THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW: AN ADDRESS

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AN ADDRESS

DELIVERED AT THE ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION, AT WHITE SULPHUR SPRINGS, JULY 25, 1889,

BY

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PREFATORY NOTE.

SOME years since, at the request of a committee of the Association of the Bar of the City of New York, appointed to oppose before the Legislature of that State the adoption of what was styled a "Civil Code," I prepared a paper upon the subject of Codification. Subsequent reflection, with the advantage afforded by a perusal of several essays, designed as answers to the one prepared by me, had more firmly convinced me that the positions I had taken were correct, and suggested some particulars in which, as I conceived, my former argument might be advantageously enlarged and re-shaped; and, as the edition of my paper had become exhausted, I was contemplating the publication of a new and revised one, when I received an invitation to deliver the Annual Address before the Virginia State Bar Association, at its Annual Meeting for 1889.

Having accepted this invitation, I could think of no subject which would be more likely to prove acceptable to my audience than that to which my former essay had been devoted. I therefore determined to take that up *de novo*, and treat it, so far as I could, without adopting my former method or language; but, in repeating some illustrative views, I have chosen to employ the same language rather than to make a studied effort to avoid repetition.

Inasmuch as my audience could not be supposed to take any special interest in the Civil Code proposed for New York, and

for the sake of brevity as well, I thought it best to omit my criticism upon that measure.

The new aspect now given to the argument is to lay down as its foundation the proposition that human transactions, especially private transactions, can be governed only by the principles of justice; that these have an absolute existence, and cannot be *made* by human enactment; that they are wrapped up with the transactions which they regulate, and are *discovered* by subjecting those transactions to examination; that the law is consequently a SCIENCE depending upon the observation of *facts*, and not a *contrivance* to be established by legislation, that being a method directly antagonistic to science.

I do not mean that legislation is itself free from the operation of scientific principles. There is, indeed, a science of legislation; but, though allied to the science of jurisprudence, it does not include it, and is quite different from it. It is the science of *making* absolute political regulations, not of *discovering* the rules of justice. Legislation is, in one aspect, the *opposite* of jurisprudence, according to the more precise import of the latter term.

These views lead to the conclusion, to establish which has been my main purpose, that the written and the unwritten law have their separate and distinct provinces, and that each should be confined to its own province.

J. C. C.

NEW YORK, September, 1889.

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MR. PRESIDENT AND GENTLEMEN OF THE VIRGINIA STATE BAR ASSOCIATION:—

When I was invited to address this Association which so well represents the Bar of this ancient Commonwealth, upon the occasion of its Annual Meeting, I was somewhat perplexed to determine what particular topic, if any, should form the theme of my discourse. I might have sought to amuse, without taxing your attention, by some slender chain of discursive allusion to the trials, the labors, the satisfactions, the disappointments and the humors which diversify our professional lives; or I might have attempted a discussion of some questions of greater moment upon which all lawyers ought to hold opinions.

It finally seemed to me that in speaking, as I was to speak, to a Bar always and still distinguished for learning, skill, and eloquence, pre-eminently illustrious for its contributions in the past to statesmanship and legislation, I should most fitly evince my appreciation of the high honor which had been paid to me by accepting the latter suggestion.

At every step in our professional lives, and from the beginning of our preparatory studies, we find ourselves under the

necessity, in seeking to ascertain the law, of prosecuting our inquiries in two quite different directions. On the one hand we are told that the legislative body of the State is the only agency which is clothed with the authority of making laws; and the natural inference from this is that if, upon a question arising in any particular case the statute book is silent, there is no law by which it can rightfully be decided. But we find, upon the other hand, that in far the greater number of cases the statute book is silent, and yet the judicial tribunals are in some manner able to find laws, or rules, by which all controversies may be determined.

To some minds this apparent incongruity has seemed a great imperfection in jurisprudence, and, looking chiefly to the supposed necessity, or desirability, that the people at large should know, and know beforehand, the laws by which their actions are to be governed, and have a participation in making them, they have insisted that this imperfection should be forthwith remedied, and that all our laws should be reduced by the legislature to the form of statutes.

Others, on the contrary, looking to what they conceive to be the difficulty, if not the impossibility, of this task, and the obvious unfitness of our ordinary legislators to frame a complete system of jurisprudence, would confine the action of the legislature to the cases in which it seems necessary that the law should be expressed in writing, and in which no difficulties are presented with which men of ordinary intelligence and learning cannot cope.

The especial champions of written law are indeed obliged to admit that *all* law cannot be reduced to writing; for, after it is written, it must still be interpreted in order to be applied, and such interpretation necessarily involves a resort to unwritten rules. We may indeed enact rules of interpretation; but these must themselves be interpreted; and thus those most opposed

to unwritten law find themselves unable to wholly dispense with its aid. And so also those who would restrict the area over which statutory law should be extended fully admit that a large part of human affairs can and should be submitted to the dominion of written rules.

I cannot help thinking that much of the contention upon this subject has been misdirected; and that inasmuch as both parties admit that our law must continue to be in part written, and in part unwritten, the principal effort should be aimed to elucidate the precise advantages and disadvantages which respectively belong to these different modes of making, or declaring, law. It may be that such an inquiry may result in a conclusion that there are certain parts of the legal system of a State which can be best dealt with by written laws; and that others are of a nature which can be successfully treated only by allowing the courts to deal with them unfettered by statutory enactments. It is my purpose to offer some suggestions in this direction; and, if my theme is worthy of a name, it may be styled "The Provinces of the Written and the Unwritten Law."

There are some obscurities which should first be cleared away in order that the real nature of the problem may be well understood. What is this thing which we call "*the law*," and about which we debate whether it should be written, or left unwritten? Is it something which exists only when men *create* it, and as men create it, or has it existed from all eternity, and from time to time revealed itself to satisfy the aspirations, or the needs of the human race? Or is it in part the one, and in part the other?

Undoubtedly, in a very large sense the term *law* embraces every rule which society enforces upon its members, and properly includes all those statutes, more or less arbitrary in their nature, which men are constantly engaged in making, and as