. Van Alstyne, *supra* note 34, at 29-37.

37. 13 Cal. 3d at 816, 532 P.2d at 1234, 119 Cal. Rptr. at 866. On the problem of flexibility see notes 78-81 *infra* and accompanying text.

38. CAL. CIV. CODE § 4 (West 1970).

39. CAL. CIV. CODE § 5 (West 1970).

40. 13 Cal. 3d at 815, 532 P.2d at 1234, 119 Cal. Rptr. at 866.

41. Van Alstyne himself, who follows Pomeroy in principle, admits, by way of understatement, that "the Civil Code itself was somewhat equivocal as to its relationship to the common law." Van Alstyne, *supra* note 34, at 31.

the same subject; but in all cases provided for by this Code, all statutes, laws, and rules heretofore in force in this State, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated.⁴²

The other provision, originally codified in the Political Code of 1872,⁴³ is of a more general import:

22.2 The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.⁴⁴

Given the completely different historical context of the latter two sections, any attempt to harmonize them in order to solve the basic problem of the relationship between the Code and the common law seems hopeless. In *Estate of Sloan*,⁴⁵ apparently the only case that dealt with *all* the relevant sections,⁴⁶ the court became so entangled in the contradictory provisions that it could only extricate itself by concluding ("a paradoxical situation"⁴⁷) that section 20 did not repeal "consistent" common law.⁴⁸

There can be no doubt that the codifiers themselves tried to solve the problem by means of sections 4 and 5 of the Code.⁴⁹ This Article will therefore examine sections 4 and 5 as they pertain to the court's analysis in *Li*. The legislative history conveys the deep ambivalence that pervaded the whole work of the codifiers.

III

THE HISTORY OF THE CIVIL CODE

An examination of the legal history of the California Civil Code should begin with Field's Civil Code of New York, which served as the basis for the California Code Commission.⁵⁰ Field's Civil Code draft

42. CAL. CIV. CODE § 20 (West 1970). Section 20 was intended to resolve the problem of the Code's effect on prior law. See the similar provision in CAL. CODE CIV. PRO. § 18 (West 1967).

43. CAL. POL. CODE § 4468 (1872); the section was transferred to the Civil Code in 1951. Ch. 655, § 1, [1951] Cal. Stat. 1833. It was first enacted to replace the Mexican-Spanish law. See Van Alstyne, *supra* note 34, at 3.

44. CAL. CIV. CODE § 22.2 (West 1970).

45. 7 Cal. App. 2d 319, 46 P.2d 1007 (2d Dist. 1935).

46. In *Estate of Elizalde*, 182 Cal. 427, 433, 188 P. 560, 562 (1920), the court mentions CAL. POL. CODE § 4468 (now CAL. CIV. CODE § 22.2), but not section 20 of the Civil Code.

47. 7 Cal. App. 2d at 330, 46 P.2d at 1012.

48. *Id.*

49. Cf. CAL. CIV. CODE §§ 23.2-6 (West 1970) (originally codified as CAL. POL. CODE §§ 4480-84 (1872)), setting forth rules dealing with conflicting provisions in the 1872 Codes.

50. CALIFORNIA CODE COMMISSION, REVISED LAWS OF THE STATE OF CALIFORNIA;

fueled a nationwide, heated, and often bitter dispute over codification, a dispute that lasted for decades.⁵¹ Although the opponents of codification had in common a deference to their "Lady the Common Law,"⁵² the opposite was not true for the codification partisans. Very few felt a genuine distaste for the substance of common law;⁵³ most proponents intended codification to be an improvement of the common law tradition. Field's fundamental idea was to codify the common law and he believed there to be no inevitable contradiction between code and common law.⁵⁴ In his civil code draft⁵⁵ he attempted to resolve the problem by including three rules of construction:⁵⁶

IN FOUR CODES: CIVIL CODE, iv-v (1871), *as amended*, An Act to Establish a Civil Code [Approved March 21, 1872] (now CAL. CIV. CODE (West 1970)); Parma, *The History of the Adoption of the Codes of California*, 22 LAW LIBRARY J. 8, 15-17 (1929); Harrison, *supra* note 34, at 187-88.

51. See note 28 *supra*; THE ARGUMENTS OF THE HONORABLE W.D. SHIPMAN AND F.R. COUDRET BEFORE THE JUDICIARY COMMITTEE OF THE SENATE OF THE STATE OF NEW YORK AGAINST THE ADOPTION OF THE CIVIL CODE (I. Strong ed. 1881) [hereinafter cited as ARGUMENTS]; A. MATHEWS, THOUGHTS ON CODIFICATION—THE COMMON LAW (1881); R. FOWLER, CODIFICATION IN THE STATE OF NEW YORK (1884). The polemic between Carter and Field even assumed a personal character, conveying the deep animosity between the two personalities. See CARTER (1884), *supra* note 28, at 11-12. On Field's personality, see H. FIELD, LIFE OF DAVID DUDLEY FIELD (1898); Fiero, *David Dudley Field and his Work*, 51 ALB. L.J. 39 (1895).

52. The personification of the common law with a religiously tainted metaphor comes from F. POLLOCK, THE GENIUS OF THE COMMON LAW 1-13 *passim* (1912); cf. CARDOZO, *Our Lady of the Common Law*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 87 (M. Hall ed. 1947).

53. Hostility to the common law was openly expressed in Sampson, *An Anniversary Discourse* (1824), in READINGS, *supra* note 3, at 30-36, and in Rantoul, *Oration at Scituate* (1836), in *id.* at 472, 475: "The common law is the perfection of human reason—just as alcohol is the perfection of sugar. The subtle spirit of the common law is reason double distilled, till what was wholesome and nutritive becomes rank poison." See also Comment, *Influence of Bentham's Philosophy*, *supra* note 4, at 256-60, 262-67.

54. "We wanted no revision of the statutes. What we wanted was a codification of the common law." FIELD, SPEECHES, *supra* note 4, at 307. See Reppy, *supra* note 28, at 30:

As Fields [sic] was not an iconoclast, or a destroyer of past traditions, as he had no desire to destroy the common law, but to preserve it by eliminating its defects and rendering it into language understandable to the people as well as the Bench and Bar, he naturally chose the historical approach, which merely involved the restatement of the existing law, cutting off its excrescences, amending it to meet modern conditions . . ."

Although Reppy correctly describes Field's general attitude toward the common law, the reality of a choice between a "philosophical" and "historical" method of codification is doubtful. *Id.* at 29, relying on M. LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA (1924). Field was simply not aware of any special methodological problem. He intended merely to codify the common law according to the continental pattern. See text accompanying notes 62-66 *infra*.

55. COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK (1865).

56. Referring to the three provisions, Field simply stated:

[I]f there be any rule of the common law not mentioned in the Code, it will

In this state there is no common law in any case where the law is declared by the five CODES.⁵⁷

The rule that statutes in derogation of the common law are to be strictly construed has no application to this Code.⁵⁸

All statutes, laws and rules heretofore in force in this state, inconsistent with the provisions of this Code, are hereby repealed or abrogated⁵⁹

Field apparently was unaware of the ideologically different function codes perform in civil law codification.⁶⁰ The difference of ideology could not be bridged by a mere adaptation of outer form.⁶¹ Both in theory and in practice a code is crucially affected by the existence or nonexistence of a common law beside it.⁶² Field's plan to codify common law according to the civil law pattern was basically unattainable. Given the profound differences in legal technique,⁶³ a formal combination of the two systems was bound to create insuperable problems of application.⁶⁴ An irreconcilable conflict exists between section

continue to exist as it was before; while if a new case arises, not foreseen and therefore not provided for, it will be decided, as it would now be decided, by analogy to a rule expressed in the Code, or to a rule omitted, and therefore still existing outside of the Code, or by the dictates of natural justice.

FIELD, SPEECHES, *supra* note 4, at 347. See also *id.* at 329.

57. COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 6 (1865).

58. *Id.* § 2032.

59. *Id.* § 2033. There are two versions of section 2033 in the Field Code, the one quoted in the text being the first in time. The second version reads: "All statutes, laws and rules heretofore in force in this state, inconsistent with the provisions of this Code, or repeated or reenacted herein, are hereby repealed or abrogated. . . ." Cf. Fisch, *supra* note 28, at 28; ARGUMENTS, *supra* note 51, at 125. On the existence of two versions see note 116 *infra*.

60. On the difference of ideology see J. MERRYMAN, THE CIVIL LAW TRADITION 27-34 (1969). The author stresses the civil law ideas of sharp separation of powers ("It is the function of the legislator to make law, and the judge must be prevented from doing so," *id.* at 33), and the rejection of the past by abolishing all prior law. For a somewhat different approach see F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 45-90 (1953).

61. See J. MERRYMAN, *supra* note 60, at 33:

An entirely different set of ideals and assumptions is associated with the California Civil Code, or with the Uniform Commercial Code as adopted in any American jurisdiction. Even though such codes may look very much like a French or a German Code, they are not based on the same ideology, and they do not express anything like the same cultural reality.

62. See Bayitch, *Codification in Modern Times*, in CIVIL LAW IN THE MODERN WORLD 161, 184-88 (A. Yiannopoulos ed. 1965) [hereinafter cited as Bayitch]; R. SCHLESINGER, COMPARATIVE LAW, CASES—TEXT—MATERIALS 237 (1970); cf. EHRENZWEIG, *supra* note 34, at § 101.

63. On the principal differences between common law and civil law, see the admirable discussion in EHRENZWEIG, *supra* note 34, at §§ 87-120, where the author mentions the factors of systematization and scholarship, legislative process, and judicial law making. See also F. LAWSON, *supra* note 60.

64. For a discussion of the different meanings and methods of codification see Bayitch, *supra* note 62, and his extensive bibliography.

6 of Field's draft and Field's own interpretation of section 2033.⁶⁵ The maintenance of common law rules alongside the Code resulted in the Code's own loss of identity because it necessarily became immersed in the sea of common law.⁶⁶

The California Code Commission that undertook the task of preparing the local codification was apparently more cognizant of the inherent problem. In the first draft, published in 1871,⁶⁷ the Commission essentially adopted sections 6, 2032, and 2033 of Field's Code,⁶⁸ but they recognized the three construction rules as insufficient to solve the problem. They proposed to add new sections 3549-54 in order to clarify the issue.⁶⁹ After further examination of the issues, a second draft was presented to the legislature.⁷⁰ The original contribution of

65. See note 56 *supra*.

66. Cf. Bayitch, *supra* note 62, at 185.

67. CALIFORNIA CODE COMMISSION, REVISED LAWS OF THE STATE OF CALIFORNIA; IN FOUR CODES: CIVIL CODE (1871).

68. *Id.* §§ 7, 3552, 3591.

69. The proposed sections were originally drafted as follows:

SEC. 3549. This Code and the Common Law are but parts of one system, differing only in their mode of adoption.

SEC. 3350. The declaration or expression of a Common Law rule or principle in this Code does not enlarge, limit or change its effect, except so far as such rule or principle is changed by the terms of the Code. It still bears the same relation to the body of the Common Law as it did before the adoption of the Code.

SEC. 3551. The expression in this Code of a general Common Law Rule upon a subject does not, by implication, change or abrogate subordinate rules pertaining to the same subject; nor does the expression of a portion of the subordinate rules abrogate or change, by implication, other subordinate rules not expressed in Code form.

SEC. 3553. The provisions of this Code, so far as they are substantially the same as existing statutes, or Common Law, must be construed as continuations thereof, and not as new enactments.

SEC. 3554. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

Id. §§ 3549-54.

The Commission's notes accompanying the draft are most instructive. Sections 3549, 3550, and 3551 are described as "New Sections." Section 3553 is said to be taken from the Revised Laws of Massachusetts of 1858, but "The words 'or Common Law' are new, and inserted to correspond with the theory of the four preceding sections." To section 3554 the note goes: "It is very difficult to properly clothe the ideas sought to be expressed in the five preceding sections. These sections need to be considered in connection with Sec. 7 of this Code [corresponding to section 6 of Field's draft, quoted in text accompanying note 57 *supra*]. They want a *new* judgment from a *new* standpoint—the judgment of an Examining Board; perhaps should be transferred to follow Sec. 7, or to supersede it. Sec. 3553 is of doubtful propriety, though drawn from high authority."

70. The date and form of its publication is not clear since it was found cut and patched into the original draft. Inserted immediately before page seven is a cut leaf page with the following passage:

The bill relative to the Civil Code, prepared and to be presented to the Legislature for its action, differs from the printed volume in the following respects:

Note.—Part V of the Civil Code, and all preceding Part I are omitted.

the final Draft Committee appears to be the second sentence of present section 4: "The Code establishes the law of this State respecting the subjects to which it relates"⁷¹ This sentence replaced the former section 7 (section 6 of Field's Civil Code⁷²).

The legislative history reveals significant facts about the codifiers' perplexity. But the truth is that the final version of the construction rules is no more apt to resolve the inherent conflict of the Code's relationship to the common law than was Field's original text. The ambiguities in the text remain. Even knowledge of the preparatory drafts does not contribute much to a resolution of the problem. There is no doubt that the first draft demonstrated a tendency to downgrade the Code's independent position in relation to the common law.⁷³ The omission in the final Code of the new and extreme provisions of sections 3549-51, however, indicates a rejection of this limiting concept, and section 4 in its entirety clearly conveys the idea of the Code's autonomous position. On the other hand, section 5's emphasis of the continuation of prior law creates a basis for the opposite proposition. Thus, the basic contradiction between the ideas of "establishment"⁷⁴ and "continuation" is unresolved in the revised draft.⁷⁵

In place thereof the sections following from 1 to 22, inclusive, are inserted immediately preceding Division I. The provisions of the omitted parts relative to law and common law are, in a different form, inserted in Part V of the Political Codes, and made applicable to the four Codes.

On the last cut leaf page (57-58) immediately following page 590 it says:

Note.—The printed volume and these amendments represent the Civil Code as adopted by the Commission. . . . [signed] Commissioners, Sacramento, December 25th, 1871." CALIFORNIA CODE COMMISSION, REVISED LAWS OF THE STATE OF CALIFORNIA; IN FOUR CODES: CIVIL CODE (1871).

The draft is available at the Law Center Library of the University of Southern California. Cf. Van Alstyne, *supra* note 34, at 7-8.

The second draft omitted sections 3549-51; preserved sections 3552 and 3554 in present section 4; embodied section 3553 in present section 5; and adopted section 3591 (corresponding to section 2033 of Field's Civil Code) in a form essentially identical to present section 20. See text accompanying note 42.

71. CAL. CIV. CODE § 4 (West 1970).

72. "In this state there is no common law in any case where the law is declared by the five CODES." COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 6 (1865).

73. "The sharp lines between statute law and the Common Law, remaining unexpressed in Code form, are toned down." CALIFORNIA CODE COMMISSION, REVISED LAWS OF THE STATE OF CALIFORNIA; IN FOUR CODES: CIVIL CODE iv (1871). This tendency may explain the peculiar choice of title for the publication. Cf. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766, 774 (1954) [hereinafter cited as Kleps].

74. "The Code establishes the law of this State respecting the subjects to which it relates" CAL. CIV. CODE § 4 (West 1970).

75. For a discussion of the problem in connection with the recent codificatory trends in England, see Scarman, *supra* note 8, at 358-60; Donald, *supra* note 8, at 175-76; Chloros, *Principle, Reason and Policy in the Development of European Law*, 17 INT'L & COMP. L.Q. 849, 863-64 (1968).

It would be helpful to know the exact views of the members of the last Commission, but unfortunately no records of their deliberations are available.⁷⁶ The Commissioners' notes, however, published after the enactment of the Code, give some indication of their general views.⁷⁷ For example, the note to section 4, which explains the reason for rejecting the common law rule of strict statutory construction, clearly reflects the then widespread controversy concerning codification. One of the main arguments voiced against codification was that the assumed flexibility of common law would be lost.⁷⁸ The supporters of codification apparently recognized some merit in this contention and sought to overcome it by eliminating strict statutory construction, to remedy the supposed inflexibility of statutory law. Accordingly, the comment to section 4 stated that the provisions of a codified system "ought to be construed in the same manner, and with like force and effect, as they would be were the principles enunciated resting in the unwritten law, and it was to this end that the section has been made part of each of the Codes."⁷⁹ This proviso again reveals the codifiers' striving for a *codified common law*, which is basically an antithetical notion.

The substance of the heated discussion over the flexibility of codified law appears today to be completely off the mark.⁸⁰ It is not the feature of adaptability that distinguishes the common law from codified law.⁸¹ At the time of codification it was merely the long historical

76. An application to the California State Archives proved unsuccessful. The lack of official historical material calls to mind de Tocqueville's remarks on administrative instability in the early 19th-century United States:

[N]o one cares for what occurred before his time: no methodical system is pursued, no archives are formed, and no documents are brought together, when it would be very easy to do so. Where they exist, little store is set upon them. I have among my papers several original public documents which were given to me in the public offices in answer to some of my inquiries. In America society seems to live from hand to mouth, like an army in the field.

A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 211-12 (P. Bradley ed. 1951).

77. *THE CIVIL CODE OF THE STATE OF CALIFORNIA*, annot. by Haymond & Burch (1874).

78. See text accompanying note 28 *supra*.

79. *THE CIVIL CODE OF THE STATE OF CALIFORNIA*, § 4 *note in fine*, annot. by Haymond & Burch (1874).

80. Cf. Fisch, *supra* note 28, at 23.

81. This point was made in LINDLEY, *supra* note 28, at 12-15, but the author used logical arguments rather than a comparative study. For a comparative analysis see EHRENZWEIG, *supra* note 34, at 132: "Common law 'dialectics' which plays between the ratio decidendi and the mere dictum, between binding and merely persuasive authority, is neither more nor less flexible or arbitrary, neither more nor less a source of law, than arguments a contrario or per analogiam in the civil law." For an extensive and profound comparative study see J. ESSER, *GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS* (1956) [hereinafter cited as ESSER]. In his later theoretical work, *VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG* 188 (1970), Esser even claims that a codified system based on more general rules has a greater potential for judicial discretion. See Von Mehren, *Judicial Process in U.S. and in*

continuity of common law compared with the relative recentness of the Codes that highlighted the changes in the case law and made the case law appear more flexible.

IV

JUDICIAL TREATMENT OF THE CIVIL CODE

The fate of the Code after its precipitate adoption in 1872⁸² was all but exclusively in the hands of the courts. The odds against its success were indeed formidable. Its immediate and ultimate failure can hardly be considered surprising.⁸³

In view of the effect codification has in lowering the status of the judiciary, especially as perceived by the common law judge,⁸⁴ no excessive sympathy was to be expected from the judicial quarter. In reality, the courts to a large extent simply ignored the Civil Code.⁸⁵ Lacking the vital background of appropriate legal education⁸⁶ and doctrinal

France, 22 REV. JUR. U.P.R. 235, 260 (1952); J. FRANK, *LAW AND THE MODERN MIND* 207 n.3 (1970).

82. The hastiness of its enactment induced Lindley, one of the code commissioners, to resign. In LINDLEY, *supra* note 28, at 5-6, he gives the reasons for his resignation and describes in telling words the measure of his personal involvement in the codification project. Cf. Kleps, *supra* note 73, at 773-79.

83. The reality of the Code's failure as a codification is accepted by all major contemporary writers. See EHRENZWEIG, *supra* note 34, at 120; 1 K. ZWIEGERT & H. KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 322-23 (1971); Donald, *supra* note 8, at 167-68; Fisch, *supra* note 28, at 53-55; cf. Van Alstyne, *supra* note 34, at 36-37; Bayitch, *supra* note 62, at 185-86; M. LANG, *supra* note 54, at 181-84.

84. Cf. EHRENZWEIG, *supra* note 34, at §§ 106, 114.

85. Van Alstyne, *supra* note 34, at 36; CARTER (1884), *supra* note 28, at 67-68; EHRENZWEIG, *supra* note 34, at 120. For specific examples see Lewinsohn, *Contract Distinguished from Quasi Contract*, 2 CALIF. L. REV. 171, 175 (1914); Bodwell, *supra* note 20, at 270, where the author notes that section 1714 of the Civil Code was not cited for 12 years after its enactment. But see Fisch, *supra* note 28, at 54, who claims that the proposition is inherently very difficult to prove. In his view the cases show an ambivalent attitude toward the Code as a source of law, but have neither ignored nor flatly repudiated it. It is certainly true that various sections of the Code were relied upon by the courts, but as Fisch himself admits, the Code failed in the most important respect—its codification function. The Code was viewed and applied as a piece of statutory legislation in the traditional way; it was completely disregarded as a codification.

86. On the differences in legal education between continental Europe and the United States owing to the differences in legal methodology, see Riesenfeld, *A Comparison of Continental and American Legal Education*, 36 MICH. L. REV. 31, 44-47, 51-52 (1937); M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *THE ITALIAN LEGAL SYSTEM*, 175-79 (1967). For an interesting report on the North Dakota experience, see Muus, *The Influence of the Civil Code on the Teaching of Law at the University of North Dakota*, 4 DAKOTA L. REV. 175 (1932). See also Pomeroy 3, *supra* note 30, at 719 n.3:

In France, Italy, and Germany, where the entire jurisprudence of the state is embodied in codes, not only are all the important text-books and treatises for

literature,⁸⁷ no judge could reasonably be expected to engage in the forbidding task of applying this special kind of mixed legal system. Indeed, no instance can be found where a common law jurisdiction successfully turned into a mixed jurisdiction simply by adopting some measure of civil law.⁸⁸

Furthermore, the Code's many defects of form and content⁸⁹ constituted another obstacle to treating the Code with real respect. One author, after a learned treatment of the Code's various defects, admitted frankly, "These shortcomings have not caused much damage, for the Civil Code appears not to have greatly influenced the decisions."⁹⁰

Despite all its defects and ambiguities, the California Civil Code nonetheless retains some potential for independent development.⁹¹ Yet the courts have rarely utilized the Code as a tool for legal creativity.

the use of lawyers composed in the form of commentaries upon the text either of the entire code or of some definite portion of it; but the instruction upon the municipal law of the country, given to the students in all the universities by the faculties of the law, is based directly upon the text of the code. In other words, the code is the principal text-book on the municipal law in the hands of the students; and the professor, in his lectures, discusses, explains, and comments upon the provisions of its text in their regular order. In like manner the instruction in the Roman law consists chiefly in lectures based upon the text of Justinian's institutes. Such a method would simply be impossible in California. To use the civil code in our law school as the preliminary and elementary text-book, and to have the instruction upon its text, would produce most imperfect and erroneous results. Attempts to pursue this mode have utterly failed.

Pomeroy's view again reflects his inaccurate notion about the nature of codification and civil law. He apparently was ignorant of the distinction between commentaries and systematic treatises. The latter form, one of the great achievements of the Pandectist school, constituted one of the main instruments in German legal education. On legal education in Italy, see M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *supra* at 167-70. One may doubt the existence of any serious attempt to "teach" the Code after its enactment. If such endeavor was ever made, it certainly was not by Pomeroy.

87. On the importance of "doctrine" (legal writing) in code systems see R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 112-14 (1968); M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *supra* note 86, at 166-67.

88. Bayitch, *supra* note 62, at 177.

89. See Pollock's devastating comment:

This Code [the draft Civil Code of New York] is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them.

Pollock, *Preface* to F. POLLOCK & D. MULLA, *INDIAN CONTRACT AND SPECIFIC RELIEF ACTS* at xii (9th ed. 1972). Pollock's statement was quoted in Lewinsohn, *Law Reform in California*, 3 CALIF. L. REV. 300, 305 (1915), and through him widely publicized. Cf. EHRENZWEIG, *supra* note 34, at 120 n.43.

90. Lewinsohn, *Mutual Assent in Contract under the Civil Code of California*, 2 CALIF. L. REV. 366 (1914).

91. Cf. Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 12 (A. Reppy ed. 1949).

Apart from a few sporadic and marginal dicta,⁹² the Code became immersed in the body of the common law in the traditional mode of statutory law. Using the Code's own ambiguous terms, it appears that the notion of "continuation" prevailed over that of "establishment."⁹³

The judicial treatment of section 1714,⁹⁴ which was intended to constitute the central provision in torts ("obligations imposed by law"⁹⁵), serves as a typical illustration of the entire Code's fate. The section's wording, literally copied from Field's Civil Code,⁹⁶ is of civil law origin. All the notes refer explicitly to the French and Louisiana Civil Codes.⁹⁷

Section 1714 embodies an abstract and broad principle of liability according to the Continental pattern.⁹⁸ Yet California courts never thought of adopting a civil law methodology in construing it. Such a methodology would have required a doctrinal analysis of the notions employed by the Code, such as damage, causation, and negligence.⁹⁹ Quite unsurprisingly, the courts continued to adhere to the typical common law case-by-case reasoning. As a result, the Code's own terminology was completely eclipsed by common law concepts of

92. See *People v. Troche*, 206 Cal. 35, 41, 273 P. 767, 770 (1928):

But when California became organized as a state it began to enact its own statutes to take the place of the provisions of the common law. In 1872 it departed entirely from the ranks of the "common law states" and, following the example particularly of the state of New York, it became a "Code state."

Note the Court's paraphrasing of section 22.2 of the Civil Code. See also *People v. Tanner*, 3 Cal. 2d 279, 296, 44 P.2d 324, 332 (1935): "The common law has been supplanted by statutory law in this state since 1872."

93. See text accompanying notes 72-75 *supra*.

94. CAL. CIV. CODE § 1714 (West 1970). See text accompanying note 20 *supra*.

95. This is the title to Part 3 of Division Third of the Civil Code.

96. COMMISSIONERS OF THE CODE, CIVIL CODE OF THE STATE OF NEW YORK § 853 (1865). A slightly different wording appears in the proviso of 1714 concerning the rule of contributory negligence. Cf. *Li v. Yellow Cab Co.*, 13 Cal. 3d at 819-20, 532 P.2d at 1237-38, 119 Cal. Rptr. at 869 (1975).

97. Louisiana Civil Code § 2295 (1825), now LA. CIV. CODE ANN. art. 2316 (West 1971); Code Napoleon § 1383 (1804), presently codified as C. Civ. art. 1383 (63e ed. Petits Codes Dalloz 1964). See *Li v. Yellow Cab Co.*, 13 Cal. 3d at 818 n.11, 532 P.2d at 1236 n.11, 119 Cal. Rptr. at 886 n.11 (1975). It is noteworthy that both the Field Code and the California Code omitted C. Civ. art. 1382, which is the main section of delictual liability. Cf. Louisiana Civil Code § 2294 (1825), now LA. CIV. CODE ANN. art. 2315 (West 1971).

98. See generally Catala & Weir, *Delict and Torts: A Study in Parallel*, 37 TUL. L. REV. 573 (1963); 2 K. ZWIEGERT & H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 313-49 (1969).

99. As a matter of fact, both section 1714 and its prototype, section 853 of the Field Code, do not use these terms. Rather, the wording is "injury occasioned to another by . . . want of ordinary care or skill . . ." See text accompanying note 20 *supra*. For the French methodology in relation to the parallel section in the French Civil Code, see 1 H. MAZEAUD, L. MAZEAUD & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE § 360 (6e ed. 1965).

tort.¹⁰⁰ In *Li* the supreme court even boasts of its "active judicial developments" such as the introduction of the twin concepts of proximate causation and duty of care,¹⁰¹ concepts that are certainly fundamental in the common law, but hardly attributable to any notion of "liberal construction" of the Code.¹⁰² More specifically, the use of the duty of care concept is actually responsible for the adoption of traditional common law limitations of tortious liability¹⁰³ that run counter to both the broad liability principle embodied in section 1714 and the general doctrine of negligence as defined in modern common law.¹⁰⁴

The court in *Li* gave several illustrations of the Code's so-called flexibility.¹⁰⁵ Ironically, most of the examples are rules borrowed from the common law without justification under section 1714's unqualified wording and later rejected when they became obsolete.¹⁰⁶

There is one instance, at least, where the California Supreme Court expressly relied on the civil law background of section 1714 and its literal text in order to overrule an unwarranted common law gloss. This rarity—an irony of destiny—was *Rowland v. Christian*,¹⁰⁷ where, in dealing with the liability of one occupying land, the court departed from the long-established classifications of trespasser, licensee, and invitee. The truth is of course that the whole "civil law" argument served merely as makeweight. The judges relied on the statutory text only after the old common law immunity rule had been discredited on a

100. On the similar Louisiana experience, see the polemic article, Stone, *Tort Doctrine in Louisiana: From What Source Does It Derive?* 16 TUL. L. REV. 489 (1942); cf. Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1 (1952); Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 1, 20-21 (J. Dainow ed. 1974).

101. 13 Cal. 3d at 822, 532 P.2d at 1239, 119 Cal. Rptr. at 871.

102. The *Li* court maintains that section 1714 by its express language speaks of causation only in terms of actual cause or cause in fact, hence the necessity of judicial development of the twin concepts of proximate causation and duty of care. *Id.* This line of reasoning begs the question since the courts never tried to elaborate the Code's own notion of causation. See CAL. CIV. CODE § 3333 (West 1970), which refers explicitly to proximate causation.

103. For example, consider the varying degrees of duty owed by landowners toward persons entering upon their premises.

104. See generally J. FLEMING, *THE LAW OF TORTS* 133-68 (4th ed. 1971); M. MILLNER, *NEGLIGENCE IN MODERN LAW* (1967); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

105. 13 Cal. 3d at 822, 532 P.2d at 1238-39, 119 Cal. Rptr. at 870-71.

106. See, e.g., *Buckley v. Gray*, 110 Cal. 339, 42 P. 900 (1895), exempting a notary public from liability in tort for negligently drafting a will under the doctrine of privity of contract. The decision was overruled in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

107. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Cf. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 819 n.15, 532 P.2d 1226, 1237 n.15, 119 Cal. Rptr. 858, 869 n.15 (1975).

common law basis, having been discarded by many jurisdictions.¹⁰⁸ *Rowland's* resuscitation of the Code as an actual codification is thus more apparent than real. In a considerable number of other cases in which the courts abolished longstanding common law doctrines, they did not even use the *Rowland* facade of mentioning the relevant Code provisions.¹⁰⁹

V

ANALYSIS OF THE CIVIL CODE AND *Li*

The 100 years of experience in application of the Civil Code by the courts, as illustrated by the use of section 1714, show dramatically the preponderance of traditional common law doctrines—a preponderance achieved by the courts' massive infusion of common law into the statutory framework. Yet *Li* confronted the supreme court with a novel aspect of the problematic relationship between Civil Code and common law since it involved a specific common law rule statutorily established by the Code.¹¹⁰ Can such a rule be judicially overruled without deeming it unconstitutional, as easily as if it had never been enacted by statute? This question puts the Code's status to the ultimate test.

The supreme court defined the problem as one of statutory construction and, accordingly, referred to sections 4 and 5 of the Code. But the judicial abolishment of a statutory rule, by *interpretatio contra legem*,¹¹¹ can hardly be considered a genuine piece of statutory construction. The court's decision is clearly contrary to the idea of "establishment" articulated in section 4; moreover, the notion of "liberal construction" requires the effectuation of the statutory provision, not its discard.

108. 69 Cal. 2d at 116-17, 443 P.2d at 566-67, 70 Cal. Rptr. at 102-03. The argument against the traditional common law distinction in reliance on the general principle of liability under the California Civil Code was by no means a new one. It had been voiced more than 40 years earlier in Note, *Torts: Distinctions Between Trespassers, Licensees, and Invitees: Duty Towards*, 13 CALIF. L. REV. 72 (1924).

109. See, e.g., *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958); cf. *Dillon v. Legg*, 63 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

110. 13 Cal. 3d at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865. The wholesale adoption of common law by a statutory general reference provision, as practiced in many states, cannot be regarded as a transformation of the common law into statutory law. In *Hoffman v. Jones*, 280 So. 2d 431, 435 (Fla. 1973), the court maintained that the contributory negligence rule, even if originally adopted by virtue of a general code provision, had been, in a large measure, "transfigured from any 'statutory creation' . . . into decisional law by virtue of various court refinements."

111. Cf. *ESSER*, *supra* note 81, at 260. On the problem of judicial amendments of statutory law in civil law in general, see K. LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 339-403 (2d ed. 1969); K. ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN* 167-77 (5th ed. 1971),

The court grounded its main arguments on the notion of "continuation of common law" articulated in section 5. The judges' basic outlook seems simple enough: once it is acknowledged that a common law rule may be judicially altered, why should a statutory rule that is the mere continuation thereof be any more sacrosanct?

The court nevertheless felt some hesitation in "overruling" an explicit section of the Code without the crutch of unconstitutionality. The open rejection of an express statutory provision runs counter to the established doctrine that legislation is the supreme source of law.¹¹² Even the rule that a statute can be invalidated on constitutional grounds formally means that the court invokes a higher *legislative* source. The court tried to rationalize its decision by ingeniously referring to principles supposedly underlying section 1714 that were now to be given expression by the new judicial rule. In other words, the court claimed it was not frustrating legislative intent but instead giving it full realization.¹¹³ The technique of abolishing a statutory rule by means of its assumed underlying principle is quite unusual in the common law tradition, where statutes are generally strictly interpreted.¹¹⁴ Perhaps the court harbored a feeling of uneasiness about this particular aspect of judicial lawmaking. In any case it made great efforts to demonstrate the historical existence of the underlying principle as a matter of actual legislative intent of the original codifiers.

The court's rather sophisticated and elaborate investigation of the history of section 1714 and accompanying notes is of interest here. The problem facing the Legislature in 1872 was how to accommodate the general principle of liability with the contributory negligence principle. It wished to do so in a manner consonant with the then progress of the common law and yet allow for the incorporation of further developments. There had existed an original harsh "New York rule" that precluded recovery for any degree of contributory negligence. This old rule, embodied in the Field Code, was rejected by the California Legislature. Since the resources of the common law at that time did not include techniques for the apportionment of damages, the best the Legislature could do to encourage a more humane rule was to accept the most progressive rule available—last clear chance. In accepting this doctrine the Legislature in no way intended to thwart future judicial progress toward the humane goal that it had embraced.¹¹⁵

112. Cf. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14 (1921); EHRENZWEIG, *supra* note 34, at 125; C. ALLEN, *LAW IN THE MAKING* 450-51 (7th ed. 1964).

113. 13 Cal. 3d at 822-23, 532 P.2d at 1238-39, 119 Cal. Rptr. at 871.

114. On rules and principles in the judicial process in general, see the excellent and profound comparative study in ESSER, *supra* note 81. In relation to statutory law within the common law tradition see *id.* at 128-31.

115. 13 Cal. 3d at 820-23, 532 P.2d at 1237-39, 119 Cal. Rptr. at 869-71.

A closer view of these "historical" arguments reveals them to be unfounded. First, the historical basis of the court's analysis is inaccurate. The change in the text of section 1714 from the original language in section 853 of the Field Code was not the work of the Code Commissioners. There exist two versions of the original 1865 Field Code.¹¹⁶ The California Code was based on the second version, which had in its notes the remark: "Modified somewhat from the existing law."¹¹⁷ In the California notes this remark became: "This section modifies the law heretofore existing."¹¹⁸ The supreme court in *Li*, therefore, labored under the mistaken notion of an independent and conscious contribution of the California legislature, supposedly intended to mitigate a "harsh" New York rule.

Second, the assumed harsh New York rule does not seem to have ever really existed outside the minds of some California judges in 1869¹¹⁹ who relied for this purpose on a Connecticut dictum of dubious value.¹²⁰ A New York case, *Johnson v. Hudson River Railroad*,¹²¹ cited in the Field Code's notes and relied upon in *Li*¹²² as chief witness for the "harsh rule," quotes with approval *Tuff v. Warman*,¹²³ which was added to the notes supposedly to mitigate the strict rule of the *Johnson* case.¹²⁴

Third, the court misinterpreted the cryptic remark in the notes concerning the modification of existing law. It was, as we now know, added by the New York Commission;¹²⁵ but the question is what was intended by the note. The *Li* court used the modification to support its

116. The apparently unknown existence of the two versions was discovered with the help of Professor Fisch, who had quoted sections 2033 and 853 of the Field Code in a version different from the text used for this Article. Fisch, *supra* note 28, at 28. After being informed of the possible existence of two versions, both copies were located by mere chance in the Los Angeles County Law Library. A perusal of the notes disclosed four other slight changes in the wording. The changes were probably made by a Commissioner during printing.

117. COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 853 (1865).

118. THE CIVIL CODE OF THE STATE OF CALIFORNIA § 1714, annot. by Haymond & Burch (1872).

119. See *Needham v. San Francisco & S.J.R.R.*, 37 Cal. 409, 420-21 (1869), mentioned in *Li* in a different context. 13 Cal. 3d at 821 n.17, 532 P.2d at 1238 n.17, 119 Cal. Rptr. at 870 n.17.

120. *Isbell v. New York & N.H.R.R.*, 27 Conn. 404 (1858). The New York cases cited in *Isbell*, which treat the occupier's liability toward trespassers, do in fact specifically distinguish between different kinds of causal nexus, as stipulated by the California court in *Needham*; see *Munger v. Tonawanda R.R.*, 4 N.Y. 349, 358-59 (1850).

121. 20 N.Y. 65 (1859).

122. 13 Cal. 3d at 820, 532 P.2d at 1237, 119 Cal. Rptr. at 869.

123. 116 Rev. R. 774 (Ex. 1858).

124. *Johnson v. Hudson River R.R.*, 20 N.Y. 65, 75 (1859).

125. See text accompanying notes 116-18 *supra*.

theory about the rejection of the supposed harsh New York rule. Given the inaccuracy of this view, another explanation seems plausible, involving a change in burden of proof. Under the older rule, prevailing in New York and in California prior to the enactment of the Code, the burden to disprove contributory negligence fell upon the plaintiff.¹²⁶ By formulating the rule as an exception to a general principle of liability ("except so far as"), the burden falls upon the defendant.¹²⁷ This constituted a modification of the existing law.¹²⁸

Finally, the idea that the Legislature would have wished to embrace the more humane rule of comparative negligence, had it not been hindered by the then limited techniques of the common law, is highly fictitious. The argument apparently refers to the subconscious layers of the codifiers' minds.¹²⁹ Moreover, it is hardly reconcilable with the fact that in section 973 of the Code¹³⁰ an apportionment system was explicitly established in relation to ship collisions.

The court's "historical" approach to the "spirit of the Code" therefore does not withstand closer scrutiny. It remains to be seen to what extent the court's approach is consonant with the "spirit of the codifiers." In other words, what was the view of the codifiers on the problem of a common law rule that had been established by an explicit Code provision and subsequently became outdated? The historical answer is quite simple: the codifiers must have considered it the

126. *Gay v. Winter*, 34 Cal. 153, 164 (1867); *cf. Johnson v. Hudson River R.R.*, 20 N.Y. 65, 68 (1859). The principle concerning burden of proof was changed in *Robinson v. Western Pac. R.R.*, 48 Cal. 409, 426 (1874). See also *McQuilken v. Central Pac. R.R.*, 50 Cal. 7 (1875); *MacDougall v. Central R.R.*, 63 Cal. 431 (1883).

127. Typically, the change of the prior rule of *Robinson v. Western Pac. R.R.*, 48 Cal. 409, 426 (1874) was made in reliance on independent common law developments and not by virtue of the newly enacted section 1714. *Cf. note 85 supra*. -

128. This explanation is still not quite satisfactory because it is hard to understand why the nature of the specific change was not mentioned. One can deduce from the original notes in the second Field version that the modification of existing law was not very substantial and that it related to the law as stated in all the mentioned cases. Even after close examination of the cases, no other meaningful alteration of the law appears.

129. *Cf. Comments, supra note 13*, at 930-31 where Malone shows that given the true rationale of the traditional rule, "contributory negligence is something more than a mere distorted anomaly in delictual law." Malone's view that contributory negligence was the genuine expression of 19th-century individualism is not only supported by the many judicial dicta that accepted the rule without any misgivings, but also by the very wording of the codified versions: "[a person] has willfully or by want of ordinary care, incurred the risk of such injury," COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 853 (1865); "[a person] has, willfully or by want of ordinary care, brought the injury upon himself," CAL. CIV. CODE § 1714 (West 1970).

130. Now CAL. HARB. & NAV. CODE § 292 (West 1955). See also COMMISSIONERS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK § 378 (1865). This section was indeed mentioned in *Li.* 13 Cal. 3d at 819, 532 P.2d at 1236-37, 119 Cal. Rptr. at 868.

foremost task of the Legislature to reform periodically the provisions of the Code. The extensive efforts in California to establish Commissions for the revision and reform of the law¹³¹ bear witness to this concern.

One could still argue that section 3510 of the Civil Code leaves considerable room for innovative judicial lawmaking in articulating one of the maxims of jurisprudence.¹³² "When the reason of a rule ceases so should the rule itself."¹³³ Should this provision be used as a kind of safety valve for the discard of outdated rules? In other words, should not the court's ruling in *Li* be justified—if justification is needed—on the basis of this very maxim?¹³⁴ Unfortunately, the time-revered maxim is and always has been most uncertain in its scope of application. Field, in his notes to the identical section in the New York draft, quotes the Latin maxim from Coke: *Cessante ratione legis cessat ipsa lex*.¹³⁵ Yet it is now clear that historically the maxim evolved from Canon law,¹³⁶ whence it penetrated into the various European systems, including the English common law.¹³⁷ The maxim's main function in continental Europe before its decline in the 19th century¹³⁸ had always been the creation of a concrete exception to a general rule, not the rule's complete abolishment.¹³⁹

In practice, the application of the general principle is always subject to the difficult problem of determining the circumstance that constitutes the final cause of a rule.¹⁴⁰ In the context of the contributory negligence doctrine, this problem finds its articulation in the legiti-

131. See Kleps, *supra* note 73.

132. On the peculiarity of the Code including a special part entitled "Maxims of Jurisprudence," taken from sections 1964-98 of the Field Code, see Fisch, *Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D.L. REV. 485, 502-03 (1967).

133. CAL. CIV. CODE § 3510 (West 1970).

134. This Article is not concerned with the actual decision of the Supreme Court in *Li*. It is the legal reasoning, the *iter* to the conclusion and its jurisprudence, that is of interest. There is no quarrel with the court's timely initiative, but the thrust of this Article is that it would have been preferable to base the doctrine of comparative negligence on the wording of section 1714.

135. COMMISSIONERS OF THE CODE, CIVIL CODE OF THE STATE OF NEW YORK § 1965 and notes (1865).

136. For an illuminating study, see Krause, *Cessante causa cessat lex*, 46 ZEIT. DER SAV.-STIFT. KAN. ABT. 81 (1960) [hereinafter cited as Krause]. The maxim was formulated in the 12th and 13th centuries.

137. Contrary to Pound's assumption that it was borrowed from "logic," 3 R. POUND, JURISPRUDENCE 535-36 n.268, 540 u.294 (1959), Pound's quotation from the Year Books, *cessante causa cessare debet effectus*, indicates the formulation of the maxim by Innocent III and its elaboration by the gloss. See Krause, *supra* note 136, at 85-88.

138. On a certain revival of the maxim in the last decades, see Krause, *supra* note 136, at 108-11; K. ENGISCH, *supra* note 111, at 221 n.82a; cf. K. LARENZ, *supra* note 111, at 333, 374.

139. Krause, *supra* note 136, at 103.

140. See Krause, *supra* note 136, at 103, and especially the distinction between *causa impulsiva* and *causa finalis*. *Id.* at 92-96.

mate question whether it is the *reason* for the original rule that has ceased, or merely its *fairness*.¹⁴¹ The traditionally uncertain character of the maxim underlying section 3510 is compounded to open ambiguity in light of the preceding proviso of section 3509: "The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application."¹⁴² But how can a rule cease if it cannot be qualified?

In practice the section 3510 maxim has been rarely used in California. Most cases citing it deal with judicial developments of common law¹⁴³ or with concrete exceptions to procedural rules.¹⁴⁴ No instance can be found where the maxim was used to discard an explicit statutory provision.¹⁴⁵ There can hardly be any doubt that the codifiers did not intend the maxim to be used to abrogate judicially an explicit Code provision.

CONCLUSION

Who is more competent to voice an opinion than Field himself, the father of the Code? One of his praises of a code was that "[A] statute once enacted will stand without the risk of appeal by the Courts so long as the Legislature leaves it alone [T]his inflexibility is certainty, which, so far from being a fault, is, to my thinking, a merit of the highest value."¹⁴⁶

The *Li* decision indeed constitutes a landmark in California's legal history. It epitomizes the ultimate failure of Field's idea of a common law codification. Thus the belated celebration by the California Supreme Court of the centennial of the California Civil Code has all the characteristics of an obituary.

141. Cf. Fleming, *supra* note 19, at 241-42.

142. CAL. CIV. CODE § 3509 (West 1970).

143. Katz v. Walkinshaw, 141 Cal. 116, 122-24, 74 P. 766, 767-68 (1903) (applications of English law in California); Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 389, 525 P.2d 669, 673, 115 Cal. Rptr. 765, 769 (1974) (old common law rule abolished).

144. Radar v. Rogers, 49 Cal. 2d 243, 249, 317 P.2d 17, 21 (1957). Webber v. Webber, 33 Cal. 2d 153, 164, 199 P.2d 934, 941 (1948). Interestingly, its most recent and somewhat unlikely use was in connection with evidence obtained by wrongful seizure in criminal proceedings. Tidwell v. Superior Court, 17 Cal. App. 3d 780, 787, 95 Cal. Rptr. 213, 217 (1st Dist. 1971); People v. Moore, 31 Cal. App. 3d 919, 926, 107 Cal. Rptr. 590, 595 (1st Dist. 1973); Steinberg v. Superior Court, 41 Cal. App. 3d 281, 294, 115 Cal. Rptr. 893, 901 (1st Dist. 1974).

145. Cf. Hicks v. Scott, 48 Cal. App. 2d 481, 487, 120 P.2d 107, 110 (2d Dist. 1941):

The rule just referred to is not one created by statute but one worked out by the courts from the necessities of the situation and it presents a proper case for the application of the maxim that 'When the reason of a rule ceases, so should the rule itself.' (Civil Code section 3510.)

146. FIELD, SPEECHES, *supra* note 6, at 368-69; cf. FIELD, *Codification*, *supra* note 28, at 253-54.