

## SOME LESSONS FROM THE CIVIL LAW.

The purpose of this brief article is not so much to set forth any specific institutions disclosed by a study of the civil law, as to point out some of those defects of our own system which are accentuated by comparison with the civil law, defects due to the methods rather than the substance of the common law. There is no desire to urge such a radical and perhaps impossible step as the substitution of civil law methods for our own; but in the consideration of plans for the improvement of our law, it may be profitable to observe that the other great legal system has avoided some of the most obvious defects under which we labor, and the suggestion of a partial remedy may be ventured.

The civil law, as is well known, has had a history of some two thousand years, and in its present physical form, so to speak, its general principles have been codified into various codes. The modern codification movement may be said to have begun with the Austrian *Allgemeines Bürgerliches Gesetzbuch*, the Prussian *Landrecht* of the eighteenth century, and the French codes of the early nineteenth century. From France it has spread to most of the other civil law countries, coming by way of Spain and Portugal to the countries of Latin America. These codes include in all cases a civil code, a commercial code, a penal code, and codes of civil and criminal procedure; and with the development of economic life, following the tradition, other codes have been promulgated in various countries, such as an industrial code, a mining code, a maritime code, a rural code, a military code, and other codifications of different branches of the law.

The most recent development of the civil law is contained in those remarkable monuments of codification to which some of the greatest legal minds of modern times have contributed, namely, the German and the Swiss civil codes. The most prominent feature of all these codes is that they have laid down certain general rules governing legal relations, leaving to the courts the duty of applying the rules and filling in the details. Incidentally the development of this system has drawn and continually draws

to its service the best legal minds of all the civil law countries, and judges in their decisions call to their aid the best critical thought of the legal world. The German civil code, which for twenty-two years received in its preparation the concentrated constructive criticism of one of the ablest benches and bars in all the world, supplemented by that of economists and business men, is a practical demonstration of what legal science may contribute to the development of a well-rounded, practical and efficient system for the conduct of life and the adjustment of interests.

In civil law countries the decisions of courts are not binding precedents, but when supporting a well-reasoned principle have naturally great persuasive force. While attributing less authority to single decisions than Anglo-American courts, a consistent current of decisions or settled "practice" is regarded as almost conclusive authority. As a matter of fact, there is practically no civil law country at the present day in which the decisions of its highest courts are not regularly reported, and both briefs and opinions cite previous decisions. Certainly one of the greatest advantages which such countries enjoy is a large degree of certainty in the law, which saves much litigation and contributes to the development of a definite system. Not that differences of opinion on numerous points of law do not exist; but the margin of uncertainty is, comparatively speaking, small.

A visit to some twenty countries in which the civil law prevails and a certain degree of contact with the law and the lawyers of those countries may permit one to express, by way of comparison, a certain general opinion concerning the methods of our own legal system, which, in the writer's opinion, hamper its responsiveness to the social needs of the times. Our law is largely what judges have made it and is the result of rules they have applied in the adjudication of cases. The guiding principle of our legal method, of course, is *stare decisis*. It is based on the theory that when a court has once laid down a rule of law in one or more cases the rule will no longer be open to examination or to a new ruling by the same tribunal or by those bound to follow its decisions. This maxim involves no ref-

erence to the correctness or fallacy of the precedent required to be followed. At a time when precedents were comparatively few, when economic life had not reached its present complexity, when the great landmarks of the common law were still being worked out, when judges all had time to think out their opinions, the system was undoubtedly well adapted to the people for whom it was designed to do justice.

But at the present day conditions have completely changed, and *stare decisis* has, it is believed, outlived its usefulness. Reported decisions have enormously multiplied. The American case law today is to be found in some nine thousand volumes of decided cases, with three to four hundred added each year. The attempt to retain the old system in the presence of these new conditions has resulted in chaos in the law and in an inefficiency in the administration of justice and an economic waste to the community which are incalculable in their scope.

The rule of *stare decisis* is based upon the importance of stability and certainty in the law, which, as Lieber said, was next in importance to its justice. But with the "countless myriad of precedents" supporting different sides of so many questions, it is not unfair to say that stability and certainty, the reason for the rule, have practically disappeared. And the manner in which precedents have been used—or abused—has further destroyed the value of the rule. Instead of adhering to the original maxim that only previous decisions in the same jurisdiction are binding precedents, many of our courts and our lawyers, when they deem it desirable, draw upon the decisions of any other jurisdiction in support of a conclusion. Nor is the distinction between *ratio decidendi* and *dictum* properly maintained.

But most curious is the varying degree of consistency with which different courts have adhered to the rule. Many courts have considered themselves bound by former decisions although frankly expressing doubts as to whether they were legally defensible. Other courts have considered it their duty to follow decisions even if thereby they perpetuated error, regarding the legislature as the only source of relief. Still other courts, in the endeavor to uphold the principle and yet depart from a prior

decision considered erroneous, have introduced the insidious process of distinguishing and limiting, which, however much its legitimate use may contribute to the growth of the law, has been carried to a point at which it creates confusion and uncertainty. While professing to uphold a rule of law, they actually pare away all its substantial support. But few courts have recognized that it was not the purpose of *stare decisis* to perpetuate judicial error.

One of the results of *stare decisis* has been a lack of flexibility in the interpretation of the law, notwithstanding its early success in this regard. The common law rules, as has been demonstrated during the last decade, could not accommodate themselves to the social legislation of the present day and statutory repeal of common law rules was in some cases necessary to secure judicial recognition for such legislation. While it is well that changes in law should be slow, there must be some measure of harmony between the progress of the law and the development of society. The principles of assumption of risk, contributory negligence, and the fellow-servant rule, all favorable to the employer, with the "due process" clause of our constitutions, were responsible for much maladjustment and long delay in the recognition of the worker's rights.

But the slavish worship of precedent has had other results. The system and the courts demand that to sustain a proposition of law previous supporting decisions must be cited. To enable the lawyer to examine the immense mass of judicial law, enterprising publishing companies have prepared voluminous digests which are designed to make his task easy. Incidentally, it may be said that it is not the principle of law which is emphasized in this digesting of cases, but rather the similarity of fact, and it may be added that by the customary treatment of a case in minute cross-sections, the broad principle of law is generally completely lost. The result of the system is that in practice the lawyer to whom a case is presented for litigation immediately feels called upon to search for similar or analogous cases and it is commonly stated that with fifty or more jurisdictions in this country now handing down decisions, there are few points of

law doubtful enough to require litigation in which decisions on both sides can not be found.

A better picture of the place now occupied by judicial decisions in our legal system has perhaps never been presented than that drawn recently by one of the ablest lawyers and scholars in the United States. His remarks warrant quotation:<sup>1</sup>

"We have spoken of the annual 'output' of judicial reports, and the phrase, with its thrifty flavor, is deliberately chosen; for the publication of reports is little regulated and thoroughly commercialized. With each court there is connected a pipe promptly to convey its product to the great centre of distribution; and from this centre, day by day, month by month, year by year, there is poured out, as through a great main, upon a gurgling, gasping, sputtering bar, a turgid stream of judicial decisions. Here there is no discrimination, no estimation of merit or of importance. Cases petty and cases important, cases of national interest and cases of interest purely local, final decisions, and decisions either reversed or on the way to reversal, are, with generous impartiality, spread broadcast over the entire land.

"This system is supported by the bar, with mingled feelings of gratitude and despair; for the bar is conscious of the fact that while it is in a sense served by the system, it is also enslaved and debauched by it. The very multiplicity of cases, and the consequent impossibility of dealing with them scientifically, reduces practitioners to a reliance upon particular decisions rather than upon general principles; and this in turn accentuates the tendency, long ago abnormally developed, to pay undue respect to mere cases as authority. How often do counsel produce with an air of triumph the latest decision, rendered perhaps in some far off jurisdiction by a judge whose opinions derive their weight solely from his official position! How often, too, do they cite cases in their briefs indiscriminately! Some years ago the statement was made that in a single volume of reports then lately published more than five thousand cases were cited; and although this number would seem to suffice, possibly it may since have been exceeded."

The lawyer, therefore, in presenting his case is concerned less with reason or principle than with the necessity of finding as many cases as possible which are like the one at bar and support his conclusion. The efforts of his mind are concerned much less with legal reasoning than with distinguishing ingeni-

<sup>1</sup> Address before the Alumni of the Law School of the University of Pennsylvania, by Mr. John Bassett Moore. See 62 *UNIV. OF PENNA. LAW REV.* 525, 538 (1914).

ously the cases that are against him and by analogy drawing into line those that seem to support him. The result is an ever increasing dialectic technicality. The system tends to make smart men, rather than learned men.

The advantages derived from our political system of a federation of states have brought some penalties, among others, numberless conflicting judicial decisions which must be assimilated in the law. The courts have to go but little beyond the briefs of the attorneys for all the decisions which they need to consider, and while many able opinions are still delivered, the customary decision usually adds but one more case to the uncertain line of decisions which has been constructed upon a given point of law. The attempt to make a selection of the cases to be reported has apparently met with no support from the bar. The advantage of the homogeneous judicial hierarchy enjoyed by England has enabled the bench to co-operate with the bar, so that the Council of Law Reporting excludes from the Law Reports cases which are valueless as precedents, although the eager demand for decided cases still prompts the *Law Times* and other similar publications to report many of the discarded cases. In this country, recommendations to bring about some selection in the reporting of cases have been left unheeded. Our common law more than ever has become a "wilderness of single instances", and for that very reason the need is now greater than ever for emphasis upon guiding principles. In many branches of our law, it is now almost futile to endeavor to deduce a guiding principle from the decided cases. Certainly it is unfortunate that, as happens so often in our larger cities, the same state of facts leads to one legal conclusion in a state court and to a different conclusion in a federal court a few hundred yards away.

There is some difference of opinion as to whether judges should be appointed or elected. But the system of electing judges for short terms, usually without consulting the bar, is surely unwise and makes it surprising that our bench when thus recruited can still boast of so many good judges. The tremendous pressure under which most courts labor, due to the

great amount of litigation they must dispose of—much of which would be unnecessary under a more efficient system—renders a carefully reasoned and scholarly opinion very nearly a physical impossibility and an all too infrequent occurrence. The system of case citation as the guiding rule of our legal method in reality caters to the incompetent judge, for, with the power to rely upon previous decisions, it enables a judge so inclined to avoid the necessity for independent thinking.

The demand of our courts for case law is naturally met by the bar, by publishing companies and by writers. The demand of both bench and bar is met by the law schools, the one institution from whom we have the right to expect a contribution and an encouragement to learning and scholarship. Very few law schools in this country pay the slightest attention to the history of law, to the theory of law, or to legal science as a whole. The study of these subjects is an absolute requisite in civil law countries. How few of our students acquire any familiarity with the contributions of such jurists as Amos, Maitland, and Gray, not to mention von Jhering, Gierke and Duguit, to cite but a few jurists who have written for the whole profession throughout the world. The work of such leaders of thought as Wigmore and Pound receives far too little appreciation from our bar and our courts. Far too few among our lawyers have taken advantage of the recent translation into English of standard works of foreign jurists by which Professor Wigmore and his colleagues have placed at the disposal of the American lawyer some of the most valuable contributions to legal history and legal science. It remains with the law schools to take the initiative in improving our bar and through our bar, our law. They must assist in overcoming the contempt which the practicing lawyer of today has for what is termed "jurisprudence" or the science of law. Dicey states that "jurisprudence stinks in the nostrils of a practising barrister" and this unattractive sentiment has been echoed not only by practitioners but by professors of law in this country. Perhaps it is the natural distrust of the unknown which inspires the dislike.

It must be admitted that the case system of studying law

classified into subjects to be mastered in three years, however desirable as a method of legal training, gives but little time for the study of law in its larger sense as a social science, as a vital factor in the maintenance of the social order, as a field of knowledge which requires in its service the aid of the best scholars. The veneration of judicial precedent, the corner stone of our system, the vitalization of the maxim that "an ounce of precedent is worth a pound of principle", has encouraged hack-writers, compilers, and digesters, who are indeed at times cited without discrimination as authorities. In England they are at least consistently severe in this regard. Lord Chancellor Hal-dane recently protested against Halsbury's "Laws of England" being cited as authority in his court, and Lord Justice Vaughan Williams objected to a similar use of Odgers on Libel, expressly endorsing the old idea that counsel were not to cite living authors as authorities. Thoughtful writers and thinkers on the law, who have contributed so greatly to build up the civil law, are given no encouragement under our system because their opinions, however well reasoned and mature, have not as much authority as the opinion of the weakest judge in a litigated case. Probably most of our lawyers are too busy or too little inclined to observe that but very few scholarly contributions to our legal literature are being made.

It will be necessary to mention only a few of the specific problems in which our weakness is additionally demonstrated by comparison with the civil law. Reform in procedure, of course, was the first watchword of our law reformers, and up to the present time slight improvements have indeed been made in some states. In the civil law countries, procedure is made as simple as possible. The codes of civil procedure of most of the civil law countries contain usually less than fifteen hundred articles of a few lines each,<sup>2</sup> setting forth certain general rules which are

<sup>2</sup> The following table shows the dates and number of articles in the codes of civil procedure of the following civil law countries:

Argentina				Italy	June 25, 1865	950
(Buenos Aires)	Dec. 9, 1907	961		Luxemburg	Apr. 14, 1806	1042
Austria	Aug. 1, 1895	602		Monaco	Sept. 5, 1896	977
Belgium	Mar. 25, 1876	1042		Netherlands	June 7, 1838	899

designed to enable contending parties quickly to join issue, and to facilitate the trial and dispatch of litigated cases. Procedure occupies its proper place as a means to an end, the end being the prompt adjudication of conflicting interests according to law. It must be admitted also that procedure is not equally bad in all states, but the State of New York, more populous than all but one of the civil law countries on this hemisphere, may not unfairly be pointed to as an example of how far we sometimes divorce law from justice. A complicated code of civil procedure of over three thousand three hundred sections, many of enormous length and full of technicalities, has enabled lawyers time and again to thwart, delay and overburden with expense the adjudication of a meritorious cause. The innumerable decisions on questions of procedure signify enormous sums paid by clients who have substantive rights to be determined instead of subjecting themselves to a game of jockeying between attorneys—a game which continues in fact throughout the trial of a cause, for the trial judge is but little more than an umpire to secure observance of the rules of the game. An examination of the reports of the highest courts in the countries of Western Europe for 1913 discloses that the number of decisions on questions of procedure is almost negligible. The number of new trials on technical points and the complexity of appellate procedure in this country are really, it may be truthfully said, unknown to the countries of the civil law,

Bolivia	Dec. 31, 1857	993	Paraguay	Aug. 14, 1876	774
Brazil	Nov. 25, 1850	806		Jan. 1, 1884	
Chile	Aug. 28, 1902	1100	Peru	July 28, 1852	1824
Ecuador	June 18, 1897	1034	Portugal	Nov. 8, 1876	1178
France	Apr. 14, 1806	1042	Spain	Feb. 3, 1881	2182
Germany	Jan. 30, 1877	1048	Switzerland		
Haiti	July 18, 1834	963	(Federal)	Nov. 22, 1850	203
Honduras	Mar. 1, 1906	1306	Uruguay	Jan. 17, 1878	1362
Hungary	Jan. 8, 1911	792	Venezuela	Apr. 18, 1904	777

The following are the number of articles in the codes of civil procedure of various code states of the United States. Some exclude evidence and some are merely practice acts.

California	2104	New York	3384
Georgia	1040	North Carolina	542
Idaho	2343	Ohio	2154
Iowa	1299	Oklahoma	962
Louisiana	1161	South Carolina	492
Montana	1855	Tennessee	1991

or, for that matter, even in England. In addition, lawyers' fees are much more moderate in the civil law countries.

Again, our complicated rules of evidence have made for technicality and in many cases unfortunately are employed not to reveal but to suppress the truth, and the fact that they *are* legal rules renders the judge powerless to disregard them for the purpose of ascertaining the truth. Probably no branch of our law affords the student more intellectual pleasure or appeals more to logic than the law of evidence, and no proposal to abolish it would meet with favor. Our rules of evidence, of course, grew up with the jury system and were intended largely for the guidance of the jury. Perhaps that is one reason why the civil law countries get along without these technical rules which are embraced in our law of evidence. The jury in civil cases is practically unknown to them. Civil cases are presented to a judge, usually a man of the best training, who hears conflicting evidence and judges of its weight for himself. Moreover, at least in Central and Western Europe, the oath has much greater sanctity, than with us apparently and perjury is severely punished. In our own system there is no doubt that the jury is a much overworked institution and does not necessarily contribute to justice, the presumptive aim of all systems of law. It is a well-known fact that when lawyers have a weak case they prefer a jury to a single judge sitting alone, for "one can always take a chance with a jury." There is every reason why ordinary civil and commercial cases can be better decided by judges without juries, and in England, in fact, the jury is now practically employed only in certain tort cases, such as malicious prosecution and slander and libel. Workmen's compensation acts have also diminished the necessity for the jury, for they have replaced those common law rules of liability which were favorable to the employer and were only tempered by a jury favorable to the employee. If we could, therefore, gradually decrease the employment of the jury in civil cases, we should render less necessary many of the technical rules of evidence, we should have fewer new trials on errors due to the jury system, and we should greatly lessen the cost of litiga-

tion, besides gaining other advantages too obvious to require statement.

One of the most serious defects of any legal system is uncertainty, and of that we have an abundance. The mass of conflicting and inconsistent decisions, on substantive and adjective law, has invited a mass of legislation. The enactment of rules of procedure is still in the hands of legislatures, instead of being, as in the British Empire generally, a part of the rule-making authority of the courts.<sup>3</sup> The general ignorance of legislative technique has resulted in a great deal of ill-considered and badly drafted legislation, which has necessitated more judicial construction, and so on in the vicious circle. The purpose of *stare decisis* was to make for certainty in the law. The verdict of experience is that we have probably more uncertainty in the law than any other civilized nation, and that Coke's admiration for the common law system because derived from actually decided cases has but little justification today. As Mr. Wigmore has pointed out, we have lost all of the advantages of *stare decisis* and have retained and intensified all of its advantages.

It may be asked how we shall escape from the disadvantages of our legal method. Feasible plans are not easy to frame, but if a suggestion may be ventured, it is this: only by a change in our legal habits, combined with a rational system of codification, the codification of controlling principles and precedents. Whatever its weaknesses, codification offers probably the best solution for our difficulties. It has tremendous obstacles to overcome in our political system of sovereign states and the tendency to local particularism which discourages uniformity. A slight beginning, greatly appreciated, has, however, already been made in the acceptance of some of the drafts of the Commissioners on Uniform State Laws. We need not, therefore, consider the task as hopeless. We might with considerable profit examine the method of codification adopted in British India, where by the use of what is known as "Macaulay's invention" of adding au-

<sup>3</sup> See "Studies in English Civil Procedure: II. The Rule Making Authority," by Samuel Rosenbaum, in 63 UNIV. OF PENNA. L. REV. 151 (1915).

thoritative illustrations to the enacted text of a code they have achieved the advantage of a clear statement of the general principles of many branches of the law, while retaining the great advantage of case law in preserving the record of the remedies applied in the solution of actual cases.

But at the present moment, it is submitted, we are not ready for codification. Our law schools have not met their obligation of training a sufficient number of men who would be competent to take up such a monumental task. The law schools should offer an opportunity to qualified students for training in the principles of legal history, legal theory, and legal science in general, the absence of which Professor Redlich criticized in his recent report upon our system of legal education. One of the incidents of our insularity has been a neglect of foreign languages. Few of our lawyers can intelligently read a foreign law book, yet much of the world's best thinking in law has been made known in a foreign tongue. Greater emphasis upon modern languages will be an important factor in enabling our law students to acquire that broader and deeper substructure of legal knowledge which is essential. It has been the observation of the writer, after contact with lawyers of some twenty countries, that the education of our bar, taken as a whole and considering the average, is more superficial than is that of the bar of nearly every other civilized country. But very few of our lawyers think in terms of society, or have any other than a merely business—certainly not a scientific—interest in the law. And yet if our law is to be improved it must be done by the bar itself on its own initiative, for the general public, notwithstanding the bitter experience of individuals, has proved indifferent to the social waste entailed by the present inefficiency of our system.

The aim then must be to institute in our leading law schools, in addition to the present courses for active practitioners, certain advanced courses in legal research to cover the history, the theory and the philosophy of law, and comparative law, and thus stimulate constructive scholarship. A proposal to extend our law course to four years might be regarded as inexpedient, notwithstanding the fact that in the civil law countries of Western

Europe and Latin America the law course covers from five to seven years. Moreover, experience has shown that however admirable the case method is pedagogically, it takes the average student nearly a half-year to feel at home and in tune with his work, especially as many of our law schools fail to give the student an introductory survey of the law as a consistent whole. If three years, however, is to be the limit of instruction, a portion of the work of the third year might be devoted to the subjects mentioned above, in order (1) to give every practitioner some of the rudiments of legal science, and (2) to enable the more serious students to acquire a taste for deeper learning in the law and a desire to continue further the pursuit of legal knowledge. If the law schools can exercise this progressive influence on our bar, it will inevitably reach the bench, the law, and the system itself.

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