

# One Code for all the United States the Only Remedy to Cure American Law of its Confusion and Uncertainty

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THAT English law country which today most needs a codified private law which shall be uniform from one border to another is the United States — and Great Britain is easily next.

Why should 91,000,000<sup>1</sup> Americans longer endure the miserable confusion of 48 different varieties of state "common law," superimposed by that other variety known as "federal common law" — all of which (except in two states)<sup>2</sup> are but unwritten or customary law located in a tangled jungle of multitudinous statutes, reports of decisions and digests of these? The uncertainty of our law, its confusion, its startling bulkiness, redundancy and prolixity, increased annually by some 20,000 new statutes and thousands of new reported cases, make our law today the most intolerable in the world and perhaps the worst ever known to human history — all because its form and lack of uniformity are so objectionably bad.

A German jurist who should come to this country to prosecute legal research in American law would be lost almost hopelessly in the maze of hundreds and thousands of unsystematized decisions without any possibility of systematizing or standardizing them himself, and could not discover one law for all the United States. As it is, American lawyers are finding it almost impossible to advise

their clients competently — they perforce resort too frequently to guessing at the law. No wonder our courts are clogged, and the justice of American law is often excessively delayed and is in danger of becoming a by-word to the civilized world.

But there is a way out for our America just as there was for Rome, France, Germany and all the other non-English countries. *The logical succession to multitudinous precedents is codification.* Rome was at one time almost as sorely harrassed as we are; then came the final codification of her law by Justinian. What France and Germany did, we can do. And we have their modern codes to help us, whereas they had to go back across the centuries to Justinian's code for help.

*Objections against one and only one system of codified private law for the entire United States.*—The arguments against the formation and inauguration of a Federal code of private law uniform throughout the United States which shall abrogate the private law of 48 states are broadly based on two grounds: that American law cannot be codified, and that a federal codified jurisprudence would damage, if not destroy, the integrity of the several states.

*Objection I—Anglo-American law is essentially non-codifiable.* This objection constituted for many years the citadel of the opponents of codification in Eng-

<sup>1</sup>Census of 1910: our population will soon be 100,000,000.

<sup>2</sup>Louisiana and California.

land and the United States. But this position is no longer impregnable, if it ever was. In every country, to discourage codification, the cry has been raised: "Let well enough alone." It has been heard in more than one century: Rome, Paris, Berlin have listened to it. To "let well enough alone" is a fine principle of conduct *only* when nothing better is obtainable.

If uncertainty, diversity and diffuseness — the "hall-marks" of present American and English law — denote a jurisprudence needing no improvement, then wretched will be the future of Anglo-American law. On the contrary, it is this long continued lamentable condition itself of American and English law which is responsible for the present movement, now well under way, toward codification. Lord Macaulay, although referring to Anglo-Indian law and the then pressing necessity for its codification, very clearly pointed out the path of future progress for English and American law when he said: "Our purpose is simply this — uniformity when you can have it; diversity when you must have it; but in all cases certainty."<sup>3</sup>

The idea of a codified jurisprudence as applicable to English and American law did not find a ready reception when first broached; it savored perhaps too much of inferring that English law could be treated for codification purposes like any other law. English and American insularity became prejudiced against codification; it has fiercely assailed codification — and the fighting is not yet over. But while the opponents of codification have been reiterating and fulminating that English law cannot and ought not to be codified, an examination of recent events and present tendencies in English law on both sides of the

Atlantic and elsewhere will reveal the great fact that codification of English law is slowly being accomplished right under their very noses.

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

The glory of first showing to the world that English law can be codified belongs to English jurists. Included in the acts of the Governor-General of British India are the world-famous Anglo-Indian codes of criminal and civil law, uniform and applicable for all India. These constitute irrefutable facts, proof positive of the possibility of codifying English law. These Indian codes, by their very existence, completely upset the argument that English law wherever found is inherently non-codifiable, and point to the inevitable conclusion that, if Anglo-Indian law can be successfully codified, then Anglo-American, Anglo-Canadian and British law are also susceptible of codification, given the right men to do it — trained jurists familiar not only with their native law but also with the Roman law and the modern codes, and not politicians with a smattering of legal knowledge.

The first Indian code was the celebrated penal code of 1860.<sup>4</sup> Now there

<sup>3</sup> See Stokes, *Anglo-Indian Codes* (reverse of title page).

<sup>4</sup> Amended in 1861, 1870, 1872, 1873, 1882.

is a codified law uniform throughout all India on the topics of civil as well as criminal law. The most important of these later Indian codes are those which cover the subjects of successions,<sup>5</sup> contracts,<sup>6</sup> evidence,<sup>6</sup> prescription,<sup>7</sup> negotiable instruments,<sup>8</sup> transfer of property,<sup>9</sup> easements,<sup>9</sup> trusts,<sup>9</sup> civil procedure,<sup>9</sup> criminal procedure.<sup>9</sup> So highly are the codes of criminal procedure regarded, that these have been made applicable also to British Zanzibar in Africa.<sup>10</sup>

The effect of these Indian codes on British law has been enormous. The partial codification of the law of England along a few lines of special topics is largely due to the success of the Indian codes. From England the movement toward codification, even by attempting it piecemeal, has spread to America. In the year 1910 it was announced in the House of Lords by the Lord Chancellor that he and other eminent jurists were engaged in an attempt to codify the criminal law of England.<sup>11</sup> The English particular codifications of special legal topics by statutory enactment are now no longer strange: on the contrary this plan has been adopted in the United States—the “uniform” negotiable instruments, practice and sales acts bear witness to the success of the American adoption of this English method.<sup>12</sup>

<sup>5</sup> Enacted in 1865.

<sup>6</sup> Enacted in 1872.

<sup>7</sup> Enacted in 1877.

<sup>8</sup> Enacted in 1881.

<sup>9</sup> Enacted in 1882. Other important codes are: The “Court Fees Act” of 1870, “Oaths Act” of 1873, “Specific Relief Act” of 1877, “Registration Act” of 1877, “Stamp Act of 1879, “Suits Valuation Act” of 1887, “Debtors Act” of 1888. See Preface of Stokes, *Anglo-Indian Codes*.

<sup>10</sup> See Stokes, *Anglo-Indian Codes*, Table of Contents.

<sup>11</sup> *Law Notes*, May 1910, p. 36.

<sup>12</sup> It should not be overlooked that the publications of vast encyclopedic treatises of law, like Lord Halsbury’s “Laws of England” and the “Cyclopedia of American and English Law” are stepping stones to a complete codification of law in both countries.

*Objection 2*— *A republic cannot codify its law; to do this necessitates a monarchy or an empire.* This is a weak argument, and is easily refuted. If it be argued that the codes of France and Germany, etc., were made possible only by the power of a monarchical government, and that Napoleon<sup>13</sup> and William II are reminiscent in this respect of Justinian, there is one irrefutable reply: Has not Switzerland, a republic—and a federated republic also—successfully codified her private law?

A lesson in experience can also be taken from our Spanish American sister republics—especially Argentina and Chile—which, although republics, have excellent codes of law uniform for each country. Did not Louisiana codify her law most excellently soon after her admission to the American union? Finally, have not many of our American states already codified parts of their own law, for example the Negotiable Instruments Act? The argument that a republic cannot codify its law falls to the ground from its own weight.

*Objection 3*— *Uniformity of American law can be obtained by making state legislation uniform; there is no necessity for a uniform codified federal system of private law.* This objection recognizes by implication the value of a codified American law, even if it is attempted to do this piecemeal: for a code is a promulgated collection of laws scientifically arranged,<sup>14</sup> and a code may comprise an incomplete as well as a complete system of positive law. In other words, codes may be partial as well as complete. The various uniform state acts adopted by many American states are of the nature of

<sup>13</sup> Napoleon was not Emperor, but First Consul, when the Code Civil was completed; but the Empire quickly followed.

<sup>14</sup> See Black, *Law Dict.* (“Code and cases cited”).

partial codes. If each branch or topic of the law shall be reduced to writing, eventually all our law will thus achieve full codification. Perhaps then the lack of coherence due to this piecemeal process would be remedied by welding a true code out of these many parts of a code.

This method of codifying law a part at a time originated, as has been shown, in British India, whence it spread to England and America. It is the easiest — but not the best — way to achieve a full codification, because the movement is along the line of least resistance, and deals with the difficulties of only one legal topic at a time.

The prospect of uniformity of state laws in the United States looks very promising on the surface. Sanctioned by the American Bar Association and ably executed by the Conference of Commissioners on Uniform State Laws, the promotion of uniformity of state legislation by practically partial codifications has been greatly advanced during the past twenty years. Forty states have already adopted the uniform Negotiable Instruments law,<sup>15</sup> which was first published in 1896 and like many of the subsequent Uniform Acts was, as to its conception, borrowed from England. Twenty-three states now have a uniform Warehouse Receipts Act.<sup>16</sup> Ten states already have a uniform Sales Act.<sup>17</sup> Eight states have a uniform Bills of Lading Act.<sup>18</sup> Six states have already adopted a uniform Foreign Wills Act.<sup>19</sup> Five states have already adopted a uniform Stock Transfer Act.<sup>20</sup> Four states now have a uniform Family Desertion

Act.<sup>21</sup> There states now have a uniform Divorce Act.<sup>22</sup> “And the outlook for continued strength of the movement for uniformity is exceedingly encouraging,” declares a recent President of the Conference of Commissioners on Uniform State Laws.<sup>23</sup> The case for uniformity of American law via state legislation and codification is apparently won — certainly from a superficial point of view.

But what is the meaning of the following observation made in the very next sentence of his article by this same President of the Conference of Commissioners on Uniform State Laws — himself a strenuous advocate of uniformity via state action only? He says: “The business world begins to realize that there is *only one alternative*<sup>24</sup> to an agreement among the states upon matters of vital concern to all of them. . . . They must agree among themselves or the pressure of sentiment will cause amendments to the Federal Constitution that will still further minimize the importance of the states and jeopard the basic principle of local self-government. Business has long since overleaped state lines.”<sup>25</sup>

Right here crops out the fatal weakness of any scheme for making one law for the United States via uniform state legislation: when once uniform laws or partial codifications are thus obtained, *how long* will these stay uniform? The answer is, just as long as the legisla-

<sup>15</sup> 23 *Green Bag* 620 (Dec. 1911).

<sup>16</sup> First published 1906: 23 *Green Bag*, p. 620-1.

<sup>17</sup> First published 1906: 23 *Green Bag*, 621.

<sup>18</sup> First published 1909, 23 *Green Bag*, 621.

<sup>19</sup> 23 *Green Bag*, 621.

<sup>20</sup> First published 1909, 23 *Green Bag*, 621.

<sup>21</sup> 23 *Green Bag*, 621.

<sup>22</sup> 23 *Green Bag*, p. 621. Moreover the Conference of Commissioners has drafted or has under consideration these additional acts: a Uniform Child Labor Act, Uniform Marriage and Marriage License Act, Uniform Workmen's Compensation Act, Uniform Act as to Insurance, Uniform Act as to the Situs of Property for Taxation.

<sup>23</sup> Smith, “The Outlook for Uniformity of Legislation,” 23 *Green Bag*, 621.

<sup>24</sup> The italics are mine.

<sup>25</sup> Smith, “The Outlook for Uniformity,” 23 *Green Bag*, 621-622.

tures of the states refrain from acting on the "basic principle of local self-government." Sooner or later the legislatures will inevitably tinker — each one probably in a different way — these uniform acts secured after so much trouble, and then will begin again the old familiar American condition of diversity of law. Already the oldest uniform state law, the Negotiable Instruments Act — only seventeen years old<sup>26</sup> — is attacked because it is beginning to cease to be uniform.<sup>27</sup> Permanent uniformity of American law is utterly impossible via state legislation. This magnificent movement toward one law for the United States is doomed to a miserable failure unless it be switched to the "main line" of legal progress.

There is only one route to permanent uniformity of law in the United States — an act of Congress. In no other way can one private law for our great republic be secured. When our business world, which "has long since over-leaped state lines," realizes that diversity and uncertainty of law will not actually disappear until a federal codification be promulgated, verily "the pressure of sentiment will cause amendments to the federal Constitution" to secure but one system of law instead of forty-eight.

Let all traditional prejudices be dismissed, and let the subject of a federal codification of private law be investigated intelligently: it will soon be seen that the importance of the states will not be injuriously "minimized" by the promulgation of a federal code of private law. Such legislation must come eventually. When it does come, a great

debt of gratitude will be owed by every American to those who fathered and developed the movement for uniform state laws — thus revealing the fact that codification of American law was not impossible after all.

*Objection 4 — A federal codified jurisprudence abrogating the private law of the states is impossible without impairing the integrity of the several states.* It is argued that because the United States are an enormous country equal in area to practically all Europe, federal uniformity of private law throughout the United States would not work well or be satisfactory; that uniformity of law through federal legislation or control would be an experiment, the dangers of which are unknown.

This easy-going belief is entirely superficial, and is quickly refutable. Ignoring our uniform rules of naturalization, do not the United States already possess federal uniformity of law as to bankruptcy and admiralty? Have these worked so badly that these ought to be made matters to be regulated by 48 different state laws? On the contrary, the wisdom of the framers of the Constitution in making bankruptcy and admiralty federal matters grows more apparent, and is more highly prized than ever. Furthermore, we often feel that many of our present evils might have been avoided had more matters — such as marriage and divorce — been entrusted to federal regulation, thus securing uniformity of law thereon. Uniformity of law through federal legislation has never worked ill to the people of the United States.

If we turn to history, we find that the size of a country does not derogate from the value of uniformity of law. The vast Roman Empire found uni-

<sup>26</sup> It was first passed in 1896.

<sup>27</sup> Hening. "The Uniform Negotiable Instruments Law: is it producing uniformity and certainty?" 59 *Penn. Law Review*, 471 (1911). See Judge Mack's article, 6 *Illinois Law Review*, 62.

formity<sup>28</sup> of law highly satisfactory. The vast extent of the influence of the Napoleonic codification in both Europe and the twin Americas shows the value of a simple codified legal system is not canceled proportionately by increasing the size of a state. Finally, it is indisputable that the elements of law in the vast English law countries have remained the same without suffering detriment from the enormous spread of English law by colonization.

Not well founded is the conviction that a federal codification of our law made uniform throughout the United States is not only impossible, but, even if it were possible, it would also irreparably damage or destroy the states themselves. The facts of history point to this very solution as quite possible and not injurious to the integrity of the states of a federal union. The best answer to the assertion that any proposition for a uniform federal codification of American law would be like a leap into the dark is to look at a federal Germany and Switzerland. Both were able to rise out of the quagmire of intensely active state pride, jealousy and historical traditions, and to enact one codified private law for over twenty Swiss and German states without in any way destroying these states themselves. Is the Constitution of the United States the sole supreme wisdom of statesmanship? The framers of the Constitution never held this view as to their work; they provided for amending it whenever necessary.<sup>28</sup>

It is quite possible to pass an amendment to the Constitution giving Congress power to enact a federal codification for the entire United States which shall abrogate the private law of the

several states. It may also be expressly stipulated in the amendment that the public law of the states shall be left untouched: such a reservation of power was left to the German states when the German Civil Code was promulgated. The public law of the several American states need not be disturbed; but their private law should be replaced by federal codes of civil and commercial law<sup>29</sup>—thus resulting in one and only one uniform and codified private law throughout the entire United States. Such a single codification of American law would be of a permanent nature. At any rate, future changes in law would operate uniformly throughout the whole United States. But this is centralization! greater nationalization! Very well—it is better to hang together by the adhesive force of one uniform system of private law than to be pulled asunder by the disintegrating forces of 48 different systems.

But it may be urged, assuming the existence of a uniform federal codification, would not diversity of interpretation soon arise, and how can this be avoided as long as we retain adherence to precedent — that salient feature of the common law of England? This is the answer: the force of *stare decisis* no longer has today in Anglo-American law the binding power it once had—it is useful but no longer controls; why not then abrogate it entirely, as Germany, France and other countries have done? When there is a written code of law, the force of precedents is no longer binding; the code itself is its own interpreter.

The argument against one codified law for all the United States made under

<sup>28</sup> And seventeen amendments have already been adopted.

<sup>29</sup> Perhaps also federal codes of criminal law, civil and criminal procedure, may some day be deemed advisable.

federal auspices gains no additional strength because the task would be very difficult to accomplish. But it should not be forgotten that the conquest of the obstacles to the codification of American law can be greatly expedited for us with the aid of the many codifications already made by other modern nations, — an inestimable privilege not so abundantly enjoyed by them when they codified their law. Justinian first showed to the modern world how to remove the stones of practical difficulties so as to smooth the way to a uniform, codified private law. If the Napoleonic codification was made easier of accomplishment by the example of the Justinianean, and the German and the Swiss, a century later, were made easier of accomplishment by the previous examples of the Justinianean and the Napoleonic, how very much easier is our task than theirs, when there are before us so many examples of successful codifications of private law? Is our problem more difficult or even as difficult as the problem of codification was in other countries, especially in France or Germany?

France can give us hope and courage for a Herculean cleaning of our Augean legal stables. Prior to the Napoleonic codification, France had 300 different varieties of law more or less alike: but French lawyers finally succeeded in accomplishing the task of obtaining one codified law for all France — the first genuine grand codification since Justinian's age then nearly thirteen centuries in the past, and of enormous blessing in the nineteenth century to all mankind.

Germany, to obtain one codified law, had a very difficult problem to solve. Early in the nineteenth century there were some 1800 different states in Germany, which left as a legacy to the modern German Empire numerous con-

flicting systems of law; but not even this mischievous legal heritage from the past was allowed to stop the formation of one German law in codified shape — the magnificent code of 1900. It is absurd to believe that Americans are mentally inferior to Romans, Frenchmen or Germans.

*Objection 5 — The effect of one federal code for the entire United States would cause American law to become atrophied.* It is also claimed that to put our law into permanent shape in the form of a federal codification would cause it to become atrophied. How could it grow if codified? The answer is so easy: amend or revise the code whenever necessary, as for instance just as France has frequently done since 1804. Instead of causing a stoppage of growth, on the contrary a code really facilitates growth in law: for a code in course of time reveals its own deficiencies, and the law being made certain by the code, is easily alterable because of this discernible certainty — there is no danger of "leaping into the dark" when revising a code.

This whole argument of the atrophying influence of an American federal codification is quickly seen, when analyzed, to rest on a *very unscientific basis*. Furthermore, it demeans the dignity of the legal profession. *If* the enactment of a uniform federal codification of American law will have the bad consequence of introducing the "deadening" influence of a standardized law, then such an evil ought now to be true of the effect of our uniform state acts; but to claim that these are exerting a "deadening" influence is obviously nonsensical. At once *the reactionary spirit* of the argument is revealed: it would persuade us to turn back the hands of the clock of legal progress;