REPORT

OF THE

COMMISSIONERS

APPOINTED TO CONSIDER AND REPORT UPON THE

PRACTICABILITY AND EXPEDIENCY

OF REDUCING TO A

WRITTEN AND SYSTEMATIC CODE

THE

Common Law of Massachusetts,

OR ANY PART THEREOF.

MADE TO HIS EXCELLENCY THE GOVERNOR,

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REPORT.

The three leading questions presented for the consideration of the Commissioners are:

1. The practicability of reducing to a written and systematic code the common law of Massachusetts, or any part thereof.

2. The expediency of such a reduction, if practicable.

3. The plan or plans, by which the same can be best accomplished, if expedient.

Before proceeding to a direct examination of these questions, it seems proper to make some preliminary remarks, which may serve to explain the exact state of these questions, and to guard against any erroneous inferences, as to the nature and limits of the inquiries, which they involve.

When our ancestors first emigrated to this country, then a wilderness, inhabited only by the Indians, who possessed no regular government or administration of laws, they brought with them the common law of the mother country (England), so far, as from its nature and objects, it then was or might be applicable to their situation, as colonists, distant from and possessing institutions, and political arrangements varying from those of the parent country. It is obvious, that they could not bring with them the whole body of the English law then in force; for much of it must have been wholly inapplicable

to their situation, and some of it was inconsistent with their policy and prosperity as colonies. Thus, for example, many of the feudal tenures, then in force in England, were never known here, all tenures of land here being from the beginning in free and common socage. So, the whole common law, applicable to the ecclesiastical establishment of England, never had an existence here, for a similar reason.

Nor was this an artificial principle assumed for the occasion to govern the colonies. It was a part of the general law of the land, at the time of the emigration of our ancestors, that all new settlements made by Englishmen in desert and uncultivated regions were to be governed by the law of England, subject to the qualifications already stated. It was also a principle, fully recognized in the charters granted to the colonies, either in direct terms, or by necessary implication. In most, if not in all of them, there will be found an express declaration, that no laws shall be made repugnant to those of England, (or some equivalent phrase,) but as near as may conveniently be, their laws shall be consonant with and conformable to those of England. There is also to be found in all the charters, except that of Pennsylvania, (where it was probably omitted by mistake or accident) an express clause, declaring, that all English subjects and their children, inhabiting in the colonies, shall be deemed natural born subjects, and shall enjoy all the privileges and immunities thereof. This was specially true in relation to the colony of Massachusetts, whose successive charters expressly recognize these privileges and immunities, as the right of all subjects and their children inhabiting therein, and authorize the enactment of laws not repugnant or contrary to the laws of England.

The common law, thus introduced into the colonies, was not, in a strict sense, the common law in its original form, but as it was then existing in England, modified, amended, and ameliorated by statutes; and it was claimed as the birth-right and inheritance of all the colonists. The Revolutionary Congress of 1774, accordingly, unanimously resolved, "that the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers, in the vicinage, according to the course of that law;" and "that they were entitled to the benefit of such of the English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several local circumstances."

But notwithstanding this general adoption of the common law of England, it is obvious, that the qualifications annexed to it must have given rise to many very perplexing doubts and difficulties. What portions of the common law were applicable to the situation of the colonies, was an inquiry perpetually presented in the course of forensic discussions in former times. And though by the gradual operation of judicial decisions, and the positive enactments of the Colonial, Provincial and State Legislatures, the field of controversy has been greatly narrowed; yet there still remain some topics of debate, upon which it would not be easy to affirm, whether the common law of England had been adopted here or not. Nor has the provision of the constitution of this Commonwealth of 1780, that "the laws, which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until alter-

ed or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution," materially changed the grounds of difficulty and controversy; for the inquiry must still be made, what are the laws, which have been so adopted, used and approved, and usually practised on in our courts of law.

Besides the common law of England, there are to be found in Massachusetts some few local usages and principles, which properly constitute a part of our common law, though unknown to that of England. One of the most striking instances of this sort is the capacity of a married woman to dispose of her real property by a deed with the consent of her husband; whereas, by the common law of England, it can be done only by a peculiar process called a fine or a common recovery.

The common law of Massachusetts, then, properly embraces, in the first place, that portion of the common law of England, (as modified and ameliorated by English statutes,) which was in force at the time of the emigration of our ancestors, and was applicable to the situation of the colony, and has since been recognised and acted upon, during the successive progresses of our Colonial, Provincial and State Governments, with this additional qualification, that it has not been altered, repealed or modified by any of our own subsequent legislation now in force. In the next place, it embraces those local usages and principles, which have the authority of law, but which are not founded upon any local statutes. The latter, indeed, are so few, and comparatively, in a general sense, so unimportant, that they may, for all our present purposes, be passed over without farther observation or notice.

The next inquiry is, what is the true nature or char-

acter of the common law, so recognized and established, and where are its doctrines and principles to be found. In relation to the former part of the inquiry, it may be generally stated, that the common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which cannot now be distinctly traced back to any statutory enactments, but which rest for their authority upon the common recognition, consent and use of the State itself. Some of these rules, usages and principles are of such high antiquity, that the time cannot be assigned, when they had not an existence and use. Others of them are of a comparatively modern growth, having been developed with the gradual progress of society; and others, again, can hardly be said to have had a visible and known existence until our own day. Thus, for example, many of the rights and remedies, which ascertain and govern the titles to real estate, are of immemorial antiquity. On the other hand, the law of commercial contracts, and especially the law of insurance, of shipping, of bills of exchange, and of promissory notes has almost entirely grown up since the time (1756) when Lord Mansfield was elevated to the bench. And again, the law of aquatic rights and water courses, and the law of corporations can scarcely be said to have assumed a scientific form until our day.

In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress

of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usages of the country, There are certain fundamental maxims in it, which are never departed from; there are others again, which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.

When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law, which, by analogy, or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law, and the only relief, which remains, is by some new Legislation, by statute, to operate upon future cases of the like nature.

These remarks may be illustrated, by referring to some of the most familiar cases, which occur in the every day business of life. In the common case of work and labor, done for any person, or goods sold and delivered to him, the common law implies an obligation or duty in the person, for whose benefit, and at whose request it is done, to

pay the amount of the price of the goods, or the value of the work and labor. Now, there is no statute from which this obligation or duty is derived. It is simply a dictate of natural justice, and from that source was adopted into the common law. The mode, by which this obligation or duty was enforced in the ancient common law, was by the remedy called an action of *debt*. But this remedy was in some respects, and under some circumstances, liable to embarrassments and technical objections. About three hundred years ago, it occurred to some acute lawyers, that another remedy, which would avoid these embarrassments and objections, might be applied. Accordingly, an action of trespass on the case, now well known by the name of an action of indebitatus assumpsit, was brought in the courts of Westminster Hall, to recover the amount of the debt. It was then very gravely debated, whether such an action would lie, and finally (after great diversity of opinion) it was settled in favor of the action. The principal ground of the decision was from the analogy to other well known forms of actions on the case, and the undertaking or promise of the debtor, implied by law, to pay the debt, the breach of which undertaking or promise was a wrong to the other party, for which he was entitled to recover, not technically the debt, but damages to the full amount of the debt. And this is now the common mode, by which debts of this sort are usually sued for and recovered.

Again: When a man borrows money of another to be repaid to the lender, the common law, upon principles of natural justice, holds him liable to repay it, upon his express or implied agreement to that effect. But cases occurred, in which money in the hands of one person, in justice and equity, belonged to another; but it had not

been borrowed, nor had the possessor promised to pay it over. On the contrary, he resisted the claim. The question then arose, whether in such a case the money was recoverable. And the courts of law, at a comparatively recent period, held, that an action would lie for the recovery of it, and that the proper action was indebitatus assumpsit, for money had and received to the use of the party entitled. Here, again, the courts acted upon principles of natural justice, and founded themselves, both as to the right and the remedy to recover, upon the analogies of the law. They first inferred, from the principles of natural justice and the analogies of the law, an implied undertaking or promise to pay over the money, because in conscience and duty the holder was bound so to do; and next they applied the remedy by analogy to other cases where there was an express promise of a similar nature.

Again: Until the reign of Queen Anne, promissory notes although payable to bearer or order were held not to be negotiable; so that no person but the payee could maintain an action for the money due on the same. The ground of this decision was, that debts, technically called choses in action, are not assignable at the common law, a doctrine, which can be traced back to its early rudiments. This, therefore, was a case, where, though the principles of natural justice might apply to create an obligation, the positive rules of the common law forbade it. Hence the interposition of the Legislature became indispensable. Nay, even the payee himself could not, according to the rules of the common law, maintain an action directly on the instrument; but he could only use it as evidence of a debt in an action properly framed upon the consideration, for which it was given. When the Statute of

3d and 4th Anne, chapter 9, made such promissory notes negotiable, it was found to be so convenient, that it was generally, though not universally, nor without some exceptions and modifications, introduced either by statute or usage into the Colonies. In Massachusetts it was adopted by usage, and acted upon down to our day, without any other sanction than judicial recognition.

As soon as the negotiability of promissory notes was thus established, it gave rise to innumerable questions, as to the rights and responsibilities of the parties, which were either confessedly new, or but faintly indicated by antecedent principles. What were the nature and extent of the obligation of an indorser; what were the duties of the indorsee; when demand was to be made of payment of the maker; what notice was to be given, and how notice was to be given, by the holder to the indorser; these, and very many questions of a like nature, were necessarily to be resolved. And so complicated and so various are the circumstances, which may attend cases of this nature, that notwithstanding the long course of decisions, which have in a great measure ascertained and qualified the rights and responsibilities of the parties, there yet remains a wide field for future discussions, growing out of the new and ever varying courses of business. The principles of natural justice have furnished many rules for the exposition of the contract and obligations of the parties; the analogies of the common law have furnished others; the usages of the mercantile world have furnished others; and then again there have been anomalies, which could not be brought within the range of any well defined principles, and therefore have been left to be regulated by legislative enactments. In this branch of the law, in an especial manner, will be found a striking illustra-

tion of the remark of an eminent judge, that the common law is a system of principles, which expands with the exigencies of society.

With these few preliminary observations, which seemed necessary to a just understanding of the subject, the Commissioners will now proceed to the direct consideration of the inquiries presented by their commission.

1. The first is, as has been already stated, the practicability of reducing to a written and systematic Code the common law of Massachusetts, or of any part thereof.

This inquiry involves, or at least may involve, two very distinct and widely different propositions, according to the sense, in which we interpret the terms, "the common law of Massachusetts." If by those terms is to be intended not only all the general principles of that law, but all the diversities, ramifications, expansions, exceptions and qualifications of those principles, as they ought to be applied, not only to the past and present, but, to all future combinations of circumstances in the business of human life, it may require one answer. If, on the other hand, those terms are to be understood in a more restricted sense, as importing only the reduction to a positive code of those general principles, and of the expansions, exceptions, qualifications and minor deductions, which have already, by judicial decisions or otherwise, been engrafted on them, and are now capable of a distinct enunciation, then a very different answer might be given. In the former sense, the Commissioners have no doubt, that it is not practicable to reduce the common law of Massachusetts to a written Code; in the latter sense, they have no doubt, that it is so practicable;—and the expediency of doing it will come under review in a subsequent part of this Report.

As there appear to the Commissioners to be abroad in the community some erroneous notions on this subject, under both of the preceding aspects, they beg leave respectfully to suggest the reasoning, by which they have arrived at the conclusions above stated. It is not an uncommon opinion, that all law is capable of being reduced to a specific form, which shall apply with equal clearness and certainty to the solution of all cases, past, present and future. In short, it is frequently supposed and frequently asserted, that a Code may be compiled of all the law, which is to regulate the rights and titles, the property, the business and the contracts of a nation, so definite, full and exact, that it shall furnish a complete guide, not only for the decisions of courts of justice, but for intelligent citizens throughout the country, in all cases, and shall supersede, if not the necessity of new legislation, at least the necessity of new rules, and the modification of old rules by courts of justice, to reach the exigencies of every variety of controversy. Why, it is often asked, cannot the law of a country be reduced to a positive form? If it is law, it must be known, or it ought to be known, so that every citizen may govern his conduct accordingly. If it is known to a few, why may it not be made known in a positive form to all persons? If not fully known to any persons, ought a free nation to remain subject to rules, of the nature and extent of which they are ignorant, and to allow their rights to be decided by doctrines now promulgated for the first time? Questions of this sort are often put, and suggestions of this character are often made. They wear an air of plausibility, and therefore should be deliberately examined, and the errors, to which they may lead, should be corrected by expounding the sources of them. It is

very certain, that no Nation, whose legal institutions are known to us, ever had a Code of the nature above supposed, viz, one, which was comprehensive enough to embrace all the doctrines and details required for the private concerns and business of its whole population. That it never has been done, however, furnishes no absolute proof, that it cannot be done. But at the same time, since it is well known, that many partial codes or collections of laws have been made, the fair presumption is, that it has been deemed impracticable or unwise to attempt more.

In proportion as nations advance in civilization and commerce, the business of the people, and the rights and modifications of property, become necessarily more complicated, and difficult, and various in their relations and circumstances. The principles of law, which might suffice for the ordinary transactions of one age, would be wholly insufficient to answer the exigencies of the next age. Of the innumerable questions, which arise in any one age, and admit of forensic controversy and doubt, probably not one in a hundred, perhaps it would be more correct to say, not one in a thousand, ever comes before a court of justice to be there finally settled by adjudication. Many are settled by compromise; many by arbitration, or the intervention of friends; many are neglected or abandoned, from their comparatively slight importance, or the poverty of the claimants, or their ignorance of or indifference to their rights, or from other causes tending to suppress litigation. Hence it is, that the basis of the actual administration of justice in every country must comprehend principles of far more extensive reach, than those, which become the subjects of direct adjudication in courts of justice, and be capable of a progressive adaptation

to new cases as they arise, or the most manifold public and private mischiefs must pervade the whole community.

It may be asked, why may not a nation require all the laws, which are to govern it, to be clearly made known and promulgated, before they are acted upon? Certainly it is competent for a nation so to act. It may declare, that the administration of justice shall be applied only to rights and titles and claims, which have been previously ascertained by the terms of express laws, leaving nothing to the judgment of courts of justice, beyond the direct application of the text to the very cases thus ascertained. But what would be the consequence of such a course of legislation? It would be, that every case of wrong, and injustice and oppression, not thus foreseen and provided for, would be wholly remediless. And the mass of such cases would be perpetually accumulating, since positive legislation, however rapid and constant, can never keep up in any just proportion with the actual permutations and combinations of the business of an active, enterprising and industrious people. Suppose, for example, the Legislature of Massachusetts should declare, that there should be no other laws in force except what are contained in the Revised Statutes; it is obvious, that the whole business of life must stop in this State; for that Code does not provide for one case in a thousand, perhaps not for one in a hundred thousand, which is of daily occurrence and activity.

It is obviously impossible to make a positive Code, which shall be adequate to the business and rights and modifications of property in any one single age, unless the Legislature can foresee every possible as well as every probable combination of circumstances applicable to eve-

ry subject matter in that age. Such a degree of wisdom and foresight belongs not to any human beings. If it were possible to foresee and provide for all such exigencies of a single age, having a determinate course of business, and institutions, no one would be rash enough to assert, that it was possible to foresee and provide for the exigencies, rights, duties and business of the same nation throughout all time. A Code, therefore, however full, would be perpetually growing more and more defective, unless resort was had to new legislation; and such legislation, to be either wise or effective, must allow a great number of cases of the same sort to arise under various aspects, before the proper remedy or principle, which ought to be generally applied, could be clearly perceived, or safely adopted. In short, unless it were possible to compel all men to act at all times in one way, and to prevent the occurrence of any new combinations of circumstances, (a condition morally and physically impossible,) and unless it were also possible for a Legislature to foresee and provide for all the cases, that had arisen, or could arise, (a condition equally impossible,) there is no pretence to say, that any written Code could embrace all the provisions fitted for an active, commercial, and free people, advancing in civilization, wealth, and industry. And if any Code could be framed, which should aspire to provide in detail for the common run of circumstances, it would be found in practice to be not only materially defective, but so voluminous in its precepts, that a whole life would be required to master all its provisions, and more than a whole life to accumulate the materials fit for its composition.

It has been already stated, that perhaps not one case in a hundred, which admits of doubt or controversy, ever comes before a court of justice for decision. Of the re-

ported cases, which were decided in England before the middle of the last century, consisting principally of cases at the common law, an abridgment has been published in twenty-four folio volumes; and, after all, it is a very unsatisfactory and incomplete abridgment of those cases, probably not covering one half of the minute doctrines asserted and acted on in them. An abridgment of the reported cases at the common law, from that time down to the present, has also been published in fifteen volumes (royal octavo), which is equally imperfect and unsatisfactory. These voluminous works are but specimens of what a Code must be, which should attempt to enumerate in detail the doctrines of the common law, which have been in dispute in courts of justice, and have been established by decisions. If the enumeration of these is so voluminous, we may readily see, what space would be required for those, which are known and not disputed, and for those, which are unknown, or uncertain in their application, and whose circumstances have never been discussed in tribunals of justice. A Code, which should embrace the doctrines of all the reported cases of the common law, from the most important to the most minute, with accuracy and clearness, would of itself be exceedingly voluminous, and require many years, if not an age, for its preparation, and then would be mastered only by those, who could afford to devote a large portion of their lives to the study and exposition of it. For the purposes of common life, it would be like a sealed book, which would neither enlighten nor aid practical inquirers, and perhaps by a partial examination might mislead them. But if a Code should attempt more, and be framed so as to comprehend, in all their details, all the known and undisputed doctrines of the common law, which on that

account are only incidentally touched or alluded to in reported cases, it would probably be doubled in its bulk and extent. If it should attempt to go farther, and provide for the application of those doctrines to all other cases, which had arisen and were known, or which could be foreseen by the exercise of the most profound and varied wisdom and experience of the Commonwealth, it would not only be found upon its first promulgation exceedingly defective, but it would be of such vast size and accumulated materials, that it would serve to perplex rather than to clear away difficulties, and would import into the administration of justice more mischiefs and doubts, and stimulants to litigation, than it could hope to remedy. There would be this additional evil, that as the rules established for future cases would necessarily be founded upon general theories, and would not, as now, be adopted upon full argument, and modified from time to time, to meet the circumstances of each particular case, there would be infinite danger, that they would in practice be found to work ill, or to defeat the main objects, which the legislation was intended to accomplish.

The Civil Code and the commercial Code of France are probably as perfect specimens of legislation as ever have been, or ever can be produced, having been prepared with great care and diligence, by the most learned jurists of France, after repeated revisions, and with the assistance of the ablest and most experienced judges of the tribunals of all the departments of that extensive kingdom. Yet it is well known, that a great variety of questions, as to the true construction of the text, and a still greater variety of questions, arising from new and unforeseen cases, have been discussed in their judicial tribunals, which already occupy many volumes of reports, and must

constitute a continually augmenting mass of materials, alternately for litigation and for legislation. This consideration furnishes no just objection, when properly viewed, to the establishment of codes; but it serves to show the utter impracticability of making any adequate provisions for all future cases; or of devising any forms of expression, which shall not be susceptible of some diversities of interpretation. Such is the unavoidable imperfection of all human language, and such the short-sightedness of the most deliberate efforts of human wisdom!

Considerations of this sort, which cannot fail to force themselves upon the mind, upon a close survey of the subject, have led the Commissioners to the conclusion, that it is not possible to establish in any written Code all the positive laws and applications of laws, which are necessary and proper to regulate the concerns and business of any civilized nation, much less of a free nation, possessing an extensive commerce, and a great variety of manufacturing and agricultural interests, which are constantly undergoing new modifications, and are susceptible of being the subjects of infinitely diversified contracts, and rights of property and enjoyment. If it were possible to provide such a written Code, the Commissioners are of opinion, that the present state of the common law does not furnish sufficient materials for the purpose. An infinite number of new rules and doctrines, and modifications, limitations and enlargements of old rules and doctrines, would be required even for an approximation to such a Code. And after all, from what has been already suggested, it would be found full of defects, inconveniences and embarrassments, from the impossibility of foreseeing many new combinations of circumstances, or

of providing in the most suitable manner for them, if foreseen, without the aid of long experience and thorough argument, and a nice discrimination and balancing of opposing reasons. It is upon these grounds, that the Commissioners have ventured to express their opinion, that, in the broad sense of the terms already indicated, the common law of Massachusetts is not capable of being reduced to a written and systematic Code; and that any attempt at so comprehensive an enterprise would be either positively mischievous, or inefficacious, or futile. It seems to them, that private convenience as well as public policy requires, that the common law should be left in its prospective operations in future (as it has been in the past) to be improved, and expanded, and modified to meet the exigencies of society, by the gradual application of its principles in courts of justice to new cases, assisted from time to time, as the occasion may demand, by the enactments of the Legislature.

But although in the broad sense of the terms, the common law of Massachusetts is not susceptible of being reduced to a written and systematic Code, the inquiry is, in the opinion of the Commissioners, a very different one, whether the whole or parts thereof, in the narrower sense above stated, may not be beneficially reduced to such a Code. In this last sense, the common law may be said to embrace two distinct branches, to wit; first, the well known and ascertained general principles of that law; and secondly, the well known and ascertained applications of those general principles to the circumstances of particular cases. The former are often denominated in the juridical language of Continental Europe emphatically as law; the latter as jurisprudence. The former are rather recognized than promulgated in our courts of

justice. The latter constitute the mass of our judicial decisions, and can rarely be ascertained with perfect exactness from any other sources; though they necessarily compose a part of every elementary treatise upon any branch of the common law.

In respect to the general principles of the common law of Massachusetts, it may be affirmed, that they are not positively incapable of being generally collected into a Code. We say generally, because there may still be some question, whether particular principles of the common law of England constitute a part of the common law of Massachusetts. But in relation to a very large mass, there is no difficulty whatsoever of this nature. These general principles are to be found, for the most part, collected in elementary treatises now extant, upon the whole or particular branches of the common law. They are capable of being stated in the very form and language, in which they are there enunciated, as they have, from long examinations and critical trials, acquired a precision and exactness, which approach very near to scientific accuracy; and for all the ordinary uses of life, they are sufficiently clear in their interpretations and qualifications. To this extent, at least as far as these general principles have assumed such a precision and exactness, they may be embodied in a written Code, with such a systematic arrangement, as the nature of the different subject matters, to which they apply, may require.

In respect to the details of these general principles in their actual application to particular cases, where they have necessarily undergone modifications, exceptions and qualifications, as they are chiefly, if not exclusively, to be gathered from actual adjudications in courts of justice, it may also be affirmed, that they are not positively incapa-

ble, so far at least as reported cases go, of being generally reduced to a written Code. We say generally, because here also there are, or may be great doubts, whether particular doctrines constitute a part of our common law; and because there are to be found conflicting decisions upon some points, so that it may not be easy to affirm, upon the weight of authority, what the true doctrine is; and because some branches of the common law of England have become so nearly obsolete, and so obscure from lapse of time and disuse, that, if they constitute a part of our common law, it would be very difficult to collect all the true doctrines, and to express them in an unexceptionable form. Time here, as every where else, has wrought such great changes in rights, remedies, institutions, and usages, that it would be almost a hopeless task to suit the ancient forms and the ancient language of particular doctrines to the present state of things. It is quite a different question, which will be presently considered, whether it would be useful or expedient, to attempt any codification of all the details of these general principles, as they are embodied in the decisions, which have been made by courts of justice in different ages.

These considerations naturally conduct us to the second and very important inquiry, as to the expediency of reducing the common law of Massachusetts, or any part thereof, (in the narrower sense already stated) to a written and systematic Code, so far as the same is practicable. Upon this subject, the Commissioners have employed a good deal of deliberation; and they now propose to state the results, to which they have arrived; to state the objections, which have been or may be urged, against any system of codification, with the answers

thereto; and lastly to state the reasons, on which their own results are founded.

I. The Commissioners are, in the first place, of opinion, that it is not expedient to attempt the reduction to a Code of the entire body of the common law of Massachusetts, either in its general principles or in the deductions from, or the applications, of those principles, so far as they have been ascertained by judicial decisions, or are incontrovertibly established.

II. The Commissioners are, in the next place, of opinion that it is expedient to reduce to a Code those principles, and details of the common law of Massachusetts in civil cases, which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established, as to admit of a scientific form and arrangement, and are capable of being announced in distinct and determinate propositions. What portions of the common law properly fall under this predicament will be in some measure considered hereafter.

III. The Commissioners are, in the next place, of opinion, that it is expedient to reduce to a Code the common law, as to the definition, trial and punishment of crimes, and the incidents thereto.

IV. The Commissioners are, in the next place, of opinion, that the law of evidence, as applicable both to civil and criminal proceedings, should be reduced to a Code.

And, in order to guard against any objections founded upon a misconception of the nature, objects, and effects of such a codification, the Commissioners propose to insert in such a Code the following fundamental rules for its interpretation and application.

I. The Code is to be interpreted and applied to future cases, as a Code of the common law of Massachusetts, and not as a Code of mere positive or statute law. It is to be deemed an affirmance of what the common law now is, and not as containing provisions in derogation of that law, and therefore subject to a strict construction.

II. Consequently, it is to furnish the rules for decisions in courts of justice, not only in cases directly *(ex directo)* within its terms, but indirectly, and by analogy in cases, where, as a part of the common law, it would and ought to be applied by courts of justice, in like manner.

III. In all cases not provided for by the Code, or governed by the analogies therein contained, the common law of Massachusetts, as now existing, is to furnish the rules for decision, unless so far as it is repugnant to the common law affirmed in the Code, or to the statute law of the State.

Such is the basis of the Code proposed by the Commissioners, and such the principles, by which they propose, that those, who shall be called upon to perform the duty of codification, should be guided.

The Commissioners are aware, that there are many objections, which have been and may be urged, not only against any codification of the common law, in the broadest sense of the terms, but also against any codification whatever, even of the limited nature and extent, which they have ventured to recommend. These objections have been urged not only at home but abroad; not only in countries governed by the common law, but in countries governed by the civil law, and by their own customary law; not only in public debates, but in elaborate treatises by jurists of distinguished reputation and ability.

A proper respect, therefore, for the opinions thus promulgated, requires them to take notice of some of the most prominent objections, and to submit such answers as have occurred to them touching the subject.

One of the most general objections urged against the establishment of a Code is, the utter impossibility of making it perfect, or applicable to all future changes in the condition, rights, and property of a nation. It has been said, that no system of laws can remain for a great length of time unchanged; for the progress, or even the regress of civil society, must constantly call for new modifications of the existing laws; and that one of the peculiar excellences of the common law consists in its adaptation to all circumstances, and, in a general sense, to all the exigencies, which civil society may present. It is not necessary to controvert the general truth of this remark. On the contrary it may be fully admitted, and yet in no degree impair the reasoning in favor of a Code. The fact, that no system of human laws can be made so perfect as not to require future revisions, modifications, amendments, and even partial repeals, in the new changes of society, furnishes no just objection to the adoption of some positive laws, providing for the ordinary concerns of a nation. It would be deemed little short of an absurdity to declare, that, because no perfect laws can be made, therefore no laws should be made. Even the common law does not pretend, in the slightest degree, to be a perfect system. On the contrary, it has undergone, and is constantly undergoing changes, to meet the new exigencies of society; and the aid of the Legislature is constantly invoked to cure its defects, and improve its remedial justice. If the common law had the theoretical perfection and excellence attributed to it in the objection, (which can be

admitted only with many qualifications and exceptions,) still, it is not perceived, how this perfection and excellence are impaired by putting into a positive text, what is supposed, by the objection itself, to be clear and determinate, and to make it rest, not upon disputable deductions, but upon the positive sanctions of the Legislature, declaring it to be the common law. In truth, the objection, though in its form general, seems principally addressed to a case, where a nation should establish a particular Code of laws, and abolish all other laws not provided for in that Code. In such a case, it may be admitted, that the unavoidable imperfections of the Code would often produce very great mischief and injustice, and require incessant enactments by the Legislature to overcome them. In this view the objection has no application to codification, as proposed by the Commissioners; for every thing not governed by the Code is to be left precisely as it now is. Courts of justice are to be at full liberty to apply the existing common law to non-enumeated cases, exactly as they now do. And from the materials thus furnished by judicial decisions, improvements and additions may, from time to time, be engrafted by the Legislature on the Code itself. It will thus become, what it ought to be, a perpetual index to the known law, gradually refining, enlarging and qualifying its doctrines, and, at the same time, bringing them together in a concise and positive form for public use.

Another objection, which has been urged by distinguished jurists of continental Europe, is, that the jurisprudence of a country (in their sense of the phrase) is perpetually changing its form and character with every succeeding age; and any attempt to give it permanency in its principles or its applications must make it inflexible, and unfit

for the purposes of social justice. Thus, for example, it is asserted, that the customary law of some of the continental nations is in a perpetual though gradual state of change; and that this is a state most useful and salutary to be preserved; for otherwise the jurisprudence of one age would become obligatory upon another, and prevent the improvements in it, which might be best adapted to its prosperity and social advancement. This objection, whatever may be its force or value, when applied to the state of the customary law, in some of the countries of continental Europe, vanishes, when it is attempted to be applied to our common law. In America and in England, the common law is not, in the sense of the objection, of such a changeable nature. When once a doctrine is fully recognized as a part of the common law, it forever remains a part of the system, until it is altered by the Legislature. A doctrine of the common law settled three hundred years ago is just as conclusive now in a case, which falls within it, as it was then. No court of justice can disregard it, or dispense with it; and nothing short of legislative power can abrogate it. With us the notion that courts of justice ought to be at liberty from time to time to change established doctrines, to suit their own views of convenience or policy, would be treated as a most alarming dogma, subversive of some of the best rights of a free people, and especially of the right to have justice administered upon certain fixed and known principles. Our ancestors adopted in its fullest meaning the maxim, that it is a wretched servitude, where the law is vague and uncertain. Hence it is, that precedents in our courts of justice are of very high authority, and, with rare exceptions, conclusive as to the principles, which they decide and establish; and subsequent judges are not at lib-

erty to depart from them, when they have once become a rule of rights or of property. The whole of the judicial institutions in England and America rest upon this doctrine as their only solid foundation. But upon the Continent of Europe, or at least in some parts of it, the case is very different. The decisions of courts of justice, (technically called jurisprudence) go no further than to decide the merits of the particular case. They furnish no determinate rule for other cases of a like nature. Precedents are not of absolute authority, or, in a general sense, of any cogent obligation. The doctrines of the judges of one age may be, and are disregarded by those of another. And it is quite competent for an advocate to insist upon principles and reasonings, which are adverse to a long train of decisions, and entirely subversive of their authority. The objection, therefore, so far as it can apply to America and England, is an objection, not to a Code, but to the common law itself; for the common law has this very inflexibility of character, and permanence of doctrine, of which the objection complains. With us in Massachusetts, the common law is now just as much of general obligation, and of general fixedness in its doctrines, and as binding upon courts of justice, as it would be if reduced to a Code, and no more. When new cases arise, they are governed (as we have seen) by such analogies to those, which have already been decided, or by such principles of natural justice, as are properly applicable to them. When old cases arise, the established doctrines furnish the sole rule, by which they are decided.

But though this last objection is principally, if not exclusively, confined to the jurists of continental Europe, there is one of a kindred nature, which is sometimes pressed by the opponents of codification on both sides of

the Atlantic It is, that the moment, that the common law shall become the text of a positive Code, it will cease to be common law; it will be inflexible in its applications, and subject to none of those implied and reasonable exceptions and modifications, which now constitute its peculiar character. This objection would certainly have much weight, if it were a necessary result, that the codification of the common law would thus destroy its flexibility, and reduce it to a hard and unyielding positive text. But the Commissioners are of opinion, that no such result would or ought to follow. On the contrary, they propose, (as has been already suggested) that the reduction of the common law to a text should not be held to change the nature or character of the interpretation or application of its doctrines.

An objection of a different character, and which, indeed, is that, which in one shape or another is found afloat through the community, is, that every Code of the common law must necessarily be imperfect, and leave much still to be explained by very imperfect lights; that so far as the principles and details of the common law are capable of codification, they are, or are supposed to be, now well known, and a Code is not necessary to ascertain or promulgate them; that the benefits of a Code must, therefore, be slight and unimportant, since it can provide for comparatively few cases of real doubt, and may even lead to mischievous errors in reasoning or application of the text.

This objection may perhaps be best answered by a consideration of the benefits, which may be derived from a codification of the common law. It has been already admitted, that every such codification must, from the nature of things, be imperfect; for it never can embrace

all the past, present, and future changes in society, which may require new rules to govern them. But this is an objection, in its general form, founded upon the absolute infirmity of human nature, for every purpose of perfect action, and is not limited to codification. It by no means follows, that, because legislation cannot do every thing, or foresee every thing, therefore no legislation should exist, either to remedy evils, to ascertain rights, or to secure property. The benefits proposed by a Code may be summed up in the following propositions.

I. In the first place, certainty, clearness, and facility of reference are of great importance in all matters of law, which concern the public generally. It is desirable, in every community, that the laws, which govern the rights, duties, relations, and business of the people, should as far as practicable, be accessible to them for daily use or consultation. No one, indeed, is so rash as to suppose, that, with the very different occupations, means of education, and opportunities of leisure, of the mass of the people, it is possible for them fully or accurately to understand all the laws in their full force and extent. This must, under all circumstances, require thorough study, laborious diligence, and a great variety of accessary knowledge. But it does not follow, that, because all cannot be attained, therefore the more general and useful rules may not be brought under the notice of the people, and, according to their attainments and leisure, be made the means of guarding them from gross mistakes in business, or gross violations of the rights of others. Now, certainly, if a rule or doctrine of the common law exists in a determinate form or with a determinate certainty, it is capable of being so expressed in the text of a code. If so capable, then it is not easy to perceive, why it should

not be so expressed, that it may furnish a guide for inquirers, to clear away a private doubt, or to satisfy a hesitating judgment.

But this is not all. At present, the known rules and doctrines of the common law are spread over many ponderous volumes. They are no where collected together in a concise and systematic form, having a positive legislative sanction. They are to be gathered from treatises upon distinct and independent subjects of very different merit and accuracy; from digests and abridgments; from books of practice and from professional practice; and above all, from books of reports of adjudged cases, many hundreds of which now exist, and which require to be painfully and laboriously consulted in order to ascertain them. These rules and doctrines may be well known and well understood by eminent lawyers and judges, by profound students, who possess an ample library of law books, and by others, who devote their whole leisure to the purpose. And yet men less eminent, less studious, or with less means to provide a library, or to consult it, may be unable to arrive at the same certainty, and may even be misled by their partial examinations into serious errors and mistakes. A leading rule may have some exceptions, which have escaped the researches of the party, and yet be as well established as the rule itself. Many law suits are now founded upon errors and mistakes of this sort, which the mere imperfection of the means within the reach of the interested party, or of his counsel, has unavoidably produced. A single line of a Code, properly and accurately prepared upon such a subject, might at once have dissipated every doubt and uncertainty, as to the nature, extent and operation of the existing rule.

II. And this leads the Commissioners to remark, in the next place, that one great use of a Code of the common law, in its principal branches, will be the abridgment of professional as well as of private labor, in ascertaining and advising upon a rule or doctrine of that law. A vast deal of time is now necessarily consumed, if not wasted, in ascertaining the precise bearing and result of various cases, which have been decided touching a particular topic. If the result is at all contested by the adverse party, no counsellor would feel safe without a thorough examination of all the leading cases (even though they should spread over centuries), lest he should be surprised at the argument by a loose dictum, a questionable authority, or an ambiguous statement, either distinguishing, or controlling the case before him. Hence it is, that lawyers in the fullest practice are compelled to the most severe studies upon points, upon which they do not entertain much, if any doubt, lest, in the long array of cases, which may be cited upon any disputed or undisputed point, there should be some intimation, which might injuriously affect their client's rights or remedy. And yet, it is not too much to say, that often a single page of a Code would contain, in a clear and explicit statement, all that the researches of a week, or even of a month, would scarcely justify them in affirming with an unfaltering confidence.

One great advantage, therefore, of a Code, an advantage, which in a practical view can scarcely be overestimated, is, that it supersedes the necessity, in ordinary cases at least, of very elaborate researches into other books; and, indeed, it often supersedes in all cases, but those of rare and extraordinary occurrence, the necessity of consulting an immense mass of learned collections and digests of antecedent decisions.

This has accordingly been found to be one of the ordinary results of codification, whenever it has been successfully accomplished. Thus, we are informed, that the Codes of Justinian superseded for ordinary use some camels' loads of written Commentaries on the law. And it is notorious that the civil Code of France, (commonly called the Napoleon Code,) has, in like manner, thrown out of the daily consultation of jurists a voluminous bulk of treatises upon the customary and provincial law of that country. There are cases, indeed, in which now those voluminous collections must still be consulted. But the occasions are probably, not one in a hundred of what they were, before that Code was promulgated. In like manner, it may be unhesitatingly affirmed, that the maritime and commercial Ordinances of Louis the 14th, of 1673 and 1681, not only put an end to a vast extent of litigation in the different maritime provinces of that kingdom; but also furnished rules, so clear and so equitable, as to have been adopted as the basis of much of the maritime law of other countries, and especially of that of England.

III. In the next place, it may be stated, in connexion with the preceding head, and as illustrative of it, that there are in the common law many points, which, though on the whole now established by a considerable weight of judicial authority, are not absolutely beyond the reach of forensic controversy, if learned counsel should choose to stir them. There are, for example, many questions, which have given rise to litigation in different ages, and upon which there may be found in the reports, not only occasional diversities of judicial opinion, but many nice distinctions and differences, and many incidental dicta, which serve greatly to perplex the inquiries of the ablest lawyers. Where authorities are to be found on each

side of a point; where the circumstances of cases, very nearly resembling each other in most respects, are yet distinguishable from each other, by nice shades of difference, or have been so distinguished, thus furnishing grounds for reasoning and controversy, as to the precise extent of a principle; no judges would feel at liberty to stop the argument, although, in their judgment, the weight of authority should be clearly against the suggested distinction or difference. Much of the time of courts of justice is consumed in arguments of this sort, where there are numerous cases, with some slight differences of circumstances, bearing on the same general rule, all of which may be required to be examined and distinguished. It was said by an eminent Judge, (Lord Eldon) upon one occasion, where some question of artificial or technical law was under discussion before him, that there were upwards of three hundred cases bearing on that question, which had already been decided. To master them, with all their minute distinctions of circumstances, would of itself be a vast labor. And yet it is not perhaps too much to say, that four or five lines of text in a Code, stating the true general rule, deducible from the best of them, would at once have put aside the necessity of any further consideration of most of these cases.

There are, besides, numerous points, upon which there are now to be found conflicting decisions, or dicta of courts of justice, which shake the authority of certain doctrines. In cases of this sort, it seems desirable to establish, which of these decisions constitutes the true rule, or at least to give a positive affirmance of the true rule, when it can be fairly ascertained, what that is. And perhaps also, in some instances of daily practical importance, where there is a real doubt, what the true rule of

the common law is, it may not be without use to fix it in a like positive form.

The Commissioners do not indulge the rash expectation, that any Code of the known existing common law will dry up all the common sources of litigation. New cases must arise, which no Code can provide for, or even ascertain. These must necessarily be left to be disposed of by courts of justice, as they shall occur in future. But the Commissioners are of opinion, that a Code, which shall contain the clearly established principles of the common law, will be attended with great benefits to the public, for the reasons already stated. It will shew, what the existing law is, as far as it goes, in a clear and intelligible manner. It will have a tendency to suppress useless and expensive litigation. It will greatly abridge the labors of judges, as well as of the profession, by furnishing a starting point for future discussions, instead of imposing the necessity of constant researches through all the past annals of the law.

Having stated these general reasons in favor of the reduction to a Code of the common law of Massachusetts, to a limited extent, we are next naturally led to the inquiry, what portions of the common law should or may be reduced to such a Code?

For the purpose of a more exact consideration of this subject, the common law of Massachusetts may be distinguished into four classes.

I. That, which is potentially in existence, but, in a great measure, obsolete; and that, which is of rare occurrence in practice, or doubtful and obscure in regard to its nature, extent and operation in the Commonwealth.

II. That, which, though positively in existence and

known as a part of the common law, and admitting of general application, has yet been so modified or altered by the Legislature, as to be of but limited use in practice.

III. That, which is of daily occurrence in the common business of life, and furnishes the rules for the rights of persons and the rights of property of the community at large—in civil cases.

IV. That, which defines and punishes crimes, and ascertains the rules of proceeding in criminal cases.

In regard to the first class, it seems to the Commissioners wholly unnecessary to attempt any codification of so much of our common law as falls within its reach. It would be extremely difficult to draw up any exact text of this portion of our common law, from the obscurity of the proper materials, and from the difficulty in many cases of ascertaining the exact boundaries between what is merely obsolete, and what is not now a component part of that law. And, after all, if any codification thereof were made, it would rather be an incumbrance upon the general text, than any real aid to subsequent inquiries. Thus, for example, it may be a matter of some uncertainty, whether certain common law remedies, respecting real estate, are or were a part of the common law in force here:—such as writs of assize, of common, of pasture, of admeasurement of pasture, of partition, of admeasurement of dower, of cosinage, certain kinds of writs of entry, writs of ejectione firmae, writs of warrantia chartae, and others of a similar nature. Of others, again, there is no doubt of their actual legal existence;—such as, for example, fines and common recoveries; and yet they are now scarcely known in practice, having been superseded by other more convenient modes of transferring real estate. And yet the learning of the common law upon the subject of fines and recoveries is full of intrin-

sic difficulties and niceties, and technical principles, which it would require many pages to state, and many more to make intelligible to the common reader. The same remarks are applicable to the common law respecting markets, outlawry, prerogative, voucher, waife, and other heads of a like nature, remote from our ordinary inquiries.

In regard to the second class, there seems to be equal doubt of the solid utility of any attempt at codification. The great extent, to which legislative enactments have gone in the modification, alteration and superseding of large portions of this class, directly or indirectly, would make the task of selecting that, which is in force, exceedingly embarrassing, and perhaps perilous. Thus, for example, the common law respecting amendments of process and proceedings, bail, distress, feoffments, and other common law modes of conveyancing, forfeitures, mesne and final process, sheriffs and trials, have undergone so many modifications, and alterations, and partial abrogations, that it is not easy to say, how much of the very complicated doctrines of the common law on most of these topics is now actually in force; for in practice they are of rare occurrence and application. But a still more striking illustration may be found in the subject of special pleading. It is well known, that this constitutes one of the most purely technical, acute and intricate subdivisions of the common law; and even the doctrines relative to a small branch only of it, that of abatement, though rare in practice, is full of nice and over curious learning. The Legislature, by an act passed at its last session, have provided, that all matters of law or of fact in defence, in any civil action, may be given in evidence under the general issue, and no other plea in bar of such action shall be pleaded. The effect of this enactment is, to abolish so

much of this branch of the law as relates to special pleas, technically so called. But it leaves in full force all the doctrines of pleading in regard to declarations, in regard to pleadings in abatement, in regard to the general issue, and in regard to general demurrers to the declaration. It would seem, under these circumstances, wholly unnecessary to reduce to a Code the principles of pleading applicable to special pleas, technically so called. The reduction to a Code of the doctrines relative to pleadings in abatement, which is full of intricacy, and to a considerable degree obsolete in practice, would seem equally unnecessary. The doctrines of pleading still applicable to declarations, to general demurrers, and to the general issue, are of a very comprehensive nature, and abound with artificial and technical principles. And it would be a task of no small difficulty to say, in many cases, to what extent many of these principles reach, and how far they are governed by rules ordinarily applied to special pleas, technically so called. For these reasons, the Commissioners are of opinion, that it is not advisable, at present, to codify this branch of our jurisprudence. It would rather seem desirable, if any thing is to be done, to reduce it to a more simple form, and disembarrass it of some of its cumbrous and inconvenient appendages.

The third class is that, to which the Commissioners are of opinion, that the labors of codification should be strenuously and sedulously directed. This class comprehends three great branches of the law. I. That, which respects the civil rights, capacities and duties of persons, considered by themselves, or in their social and other relations to other persons; and the remedies resulting from those rights, capacities and duties. II. That, which respects the rights and titles to real and personal property, and

the incidents thereto, and the remedies, by which they are protected and vindicated. III. The rights, duties and claims arising from contracts, in the largest sense of that term, comprehending express contracts, such as bonds and obligations, conditions, conveyances, covenants, and other positive stipulations between parties competent to contract; and implied contracts, which result by operation of law, either from the implied consent and intentions of the parties, or from the dictates of natural justice in furtherance of right, or in suppression of wrong. Connected with this branch necessarily is the consideration of the remedies applicable to the various kinds of contracts;—some of which stand upon principles purely technical, and others again upon principles of a more general nature.

Many of the most important portions of our common law applicable to the first and second heads, are now so well ascertained, and well defined, as to be capable of being reduced to a positive text. Some of them are indeed of great intricacy; but still capable of being in a great measure reduced to such a text. Perhaps the most complicated of these will be found to be, the rights, and capacities, and duties of guardians and wards, of infants generally, of husband and wife, of executors and administrators and administrations, of corporations, and the rights and titles growing out of last wills and testaments. The latter are of singular intricacy and nicety of detail, arising from the almost infinite variety of language and provisions to be found in last wills and testaments, from the ignorance, or peculiar views, or imperfect expressions of intention by different testators. And yet, it may with truth be said, that even the reduction to a Code of the rules and principles, which have been deduced by a great writer (Mr.

Fearne) from a most acute and close survey of a single head of this subject, that of contingent remainders and executory devises, in the very language, in which he has expressed them, would of itself be no inconsiderable advantage to the profession, as well as to the public. It would almost supersede, in cases constantly arising, the necessity of a daily consultation of authorities, spreading over centuries, and so numerous and various in their application, as to task the time and diligence of the ablest lawyers to a most exhausting extent. They would, at least, have a point of rest, at which they might repose, secure as to the past.

But it is principally in the third and last class, that the Commissioners are of opinion, that the benefits of a Code will be most extensively felt, and in which the task may be performed with the greatest certainty of success. It is true, that some branches of the law of contracts contain rules and principles of a technical and artificial nature, not well adapted to the modern exigencies of society. Examples of this sort may be found in the law applicable to obligations, conditions, covenants, and certain classes of conveyances. But, in general, the law of contracts may be affirmed to be founded in sound sense, and adapted to the ends of social justice. Especially may this be affirmed of the law of contracts, which has been developed and established within the last century. Even the law of contracts, applicable to the old forms of obligations and covenants and conveyances, has been, by the cautious expositions of great judges in different ages, reduced to a high degree of certainty. But commercial contracts are eminently entitled to be deemed in this predicament; and under the forming hands of a succession of learned judges and jurists for the last century, they have attained a sci-

entic precision, and accuracy, and clearness, which give them an indisputable title to be treated as a fixed system of national jurisprudence. In regard to commercial contracts, it may be affirmed without hesitation, that the general principles, which define and regulate them, and even the subordinate details of those principles, to a very great extent, are now capable of being put in a regular order, and announced in determinate propositions in the text of a Code. Among these contracts, the Commissioners would especially recommend as the subjects of a Code the following titles, viz: the law of agency, of bailments, of guaranty, of suretyship, of bills of exchange, of promissory notes, of insurance, and of partnership. They would also recommend, in like manner, the law of navigation and shipping and maritime contracts, including therein the law respecting the rights, duties and authorities of owners, and part owners, and masters, and seamen, and shippers, and passengers; the law of bottomry, of charter parties, bills of lading, and other contracts of affreightment, including therein the law of freight; and the law of general average, of salvage, and of seamen's wages. These branches of commercial and maritime law are not only capable of being put into the form of a positive text, but of being condensed into a text of a comparatively small extent. It is not too much to affirm, that the whole law of insurance, as far as it has been ascertained and established by judicial decisions and otherwise, may now be stated in a text not exceeding thirty pages of the ordinary size of octavos. In point of fact, it is embraced in the commercial code of France in less than half that space; and most of the principles of that part of the Code are the same as those of our law.

In the next place, the Commissioners are of opinion,

as indeed they have already intimated, that the common law, as to crimes and punishments, and the incidents thereto, admits of being generally reduced to a Code with accuracy and precision. If it can be done, it seems to the Commissioners, that the public at large have a right to claim from the Legislature, that it shall be done. One of the most obvious dictates of reason is, that public crimes, which are to affect every citizen, should, as far as practicable, be made known to all. It is wholly unnecessary for the Commissioners to expound the importance of this truth, as it cannot well escape the notice of every intelligent legislator. It is fortunate, that in the present state of the criminal law, there is so much certainty as to the nature and punishment of crimes, at the common law, and the incidents and modes of proceeding therein, that it will not be found a very difficult task, to reduce most of the important doctrines and rules to a positive text.

Connected with these extensive branches of the common law, both civil and criminal, there remains the grave subject of the law of evidence, involving not merely questions respecting the competency and credibility of testimony, but the general rules for the admissibility of written and parol evidence on particular issues. Owing to the invaluable labors of the eminent judges of the last half century, this subject is now, with a few unimportant anomalies, capable of a scientific arrangement and determinate exposition, in its general principles, and in many of its most useful details. The rules of evidence have been truly said to consitute the best, if not the only real security for the lives, the personal rights, and the property of all our citizens; and, therefore, the knowledge of them is of infinite moment to the public, as well as to the profession. Any Code, which does not embrace them, must be

pronounced to be in its very constitution radically defective. The Commissioners, therefore, earnestly recommend the codification of the law of evidence, as among the first objects for the deliberation of the Legislature.

The Commissioners have thus given a very summary view of their opinions, respecting the codification of our common law. Every topic, which they have ventured to suggest, might easily have been expanded into a great variety of auxiliary considerations. But it has seemed to them sufficient to point out the general grounds of their opinions, and to leave to the wisdom of the Legislature a full review of them.

In concluding this part of the subject, it seems proper for the Commissioners to suggest, though it does not exactly fall within the strict terms of their commission, that if a Code should be framed upon any or all of the topics, which they have ventured to recommend, it will afford a fit opportunity for the Legislature to supply some of the acknowledged defects, to cure some of the admitted anomalies, and to correct some of the erroneous doctrines, which, in a long succession of ages, have gradually been engrafted upon our common law. This, to be sure, ought to be done with a cauticus and skilful hand, and with a deep sense of the delicacy of intermeddling with established principles. If, however, no changes are attempted except such as have the sanction of experience, and the support and approbation of enlightened judges and jurists, much may be done to introduce harmony, and consistency, and simplicity into the general system.

It now only remains for the Commissioners to express their opinion, as to the plan or plans, by which such codification, if undertaken, can be best accomplished. Looking to the extent and variety of the labor, as well as to the

learning and ability required for the task, the Commissioners think, that it will be indispensable to employ at least five Commissioners, of high standing in the profession, and otherwise suitably qualified, to reduce those portions of our common law to a Code or Codes, which the Commissioners have proposed. Much time must necessarily be devoted exclusively to the subject; and, with all the aids, which can be obtained, several years will be required for the completion of the entire enterprize. During the progress of it, the Commissioners must have frequent meetings for discussion, as well as for a careful examination and scrupulous review of the labors of each other. Perhaps it may be found advisable to authorize the Commissioners occasionally to employ some assistants, having extraordinary qualifications, to bring together the materials of a particular head for the more deliberate consideration of the Commissioners. In this way the progress of the work might be greatly accelerated, at a comparatively small expense. And it may be properly left to the Commisioners to decide, whether it will be best to lay before the Legislature the result of their labors, from time to time, as particular topics shall be reduced to a text; or to await the accomplishment of the entire scheme, and then to submit it as a whole to the Legislature.

As the Commissioners may find it necessary to open a wide correspondence with members of the profession, in various parts of the United States, as well as to perform many incidental duties, requiring the aid of a Secretary, it is respectfully submitted, that they should be authorized to appoint one, with a suitable compensation.

The Commissioners do not understand that they are required, by their commission, to lay before the Legislature the details of the plan or plans, by which the System

of Codification should be carried into effect, or the particular branches of the common law, which it should embrace, or any analytical exhibition of the mode or arrangement, or contents of the code. They presume, that these matters will properly appertain, and indeed ought to appertain, to the duties of the Commissioners, who shall be appointed to prepare such a Code, if the Legislature should choose to sanction the project. It is obvious, that, in the progress of the investigations, necessary to complete so extensive a labor, many new views must continually arise, and many amendments and improvements of the first plan may be suggested by the experience of the Commissioners, and a more thorough and close examination of particular topics.

Such are the expositions, which the Commissioners have thought it their duty to present to the consideration of the Legislature, upon the interesting and important subject of their commission.

All which is most respectfully submitted.

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Commissioners.