Problems of Sources of Law Relationships
Under the Uniform Commercial Code—
Part II: The English Approach and A Solution
to the Methodological Problem

Steve H. Nickles*

The primary problem in applying the Uniform Commercial Code is its application not to the clear cases falling within its express letter and intent but to those cases which arise on its open textured borderlines. These are the “hard cases,” the “unenvisaged,” the “unprovided for” cases creating doubt about the scope of the statute and its application to them. Part I of this study considers the problem of the “doubtful” cases under the U.C.C. and introduces two methods for resolving them. One method deriving from section 1-102 and influenced by the civil law approach to code interpretation suggests a liberal, analogical approach emphasizing “artful interpretation” of infra-Code principles. The other urges the introduction of ideas, i.e., “meta-Code” concepts, based on extra-Code, common law principles and derives from section 1-103, the antecedent of which is a common

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* Assistant Professor, University of Arkansas (Fayetteville).
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† Part I of Professor Nickles' study of sources of law problems under the Uniform Commercial Code appears in this volume beginning at 31 Ark. L. Rev. 1 (1977). References to textual matter prior to page 171 and to footnotes prior to page 148 are, of course, to Part I.
law "saving clause" found in each of several acts codifying portions of the English commercial law.

Deciding which of the two methods to use in construing the U.C.C. translates ultimately into a dispute over the hierarchy of sources of law in deciding commercial law cases. From which source should a court first attempt to fashion a rule of law to apply in resolving a doubtful case arising under the U.C.C., the provisions of the statute itself as construed according to civil law techniques or common law principles potentially coexisting with Code provisions as a part of a broader corpus of commercial law? The civil law approach to code interpretation recognizes the supremacy of enacted or statutory law as a source of law and concomitantly subordinates the importance of all other sources. The conclusion of Part I of this study is that this approach is not applicable en bloc to the U.C.C.

In stark contrast to the civilian method, the English approach relies upon the unwritten or common law as the primary source of law in deciding doubtful cases arising under codifying acts. The present article continues the study of sources of law under the U.C.C., and it begins by tracing the history of codification in England. The purpose is to establish the background against which one can fully appreciate code methodology as it has developed there. After examining the prevailing English attitudes about codes and the method of interpreting them, the appropriateness of applying that approach en bloc to the U.C.C. is considered.

After analyzing sections 1-102 and 1-103 and the methods deriving from them by reference to their comparative antecedents and contexts, it is clear that each suggests an approach significantly different from the other in terms of the source of law—statutory or common—which should be the primary one in deciding doubtful cases. The final issue addressed in this part of the study is how to solve the methodological problem resulting from the inclusion in the U.C.C. of both sections. No Code provision explains when one derivative method of interpretation is preferable to the other. The problem is simply one of how to decide when to apply which method. A resolution of the problem is desirable and possible, and this article concludes with a suggestion about how to accomplish it.
SECTION III.
THE CODES OF ENGLAND

A. The Nineteenth Century Codification Movement In England

In England at the beginning of the nineteenth century there existed no complete and authoritative edition of statutes and no official series for reporting case law. Numerous and varied efforts were made during the 1800's to correct these deficiencies and generally to give better organization and structure to the bodies of English law. The efforts centered primarily on projects to consolidate the enacted law, to provide more convenient methods for classifying and publishing statutes, and to compile an official index and chronological table to legislative enactments. Initiatives were also suggested to provide improved techniques for reporting, cataloguing and publishing the increasing number of judicial decisions, and the idea of comprehensive digests of substantive areas of the common law gained in popularity. The modern codification movement in England evolved during this period of English legal history, and the codification idea eventually became a much debated alternative to more traditional and conservative approaches in legislative and judicial reform.

As a replacement for the common law system, codification as a method of law, if not also as a form of law, ultimately was

149. The Year Books ceased to be published after 1535, and the Law Reports were not established until 1865. Case reporters appeared during the interim under the names of distinguished lawyers and judges. Some were complete reports of significant cases; others were informal notes and recollections of decisions. The most important of the reports are those by Wallace, Dyer, Coke and Burrow. See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 280-81 (5th ed. 1956).
150. The first proposal in Parliament to codify the common law was made under the reign of Edward VI in 1549, but the idea of reducing the common law into a digest or code dates from the time of Henry VIII. See M. LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA 28-30 (1924). No codifications resulted from these early discussions, and it was not till the close of the eighteenth century that the movement in favor of codification, which ebbed and flowed throughout the last few centuries, was to take up a place of importance and permanence in English legal science and become for a time a question of practical politics.

Id. at 30-31.
rejected in England; but, during the concluding years of this era of reform, Parliament did pass four acts "codifying" portions of the commercial law: the Bills of Exchange Act (1882);\textsuperscript{151} the Partnership Act (1890);\textsuperscript{152} the Sale of Goods Act (1893);\textsuperscript{153} and the Marine Insurance Act (1906).\textsuperscript{154} The primary objectives of this section of the study are to review the history of these laws in the context of the nineteenth century codification movement in England and to examine the English conceptions of codes and of the common law's role in the decision of cases arising under them. The principal issue to be analyzed is the extent of legislative displacement of the common law under the four codes of commercial law.

The analysis will reveal that the status of these laws as "codes" does not imply to English judges and lawyers as it does to civilians an interpretative and applicative methodology which emphasizes exhaustive artful interpretation of the statutes and subordinates the common law as a source of law in the resolution of doubtful cases arising under the acts. The English method is almost completely opposite the civilian approach to code interpretation. As a general rule, the statutes serve as a source of law only to the extent that their express language clearly applies to a case. Instead of liberal construction and analogical development, the techniques more commonly utilized under the English codes are strict construction and frequent supplementation with common law principles. The rule is free resort to "outside" law, and civilian-style interpretation stressing intra-code extrapolation is the exception.

The English commercial codes, particularly the Bills of Exchange and Sale of Goods Act, were prime movers of and models for the first uniform commercial laws in the United States.\textsuperscript{155} The commercial law of England and English conceptions about codes and the role of the common law under them, therefore, have influenced the substance, form and method of the Uniform Commercial Code. Yet the English approach to code methodology is the result of attitudes and circumstances not present in the situation of the U.C.C. Just as Section II of this study demonstrated that civilian methodology is not properly applicable en bloc to the Code, this section will suggest the

\begin{footnotes}
\item[151.] Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61.
\item[152.] Partnership Act, 1890, 53 & 54 Vict., c. 39.
\item[154.] Marine Insurance Act, 1906, 6 Edw. 7, c. 41.
\item[155.] See pp. 219-21 infra.
\end{footnotes}
inappropriateness of adopting en bloc the English approach. Attention first will be directed to the historical context of the codification movement in Great Britian out of which that country's commercial codes developed and, thereafter, to the four codifications themselves and the methodology applied to their interpretation.

The Acts when promulgated embodied legal rules and principles drawn from pre-existing statutory and common law. They are distinguishable from mere "consolidations" which order and condense only the legislatively enacted law within a legal subject area. The four commercial acts were considered to be "codes" and thus to be authoritative sources and expressions of law within their respective fields. The extent of their exclusivity as sources of law in doubtful cases is the principal question to be investigated in this section.

The commercial codes are not, however, representative products of the codification philosophy urged during the nineteenth century by the greatest among English law reformers, Jeremy Bentham. To appreciate fully the place and role of the four commercial codes amidst the seamless web of English common law, one must understand the influential ideas of Bentham and appreciate the fact of their rejection generally in England.

B. England's Justinian, Jeremy Bentham, And His Conception About Codification

Jeremy Bentham (1748-1832) was a moralist, a politician and a jurist. He argued the adoption of the principle of utility as the basic assumption upon which to reconstruct systems of ethics,

156. "Consolidation" and "codification" frequently are used interchangeably in Anglo-American jurisprudence, but they are different forms of legislation. The misuse of the terms in common law systems probably is due to the fact that the English have defined and conceptualized a "code" in the broadest and most generic terms. In England, traditionally, codification has not necessarily implied a legal method, as is the case in civil law systems, but only a particular arrangement of legal rules.

The term codification is sometimes employed loosely so as to include Consolidation of Statutes. But in its stricter and narrower sense it means an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statute law or in common law. C. ILBERT, supra note 148, at 128. "The term 'consolidation,' as applied to statute law, means the combination in a single measure of enactments relating to the same subject-matter, but scattered over different Acts." Id. at 111.
government and law; and he sought to establish the validity of his arguments on the basis of rationalism and empiricism. Bentham was an unceasing worker and a prolific writer for a wide range of causes; but according to a biographer, "the real end . . . of all of this labour was practical legislation, . . . and it will be allowed that in the field of law, at any rate, he met with conspicuous success."^{157}

Bentham's reaction to the state of the law as it existed in England at the beginning of the nineteenth century^{158} was negative and just short of fanatical, and he became a fierce critic of the traditional legal order. In this very first writing, A Fragment on Government,^{159} which was a critical response to Black-


One writer has warned that in order to appreciate Bentham's work and thought it is necessary to see it as a unity and that to consider only one aspect of it "torn asunder from the others is bound to be one-sided and misleading." Friedmann, Bentham and Modern Legal Thought, in Jeremy Bentham and the Law 233, 234 (G. Keeton & G. Schwarzenberger eds. 1948). Although the discussion of Bentham herein emphasizes the legal aspect of his work, Professor Friedmann's warning is noted; and an effort is made to integrate with the consideration of Bentham's law-related writings his efforts as a philosopher and social reformer.

Noted in passing is the argument about whether Bentham was in fact a lawyer. See Jolowicz, Was Bentham a Lawyer?, id. at 1. After taking a degree from Oxford in 1763, he undertook formal legal studies at Lincoln's Inn; but he returned to Oxford and there attended Blackstone's lectures and frequented the courts of London. He was not a lawyer in the sense of being engaged in the practice of law, and he referred to himself as a non-lawyer. Id. at 5.

158. The state of the law at the beginning of the nineteenth century has been thus described by an eminent legal historian and adopted by another as an apt description:

Heart-breaking delays and ruinous costs were the lot of suitors. Justice was dilatory, expensive, uncertain, and remote. To the rich it was a costly lottery: to the poor a denial of right, or certain ruin. The class who profited most by its dark mysteries were the lawyers themselves. A suitor might be reduced to beggary or madness, but his advisers revelled in the chicane and artifice of a lifelong suit and grew rich. Out of a multiplicity of forms and processes arose numberless fees and well-paid offices. Many subordinate functionaries, holding sinecure or superfluous appointments, enjoyed greater emoluments than the judges of the court; and upon the luckless suitors, again, fell the charge of these egregious establishments. If complaints were made, they were repelled as the promptings of ignorance: if amendments of the law were proposed, they were resisted as innovations. To question the perfection of English jurisprudence was to doubt the wisdom of our ancestors . . . a political heresy which could expect no toleration.

T. Plucknett, supra note 149, at 73, [quoting 2 T. May, Constitutional History 384 (1861)].

159. The work appeared anonymously in 1776, but its authorship
stone's Commentaries, he attacked principles, reasoning and eventually was disclosed and won Bentham a certain amount of fame and a number of influential friends. A Fragment on Government was a digression from a more comprehensive rebuttal to Blackstone entitled Comment on the Commentaries [hereinafter cited as Comment]. The Comment was intended "to deprive Blackstone of as much of his authority as he [Bentham] could, thus furthering the cause of reformation." J. Bentham, A Comment on the Commentaries 12 (1928) (with Introduction and Notes by C. W. Everett). For facts about how the Comment came to be written, see generally, Everett, Introduction to id. at 1-10. For a comparison of Blackstone's and Bentham's conceptions of law, see id. at 10-28. Bentham's purposes in writing Comment basically were two:

First, he wished to diminish the regard paid to Blackstone as a legal theorist, by showing that his philosophic ideas were confused and vague, and that the rules and maxims he had formulated or repeated were either inconsistent with each other or were platitudes hardly worth uttering; by showing also that his satisfaction with the existing state of affairs was based rather on his personal and professional prejudices than on a rational examination of the public good.

Secondly, he meant to indicate, at least by implication, that there is possible an entirely different conception of the nature and function of law from Blackstone's. Bentham saw law . . . as the expression of a sovereign will, with which the judges had nothing more to do than to see it carried out. The unwritten law he objected to because he thought it substituted the will of the judges for the will of the legislators, and also because the unwritten law, being impossible to be known by the subject, could produce only a state of uncertainty. Since he felt that certainty tended to render law a producer of happiness . . . he always advocated a complete and easily accessible publication of the law in language which those who were to obey it could understand.

Id. at 27.

Why the ideas of two legal giants such as Blackstone and Bentham should clash is understandable when one considers the opposing characterizations made of them by Sir Holdsworth: Blackstone attained lasting fame "as one of the greatest of the expositors of the traditional law of England, and Bentham as the pioneer and director of the process of adapting and transforming that traditional law to meet the needs of a new age." Holdsworth, Gibbon, Blackstone, and Bentham, 52 Law Q. Rev. 46, 59 (1936). Another comparison is this:

Bentham was primarily a law reformer. He was notably in contrast with Blackstone who, in his Commentaries, is at all times the apostle, if not the eulogist of the law and the procedure of his time. Thus Blackstone thought it better through fictions and circuitries to adapt to modern conditions old established forms, which had become obsolete and unsuited, than to repeal them.

For different was the criticism of Bentham who said of the law of England that it was a "fathomless and boundless chaos made up of fictions, tautology and inconsistency, and the administrative part of a system of exquisitely contrived chicanery which maximized delay and denial of justice."


160. Commentaries on the Laws of England was printed in 1765
methods which supported English common and constitutional law. Three years later he exhibited his faith in the legislature rather than the courts as the institution better suited for effecting utilitarian social and legal reform. In *The Principles of Moral and Legislation,* Bentham proclaimed that “there should be constant radical legislation as the mainspring of law, and it should be directed to the end of securing the greatest happiness of the greatest number.” The attacks led by Bentham on the received legal system resulted in changes which transformed the substance and administration of English law.

and comprised lectures delivered by Sir William Blackstone as a professor at Oxford. Blackstone’s *Commentaries* was the first complete analysis of the state of English law since the writings of Bracton about 500 years earlier.

161. The volume was printed in 1780, but it was not published until 1789. During the interim some of its wisdom may have been lost to the appetites of rats. C. Atkinson, *supra* note 10, at 94. *An Introduction to the Principles of Morals and Legislation* is a systematic statement of the doctrine of utility and a clear presentation of the utilitarian basis of law.


“General utility” represents “the greatest happiness or greatest felicity principle.” The latter is that principle which states the greatest happiness of all those whose interest is in question, as being the right and proper, and only right and proper universally desirable, end of human action: of human action in every situation, and in particular in that of a functionary or set of functionaries exercising the powers of government.

Id. at 1 n.1.

The most common expression of Bentham’s axiom of utility is “the greatest happiness of the greatest number,” but in the later years of his life he concluded that the phrase was insufficiently clear and precise. He dismissed “the greatest number” as superfluous and declared that the true object of politics and morals is simply “the greatest happiness.” C. Atkinson, *supra* note 157, at 214.

163. Bentham was effective in causing reforms in the substantive legal areas of poverty law, evidence, civil procedure, penal reform, and debtors law, including bankruptcy, insolvency and imprisonment for debt. The listing is not exclusive. And the Judiciary Act of 1873 which reorganized the English court system was based to a large extent on his ideas. His ideas about the form of the law, i.e., codification, were rejected in England itself (see p. 187 et seq. infra), but they were influential in other parts of the English Empire, notably India. See p. 188 supra.

Bentham’s thoughts about the law—substance, procedure and form—were only slightly influential in America. See generally, Everett, *Bentham in the United States of America,* in JEREMY BENTHAM AND THE LAW 185 (G. Keeton & G. Schwarzenberger, eds. 1948); Palmer, *Benthamism in England and America,* 35 *Am. Political Sci. Rev.* 855 (1941); Comment, *Influence of Bentham’s Philosophy of Law on the Early Nineteenth*
but his suggestions for legal reform also included improvement in the law’s form and method.

As a champion of parliamentary reform, universal suffrage and radical republican democracy,164 Bentham believed that statute law as enacted by the peoples’ representatives was the only “real” law in comparison with the “counterfeit” common law.165 Case law, he explained, is made by judges in the same fashion a man makes law for his dog.

When your dog does anything you want to break him of, you wait till he does it, and then you beat him for it. This is the way you make law for your dog; and this is the way the judges make law for you and me.166

Bentham and his disciples not only were critical of the way in which judges were making law, i.e., post facto on an uncertain basis;167 they objected generally to the fact that under the com-

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164. See Palmer, supra note 163, at 856.
165. M. Lang, supra note 150, at 33. Bentham wrote that if one wishes to know what a “real” law is:
   Open the statute-book:—in every statute you have a real law: behold in that the really existing object: —the genuine object, of which the counterfeit, and pretended counterpart, is endeavoured to be put off upon you by a lawyer, as often as in any discourse of his word Common Law is to be found. [emphasis in original]
   Common Law the name of an existent object?—Oh mischievous delusion—Oh imprudent imposture! Behold, my friends, how, by a single letter of the alphabet, you may detect it. The next time you hear a lawyer trumpeting forth his Common Law, call upon him to produce a Common Law: defy him to produce so much as any one really existing object, of which he will have the effrontery to say, that that compound word of his is the name. Let him look for it till doomsday, no such object he will find.
J. Bentham, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION pt. 2, at 105 (1817).
167. Bentham referred to ex post facto law as the “most mischievous and intolerable abuse... an abomination interwoven in the very essence of that spurious and impostrous substitute, which, to its makers and their dupes, is an object of such prostrate admiration, and such indefatigable eulogy, under the name of Common or Unwritten Law.” J. Bentham, supra note 165, pt. 1, at 33 [emphasis in original].
   He believed a “sure result” of common law to be uncertainty—“a disease, with which as with a palsy, the whole frame of this fictitious body of law is shaken,” and he thought that attempts to cure imperfections in the common law by common law methods would generate more uncertainty. Id. pt. 2, at 110.
   Bentham questioned who made the “rules” of the common law. He concluded that neither legislators nor judges made them, but that “the only individual, in relation to whom you can have any complete assur-
mon law system courts were legislating and, thereby, usurping the law-making function which belonged rightly and exclusively to the legislature.168

Two propositions which guided Bentham in developing a theory about the form and method of the law were the supremacy of enacted law and the social and legal utility of all men knowing the law and having access to it.

Yes: only in proportion as the conception a man has of it is clear, correct, and complete, can the ordinances of the law be conformed to, its benefits claimed and enjoyed, its perils avoided:—those perils with which every path, every step in the field of human action, may be encompassed.

To lodge and fix in each man's mind, that portion of the matter of law on which his fate is thus dependant—exists there that State, in which this operation is not among the most important duties of the government2169

Not only were courts improper legislators, Bentham thought, but law developed in volumes of case reports was uncertain and inaccessible—physically and intellectually—to the mass of people. It was difficult enough for some in the legal profession "to lodge and fix" in their minds "that portion of the matter of law on which [their clients'] fates are thus dependant," and lawyers of the period to some extent shared Bentham's frustration with common law methodology. The evil which Bentham and other less radical reformers saw in the case law method is reflected in the following passage quoted from a law journal article appearing in the early 1800's:

We have, in the discharge of our professional duty, just concluded a search which we trust may be profitable to our clients. In investigating a point of some difficulty, which arose in practice, we have been obliged to open at least one hundred volumes. Our first clue was the name of a leading case on the subject, on which we wished to satisfy ourselves, which case, fortunately, we remembered. This case furnished us with references to no less than twenty others, and we then pursued our search with

168. Bentham believed that reformation could come only from the legislator and that for the judge to attempt it would only make things more uncertain than ever. See Everett, supra note 159, at 24. (He was, however, an admirer of at least one judge, Lord Mansfield. See Judson, supra note 159, at 50.) Legislation was designed "to pluck the mask of mystery from the face of jurisprudence," according to Bentham; and "he was convinced of the superiority of the enacted law to the unenacted law." Holdsworth, supra note 159, at 51.
vigour. From octavo to folio, from report to abridgement, from abridgement to digest, from digest to treatise,—on we went hour after hour. Once, indeed, we thought we had caught the true rule, as laid down by one learned judge, but before we had finished the page, we found ourselves lost in further references, with new qualifications. We turned to these but to discover other diverging paths presented to us. We still, however, pursued our way: amidst clouds of dust, we dived into the forgotten lore of black-letter, and spelt over page after page of a hotchpot of language. In the old reporters we found conclusions without premises; in the new, premises without conclusions. The ancient judges laying down rules without number; the modern judges carefully abstaining from laying down any rule at all. At last, bewildered by all we had read, and hardly able to look over the pile of books we had accumulated, we found that the result of all our labour came to this,—that our precise case had never occurred before—that there was no general rule on which we could decide it, which had been recognized by the general stream of decisions, and that we must make up our minds to determine it on a common sense application of our first view of law.\footnote{170}

The common law system in Bentham's view permitted knowledge and understanding of the law to be monopolized by the lawyers who, as a class, were altogether worthless in his estimation. To him they were the "natural and implacable enemies and oppressors" of the people,\footnote{171} and their functioning was counterproductive to the goals of truth and justice.

So far as concerns love of truth and justice, the greatest but at the same time the most hopeless improvement would be, the raising of the mind of the thorough-paced English lawyer, on a bench or under a bench, to a level with that of an average man . . . whose mind has not, for professional views and purposes, been poisoned with the study of law. . . .\footnote{172}

If the form of the law could be improved to Bentham's specifications, there would be practically no need for lawyers; and men would attend to their own legal needs and represent their own legal rights.\footnote{173}

\footnote{170} The Consolidation of the Common Law, 18 Leg. Obs. 33 (1839).
\footnote{171} J. Bentham, supra note 165, pt. 1, at 65.
\footnote{172} 7 J. Bowring, supra note 166, at 188.
\footnote{173} Bentham believed that if such an all-comprehensive code as he proposed was adopted, "seldom would there be any . . . question as a question of law: never any other question of law than a question concerning the importance of this or that portion of the existing text of the really existing law." J. Bentham, Codification Proposal Addressed by Jeremy Bentham to All Nations Professing Liberal Opinions 3 (1822). Therefore, he reasoned that if his code were adopted the result would be that "every man [shall] find, for most purposes of consultation, his own lawyer: a lawyer, by whom he can neither be plundered nor betrayed." J. Bentham, supra note 165, pt. 2, at 104. But, Bentham realized:
While he preferred enacted law to case law, Bentham was not satisfied with the contemporary state of the legislative art and product. As already observed, even Parliament realized the need for modernizing the statute books. Legislation was almost as fragmented and inaccessible as case law, and Bentham was highly critical of statutory draftsmanship which he found to be imperfect on two levels. The imperfections of the first order were ambiguity, i.e., obscurity which is "ambiguity taken as its maximum," and overbulkiness. Seven imperfections comprised the second order: unsteadiness in respect of expression; unsteadiness in respect of import, redundancy, longwindedness, entanglement, nakedness in respect of helps to intellection, and disorderliness. The eminent English legal historian Sir William Holdsworth reported that these criticisms were to a large extent well-founded.

For Bentham, the solution to the problems which concerned him most—common law made by judges, law perversion by lawyers, inadequate and imperfect statutory law and the uncertainty and insecurity of all law, and the general population's ignorance of the law—was "codification," a term invented by him. According to his principle of utility as applied to the

That on every occasion of life, every man should be his own lawyer is plainly impossible.

In many instances want of talent, in any instance want of time, may suffice to render it so. But, on this point as well as on others, the further the sense of independence can be carried, the better: the better, if not in all eyes, at any rate in such as yours. . . . No man can have a lawyer at all times at his elbow. Id. While conceding that "never can the profession of a lawyer be wholly superseded: never at any rate, the office of a Judge," Bentham clearly had that goal as an important end of his codification proposal. He wrote that every step made toward abolishing the legal profession was a "blessing" and that "in the impossibility of attaining the summit of perfection, no reason can be given for not aiming at it." Id. at 115.

174. See p. 130 supra.
175. 11 W. HOLDsworth, supra note 148, at 375.
176. Id. at 375-76.
177. Id. at 375. It is doubtful whether the legislative system of England in Bentham's day was capable of better draftsmanship. Members of Parliament were "country gentlemen who were incompetent, ignorant amateurs on the job, without interest in general principles, awesome of tradition, and with a profound veneration for the law." Graveson, The Restless Spirit of English Law, in Jeremy Bentham and the Law 101 (G. Keeton & G. Schwarzenberger eds. 1948). Bentham had a plan for reforming Parliament with regard both to the franchise and the representation of the electorate in Parliament itself. See J. Bentham, Plan of Parliamentary Reform in the Form of a Catechism (London 1817). For a discussion and an analysis of the plan, see Fitzgerald, Bentham and Parliamentary Reform, id. at 123.
178. C. Ilbert, supra note 148, at 122.
form and method of the law, "in every political state, the greatest happiness of the greatest number requires, that it be provided with an all-comprehensive body of law."\(^{179}\) He argued that the greatest blessing any country can possess is a well imagined and expressed "compleat and explicit [code] of laws."\(^{180}\)

The meaning and implications which Bentham attached to a "code of laws" are outlined in this quotation from an analysis of Benthamistic codification by Sir Courtenay Ilbert:

> The object of a code is that every one may consult the law which he stands in need, in the least possible time. "Citizen," says the legislator, "what is your condition? Are you a father? Open the chapter 'Of Fathers.' Are you an agriculturist? Consult the chapter 'Of Agriculture.'" A complete digest, such is the first rule. Whatever is not in the code of laws ought not to be law. "The greatest utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten." Its style should be characterized by force, harmony, and nobleness. "With this view, the legislator might sprinkle here and there moral sentences, provided they were very short, and in accordance with the subject, and he would not do ill if he were to allow marks of his paternal tenderness to flow down upon his paper, as proof of the benevolence which guides his pen." "A code framed upon these principles would not require schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody; each one might consult it at his need. It would be distinguishable from all other books by its greatest simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals." The code having been prepared, the introduction of all unwritten law should be forbidden. Judges should not make new law. Commentaries, if written, should not be cited. "If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the Legislature, with the reasons of his opinion and the correction he would propose." "Finally, once in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time may have become obsolete."

In short, the code was to be complete and self-sufficing, and was not to be developed, supplemented or modified except by legislative enactment.\(^{181}\)

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Bentham elsewhere noted the properties or qualities which he believed should be characteristic of a code of laws:
1. Notoriety, or rather aptitude for notoriety, in respect of its content; 2. Conciseness; 3. Clearness in respect of its language;
Bentham believed the greatest happiness also required that in each country intending to adopt such an all-embracing, comprehensive code\textsuperscript{182} the drafting from beginning to end should be by a "single hand,"\textsuperscript{183} i.e., his own hand. He therefore offered his services free of charge to any nation or state which would accept his invitation to codify according to his plan.\textsuperscript{184}

The type of code proposed by Bentham was one "stating in detail the whole corpus of the law, which the courts are simply to apply"\textsuperscript{185} and "synthetically constructed according to the principle of utility which would reduce the judicial role to one of mere application of the law."\textsuperscript{186} He wanted to codify the "entire

4. Compactness in respect of its form; 5. Completeness, or say all-comprehensiveness, in respect of its extent; 6. Intrinsic usefulness in respect of its character; 7. Justifiedness, i.e., manifested usefulness, in respect of the body of instruction, by which in the form of principles and reasons, it ought to be illustrated, justified, recommended, and supported.

J. Bentham, supra note 165, pt. 2, at 106.

182. Bentham did not propose that the content of each country's code would be identical. In each nation, the substance of the law would be reflective to a degree of the needs and experiences of the particular society, but the organization and arrangement of the code would not vary from state to state. The "General Codes" (Penal, Civil and Constitutional) would be divided into "Sub-" or "Particular Codes," such as police, commerce, military and international relations. These would be divided further into parts containing respectively laws of "constant concernment" and laws of "occasional concernment," depending upon whether the specific law was one the individual should keep foremost in his mind at all times. The "constant concernment" division would be subdivided even further into laws of "major concernment" and laws of "minor concernment." Other principles of division and organization were to be applied to the Bentham codification of laws (see J. Bentham, supra note 165, pt. 1, at 7-16; id., pt. 2, at 106, 116 n.1), but what has been noted is sufficient to indicate the degree of scientifically calculated detail he proposed.

183. J. Bentham, supra note 179, at 33.

184. An offer was made by Bentham in 1782 to codify the laws of India. When President Madison rejected Bentham's offer in 1811 to codify American law, he wrote to the governor of each state of the United States. One year earlier he had written to the Emperor of Russia about constructing a codification of that country's laws. Finally, in 1822, he published an open invitation to all the countries of the world. A separate petition for codification for presentation to the English House of Commons was published seven years later, but it was never introduced into Parliament.


186. Donald, supra note 185, at 164. This author lists three categories of comprehensive codes. The first is the complete comprehensive code, such as that proposed by Bentham. The second includes the institutional comprehensive codes, i.e., "codes covering generalised areas of law, such as civil or commercial law, but stating the rules as general principles,
field of law—a field little less extensive than the whole field of human action...,”\textsuperscript{187} and thus to provide a “body of laws... designed for all purposes without exception...”\textsuperscript{188} The code was to be so complete as to effect “nothing less than the conversion of the whole body of Common Law into Statute Law...”\textsuperscript{189} No source of law except the codified enacted law would continue to exist, and he urged explicitly the “complete extirpation of the Common Law.”\textsuperscript{190}

The role of the judge operating under a Bentham code would be simply to declare the law as it was found in the text and language of the codification. “This Code will rather be a set of authentic instructions for the judges, than a collection of pre-emptory ordinances,” and their path would be ever chalked out for them “as it were two parallel lines, no power that can be called arbitrary is left to them in any part of it.”\textsuperscript{191}

In the code itself they will behold all the considerations, capable of affording proper grounds for their decision: and on each occasion, it is to the text of the law that, in justification of such application as, on that occasion, they think fit to make of those same grounds, they will all along make references.\textsuperscript{192}

Bentham did recognize the possibility of ambiguities and gaps in his code,\textsuperscript{193} but the court was not to make law, i.e., to

\textsuperscript{187} J. Bentham, supra note 185, pt. 2, at 40.
\textsuperscript{188} Id. at 100.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 125. According to Bentham, “Whatever is not in the code of laws ought not to be law,” and he excluded every other source of law, including custom, foreign law, natural law and the “pretended law of nations.” See 3 J. Bowring, supra note 166, at 205.
\textsuperscript{191} J. Bentham, supra note 165, pt. 2, at 99.
\textsuperscript{192} Id.
\textsuperscript{193} Bentham did not believe that every particular fact situation was foreseeable, but he did argue that his code could be so drafted as to foresee every species of case. 3 J. Bowring, supra note 166, at 205.

One writer who has noted the confidence of Bentham in this respect finds therein a significant flaw in the scheme of the code:

At times he seems to believe that the categories for the legal codes could be worked out once and for all with no need for development. In this respect, his thinking paralleled the me-
develop or to expand a given rule, to resolve the doubtful case. His idea of the judicial function under a code was more extreme than that suggested by the orthodox civilian method of exegesis. Unlike European codes which permit solutions based on the spirit of the written law, Bentham limited solutions only to those obvious in the literal text. No provisions analogous to U.C.C. section 1-102 calling for a liberal construction would be contained within a Bentham code. A judge would “indicate” a remedy for a doubtful case, perhaps on the basis of a liberal interpretation or analogical development; but only the legislature would be allowed to raise that opinion to the status of law.

In a Bentham code no provision similar to U.C.C. section 1-103 would find a place. No source of law relationships or problems would exist. No other source would be recognized except the express text of the statutory code. He intended the code to be pure, perfect and complete, and to protect these virtues he required the abolition of all competitive sources of law. His reasoning was clear and simple: “So long as there remains any, the smallest scrap of, unwritten law unextirpated, it suffices to taint with its own corruption,—its own inbred and incurable corruption,—whatever portion of statute law has ever been, or can ever be applied to it.” Upon the enactment of the code, the only source of law would be comprised, “the whole of it, in a small number of volumes; the part necessary to each man in particular in one small volume...,” and the unwritten law

chanist outlook according to which all future events are in principle deducible from the present position and velocity of atoms. Bentham neglected the dialectical movement which necessitates change in both the form and the content of the legal superstructure.

Comment, Jeremy Bentham’s Codification Proposals and Some Remarks on Their Place in History, 22 Buffalo L. Rev. 239, 245-46 (1972).

194. See p. 36 et seq. supra.

195. For the doubtful case arising under the code, the procedure was to be as follows: “If a new case occurs, not provided for by the code, the judge may point it out, and indicate the remedy: but no decision of any judge, much less the opinion of any individual, should be allowed to be cited as law, until such decision or opinion has been embodied by the legislator in the code.” 3 J. Bowring, supra note 166, at 210.

Bentham did not provide for the use of analogical development of code provisions. He disapproved of extending of the common law by analogy and had argued that there was no analogy in legislation. See Graveson, supra note 177, at 101, 107-08.


197. Bentham often referred to the common law in various derogatory terms. In this particular context, the unwritten law he called “sham” law. See, e.g., J. Bentham, supra note 165, pt. 2, at 114.
and other sources of law—"the whole heap of foreign lumber"—would be "completely superseded, rendered as completely useless . . . ."

Jeremy Bentham's conception of codification envisioned the annihilation forever of both pre-existing case law and common law methods of reasoning and development of legal and equitable principles having precedential value, and it proposed a radically different view of the role and the methodology of courts in the interpretation of statutes. He offered his conceptualism to England and the world.

C. The Failure Of Early Nineteenth Century Attempts
   At Partial Codification And the Rejection Of
   Bentham's Conception of Codification

In 1832, the Whigs came into power in England. Because many of them had been influenced by Bentham and his school, a royal commission was appointed in 1833 and directed to consider, among other alternatives to law reform, codification of the common law. The scope of the undertaking was not intended to embrace the whole of the law, as Bentham would have liked, but only the criminal law; but, with regard to this one area of the law, the code's intended design was reflective of Bentham's ideas about a codification superseding the common law and being the exclusive source of law.

The commission worked for seven years digesting the common law and produced seven reports. A bill was drafted embodying the digest but containing changes and improvements in the common law which the commission deemed necessary. The proposal was introduced into Parliament, but it was withdrawn prior to any action being taken. The commission was extended in 1845 to complete the digest of the law of criminal procedure. After years of work on a code and debates in and

198. Id., pt. 1, at 42. Conveniently in Bentham's scheme, a statutory enactment is of superior authority to all law that existed prior to the legislative promulgation. "In the case of Statute Law, no law can ever come into competition with any law of posterior date." Id., pt. 2, at 110. Under Bentham's plan any and all law regardless of origin would predate his comprehensive and exclusive code and thus would not be competitive with code law as a source of law.

199. 11 W. HOLDSWORTH, supra note 148, at 316.
200. The intended codification probably can be classed as a partial comprehensive code. See supra note 186.
201. M. LANG, supra note 150, at 42-43.
out of Parliament, the project finally was dropped.\textsuperscript{202} The decisive opposition came from the English bench. Judges openly expressed skepticism about the notion of a comprehensive expression of the criminal law. They feared gaps and ambiguities in the legislation which would cause uncertainty in the administration of justice and result in an increase in litigation. The English judges as a group saw no evils in common law substance and method so great as to require a change in its form.\textsuperscript{203}

A second commission was created in 1866. Perhaps remembering the nature of the judicial opposition expressed earlier, it took a somewhat different approach to a criminal law codification, i.e., "the common law was to remain the law of the land so that the digest would then serve merely as a kind of vade-mecum of the common law."\textsuperscript{204} This attempt to digest and to codify the criminal law also resulted in complete failure. A final attempt was made ten years later by a student of the Bentham school, Sir James Fitzjames Stephen. He had been successful in efforts to codify large parts of the law of India, but his English codes of evidence and criminal law failed to pass in England.\textsuperscript{205} This failure "gave a check to the cause of codification in England."\textsuperscript{206}

On a philosophical level, Bentham's notion of a perfect and comprehensive code of laws failed of adoption because his purely rational theory of law was imperfect. He failed to account for "the emotional content which must be present in any sphere of knowledge so intimately connected with human life and human passions."\textsuperscript{207} He attempted to treat the law as an exact sci-

\begin{itemize}
  \item \textsuperscript{202} See generally, id. at 43-54.
  \item \textsuperscript{203} See generally, id. at 47-52.
  \item \textsuperscript{204} Id. at 54-55.
  \item \textsuperscript{205} C. ILBERT, supra note 148, at 127-28. Bentham became interested in the codification of Indian law as early as 1782, and this interest continued throughout his life. A bill which he drafted was enacted in India a year after his death and established a commission to prepare a complete code of laws for that British colony. "With but small exceptions the law of India is a codified law; and the method by which the codes were fashioned ... was in the main that which he (Bentham) had laid down..." Versey-Fitzgerald, supra note 180, at 225. Bentham's ideas about codification were more successful in India than in any other part of the British Empire. See generally, C. ILBERT, supra note 148, at 129-55; M. LANG, supra note 150, at 69-95. See also, Stephen, Codification in India and England, 18 FTOR. REV. 644 (1872).
  \item \textsuperscript{206} C. ILBERT, supra note 148, at 128.
  \item \textsuperscript{207} Jolowicz, Jeremy Bentham and the Law, 1 CURRENT LEGAL PROB. 1, 11 (1948). In defense of Bentham's neglect of history and of the irrational character of man, it is argued:

  Bentham lived and worked in a period when the gradual expan-
ence\textsuperscript{208} and to exclude history as a vital element in the development of his scientific body of laws. The legislator, he believed, should not be touched by tradition.\textsuperscript{209}

Bentham's idea of establishing statutory law as the only source of law was also rejected for practical reasons. English lawyers and judges considered the common law a proud possession. It was an elaborate body of law which had a long and continuous history. To codify the law, as defined by Bentham, and, consequently, to expunge any part of the common law was very difficult politically.\textsuperscript{210} Most Englishmen did not share the Benthamites' beliefs about the possibility of a completely comprehensive legislative enactment, the desirability of ceasing judicial development of legal principles, the necessity of abandoning altogether historically seasoned legal rules and precepts, or, generally, the superiority of any code in solving the problem of uncertainty in any field of law.\textsuperscript{211} Bentham's con-

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\textit{section of the liberty of the individual and of the community of nations...} were generally believed to herald the inevitable progress of man. Bentham drew his inspiration from the belief in reason as the guiding principle in an age of progress. While not ignorant of the influence which time and circumstances had on peoples and laws Bentham believed in 'Man' as the transcendent unit.

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\textit{Friedmann, supra} note 157, at 243.
\textit{208. Jolowicz, supra} note 207, at 11.
\textit{209. Id.}
\textit{210. See, 11 W. Holdsworth, supra} note 148, at 317. An interesting and instructive contrast should be noted. In \textit{SECTION II} (\textit{THE CIVIL LAW COMPARISON}) of this study, the point was made that the civilians of Europe historically have distrusted judges in administering law (see pp. 18-21 \textit{supra} & notes cited), but that in England the courts traditionally have been institutions commanding great respect (see note 57). Expanding on that contrast, it should be noted that the alternative on the Continent was for citizens to look to the legislative bodies as the protectors of freedom and liberty. This was not considered necessary or desirable in the Anglo-Saxon tradition of England. It has been said that freedom was inherited with the common law, legislators were distrusted, and many preferred judge-made law to statutory law. See, \textit{Judson, supra} note 159, at 51.

\textit{211. Quoted here is a view of Englishmen's attitudes about codes and legal method which were contrary to those necessary for an acceptance of Bentham's conception of codification:}

\textit{We no longer believe either in the practicability or in the desirability of a code which shall be complete and self-sufficing, which shall absolve from the necessity of researches into the case law or statute law of the past, which shall preclude the judicial development of law in the future, and which shall provide a simple rule applicable to every case with which the practical man may have to deal. We know that legal rules and expressions cannot be severed from their roots in the past. We know that enacted law is most useful if confined to the statement of general principles, and that the more it descends into details, the more likely it is to commit blunders, to hamper ac-

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exception of codification which included the elimination of common law as a primary source of law was rejected in England. When Parliament finally did enact four "codes" of commercial laws, the common law was to find through them an explicit means for continuing expression and viability.

D. The English Conception Of Codification And Its Application To Commercial Law

Even though the Benthamite view was rejected, codification still was seen by many in England as a very practical solution to the problem of dealing effectively and efficiently with the growing bodies of statutory and case law. By the end of the nineteenth century, however, a clear conception had developed about the type of codification which would be acceptable to the British. The acceptance of two principal tenets was implicitly understood by bar and bench as sine qua non to the serious consideration of any English code.

First, a code must be confined to one single subject area of the law. A very strong feeling against a complete code of laws had arisen in England in the late 1800's. Opinion was so negative that little hope existed Parliament would appropriate funds to permit the drafting of a comprehensive codification, and no chance was given for such legislation to be enacted without an ordeal which would render it extremely imperfect.212 One commentator recognized that the most practical and expedient method of reducing, condensing and integrating both case and enacted law was a series of partial codifications. He proposed "to consolidate the common and statute law by a number of different Acts passed in a regular series, year after year, and all framed upon the same uniform system."213 His proposal was too

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213. Id. at 29.

The plan on which each bill should be framed is this: every existing enactment upon the subject should be collected and carefully examined, useless and objectionable provisions should be rejected. All the common law upon the subject, and all the decisions, whether on statute or common law should be considered. From these materials a bill should be framed, containing, in addition, all such real and practical amendments as may get rid of all doubts that have arisen, and may provide for every point that experience may have shown ought to be dealt with.
ambitious, but he was correct in assuming that the legal profession would be responsive to codification only in the form of partial codes.

Second, no code should be designed and written in a manner which neglected the common law as a source of law and a method for the development of legal principles. The relationship which the English now intended to exist between common law and code legislation is summarized by remarks of Francis Wharton commenting on the 1879 report of the royal commission charged with drafting a code of criminal law of England. "The true office of a code," he wrote, "is not to supersede the common law."

The common law, viewing it as the embodiment of right reason applied to jurisprudence, can never be superseded. . . . We cannot get rid of the common law, as the representative of reason, without getting rid of all law. The object of a code, then, is not to get rid of the common law, but to get rid of statutes which have marred the common law and have prevented its free operation.214

The Benthamites and the civil law jurists of Continental Europe conceptualized codification as a basis upon which to construct a method for legal reasoning as well as a device through which to achieve an orderly and accessible arrangement of reconstituted legal principles. The modern advocates of limited codifi-

The bills should be framed in the simplest and plainest language, and in the shortest clauses.

Id. The plan's author recognized the continued importance of the common law under the proposed codes, and the plan provided that in any case where a point of the common law had been omitted "it might be determined in the same way as it would have been if the Act had not passed." Id.

214. Wharton, Recent English Codification, 6 (n.s.) S.L. Rev. 1, 28 (1880).

A noted English scholar of the period, Justice Lawson, became an advocate of codification which he understood only to "embolden the leading principles established by decisions which practice and experience have shown to be sound and wise." Judge Lawson on the Codification of Our Law, 6 Ia., L.T. 39 (Jan. 27, 1872). In particular, he advocated and drafted a code of evidence law. See, id. at 45-46. His evidence code received some notoriety but Lawson violated a cardinal rule of common law codification in England. He went further than merely synthesizing existing law; he changed the substance of the common law. For example, his code would have permitted the introduction of hearsay evidence. See, id. at 74 (Feb. 10, 1872). A reply to Lawson's proposal reflected the universal attitude of the English about such codes: "[T]he law should be codified with all its faults and in all its most trivial details, and then let Parliament consider what shall be retained and what amended." Id. For Lawson's sin of going beyond form and into reform of substance, his code provoked serious opposition and remained a mere proposal.
carnation in England no longer understood codification necessarily to require a change in legal method.\textsuperscript{215} A leader of the movement to codify English commercial law, Sheriff Dove Wilson, reflected the popular view when he defined a code in terms which emphasized the utility of codification as a classificatory reference and not as a methodological technique. A code, he declared, “is a handbook of the law. Codification has nothing to do with the amending of the substance of the law. It affects the substance indirectly only. Codification is an amending of the form of the law.”\textsuperscript{216}

For any code to be acceptable in England at the end of the nineteenth century, prevailing attitudes demanded that it deal only with a single subject, be based upon established common law principles, and effect no significant change in the substance of those principles or hamper their continued development consistently and coordinately with the statutory provisions. An obvious further requirement was a consensus among members of the bar and the legislature that the particular field of law proposed for codification was in need of a change in form if not in substance.

During the last half of the nineteenth century a consensus was developing in support of codifying Britain’s commercial law\textsuperscript{217} or, at least, parts of it, and the most enthusiastic supporters

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\textsuperscript{215} The English essentially believed that the method of the common law was superior to that required of a Bentham code. They understood the latter “to crystallize” the law “in a given setting and to rob it of the flexibility and capacity for growth which are inherent in a living organism.” Shannon, \textit{The Codification and Consolidation of the Common Laws of the Empire}, 36 \textit{Can. L.T.} 926 (1916). This particular argument against codification has been the center of every major debate about common law codes in England and the United States.

\textsuperscript{216} Wilson, \textit{Concerning a Code of Commercial Law}, 28 \textit{J. Juris. & Scot. L. Mac.} 337, 337-38 (1884). The other principal advocate of the codification of English commercial law was Sir John Macdonell, and his view was different from Wilson’s. “Codification means the shifting out and expulsion of bad law, the riddance of decisions which society has outgrown, but which judges must enforce. . . . The process of codification is a process of improvement in the substance as well as form of the law.” Macdonell, \textit{The Codification of the Commercial Law of the Empire}, 16 \textit{J. Comp. Leg.} 265, 281 (1916).

\textsuperscript{217} A related but different proposal was the unification of the commercial laws of all parts of the United Kingdom. Agitation for the construction of a commercial code for the Empire had begun as early as 1895. See, Carss, \textit{The Codification of Laws}, 40 \textit{Can. L.T.} 451, 453 (1920). Uniformity of the law in different parts of the Empire was the goal, and two methods were available. The first required each legislature in the British dominions to pass statutes conceived in as nearly as possible the same terms. Hogg, \textit{Unification of the Commercial Law in the Empire},...
of the movement were members of the merchants' community. For the most part, the "homely precepts of the common law" still governed the mercantile industries, and "statute law . . . rarely interfer[ed] with the established routine of trade and commerce."218 Commercial activity was increasing during this period in English history, but the country's businessmen were without a convenient reference to the mass of laws which governed commercial transactions. While other areas of the common law were the subject of comprehensive digests undertaken by government and scholars, a common complaint was that,

we are without any really elementary work on commercial law, any treatise plainly elucidating the general principles of our commercial code ("code" used here to mean collectively the body of legal principles affecting trade and commerce), or explaining how these principles are respectively derived from our ancient common law, the doctrines of the Courts of Equity, or of universal jurisprudence; nor as far as we have observed, is it very easy for the student to gather from any of the works to which we might have referred, the precise operation on commercial dealings, of the provisions of commercial treaties, general acts of Parliament, local regulations, or the usages and practice of the mercantile community.219

The general principles of the laws of commerce and business were well settled in England, and most of the contested disputes

26 JUR. REV. 154 (1914). The second method was based on "imperial legislation" enacted by "Mother Parliament" and applied to all dominions, although this approach entailed jurisdictional questions and problems of sovereignty. MacKay, Unification of British Commercial Laws, 91 CENT. L.J. 45 (1920). The belief was that unifying the law of commerce and trade would lead to the creation of a general civil code common throughout the Empire (see, Carsa, supra herein at 469), and that a common code for the Empire would promote national unity, strengthen "imperial sentiment," and more tightly bind the "overseas possessions of the Crown to the mother country and to one another." Shannon, supra note 215, at 938. Three of the English commercial codes—the Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act—were widely adopted throughout the U.K. during the first decades of the twentieth century, and this uniformity of commercial law was cited as proof of the unifying tendency of codification. See, Hart, Uniformity of British Law, 32 CAN. L.T. 167 (1912).


219. Id. The article did mention, however, the existence and worth of a number of separate texts on such commercial subjects as contracts, partnership, agency, bills of exchange, insurance and others. See, id. at 40. Also, published ten years earlier in 1852 was an exhaustive treatise on commercial law by Leone Levi, Commercial Law, Its Principles and Administration; or the Mercantile Law of Great Britain Compared with the Codes and Laws of Commerce of Other Countries. Levi's work was reviewed and highly praised in Commercial Law and Codification, 16 L. REV. & Q.J. 393 (1852).
were ordinarily resolved by simple deduction from one or more of those traditional precepts.220 No one was complaining about the substance of the law as he understood it, but everyone was dissatisfied with its inaccessibility and form. Men of the commercial establishment and their lawyers began openly to envy the systematic expositions of commercial law principles contained within the various codes de commerce of the Continent.221 A commonly held belief was that to follow the example set by the civilian commercial codes would facilitate commercial transactions, domestic and international, and would reduce the amount of litigation involved in both. It seemed strange to Englishmen "that the foremost commercial nation of the world should not yet be provided with a simple, complete and authoritative statement of its commercial law, intelligible to every trader in the country."222

A possible common denominator for the commercial law of all Europe, including that of England, was the branch of the law known as bills of exchange. According to Story, the great English scholar and writer,

The Jurisprudence which regulates Bills of Exchange can hardly be deemed to consist of the mere municipal regulations of any

220. The fact that the commercial law of England was developed in great detail was cited by Sherriff Dove Wilson in support of its codification.

The fact that our law is well developed in detail is rather an encouragement for us to go on with its codification than the reverse. It supplies the strongest reason why we require codification, and as the substance of our law is sufficiently good, the probability is that the British code, although the last, might be the best of the codes of the civilised nations.

Wilson, supra note 216, at 344.

221. The French commercial code had been in operation for 75 years. The German code was completed during 1856-1861; the Italian code was enacted in 1883; and the Swiss Code of the Law of Obligations was passed in 1881.

Some believed the issue of an English codification was a question of nationalism and patriotism. During a speech on law reform, Lord Brougham made such suggestive and strong remarks that they were repeated on other occasions to rally support for a commercial code. The following quotation is from his speech:

You saw the greatest warrior of the age—conqueror of Italy—humbler of Germany—terror of the North—saw him account all his matchless victories poor, compared with the triumph you are now in a condition to win—saw him contemn the fickleness of Fortune, while in despite of her he could pronounce his memorable boast, 'I shall go down to posterity with the Code in my hand!' You have vanquished him in the field: strive now to rival him in the sacred arts of peace? Outstrip him as a law-giver, whom in arms you overcame!

Commercial Law and Codification, supra note 219, at 398.

one country. It may, with far more propriety, be deemed to be founded upon, and to embody, the usages of Merchants in different commercial countries and the general principle Ex seuo et bono as to the rights, duties and obligations, of the parties, deducible from those usages, and from the principle of natural law applicable thereto.\footnote{223}

The merchants of England finally took action, collectively and privately, to begin the codification of English commercial law. No doubt the resemblances between the legal principles of bills of exchange in Britian and on the Continent (and in the United States) was a factor which prompted them to select that body of law as the object of the first code.

E. The Common Law Under The Commercial Codes of England

The proposed Bills of Exchange Act was unique among all codification attempts to date; its drafting was sponsored, like that of the uniform commercial acts later to follow in the United States, by private bodies and not by government. The work was undertaken by the Bankers' Institute and by the Associated Chambers of Commerce\footnote{224} and the organizations enlisted Sir Mackenzie D. Chalmers as draftsman. Chalmers himself had decided on the desirability of codifying the law of negotiable instruments some years earlier\footnote{225} and he previously had prepared a digest of the law relating to bills, notes and checks.\footnote{226}

\footnote{223. Jencken, The Codification of the Law on Bills of Exchange and Negotiable Securities in Europe and in the United States, 4 (ser. 2) L. Mag. & Rev. 80, 85 (1876) (citing J. Story, Bills of Exchange 3, 20). See the Jencken article generally for a description of the leading features of the law of England regarding Bills of Exchange and, also, those of France and Germany. His purpose in writing the piece was to urge the promulgation of a common code of commercial paper for the continental states of Northern Europe, Germany, Austria, Scandinavia, Russia, and England, as well as for the United States. Id. at 94.}

\footnote{224. Wilson, supra note 216, at 344-45.}

\footnote{225. See Chalmers' discussion of the legislative history of the Bills of Exchange Act appearing in the edition of his work on the subject which appeared shortly after the Act's passage. M. CHALMERS, BILLS OF EXCHANGE, NOTES AND CHEQUES XXXV-XXXIX (5d ed. 1887).}

\footnote{226. Chalmers reported:}

The idea of codifying the law of negotiable instruments was first suggested to me by Sir James Fitzjames Stephen's Digest of the Law of Evidence, and Mr. Pollock's Digest of the Law of Partnership. Bills, notes, and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a Digest of the law relating to them. I found that the law was contained in some 2,500 cases, and 17 statutory enactments. I read through the whole of the decisions, beginning with the first reported case in 1603. But the cases on the subject were comparatively few
The Bills of Exchange Act, composed of 100 sections, was passed in 1882 and became the "first enactment codifying any branch of the Common Law which found its way into the Statute Book." Sir Mackenzie was as much a crafty legislative politician as he was a skilled legal draftsman. He appreciated the attitudes regarding codification which pervaded the legal profession and Parliament. Chalmers reasoned that a "Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy." On the other hand, "If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition." His aim in drafting the Bills of Exchange Act was therefore, "to reproduce as exactly as possible the existing law, whether it seemed good, bad, or indifferent in its effect." After it had become law, Chalmers rationalized about his product: "The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation."

Chalmers then had satisfied Parliament on the underlying conditions that any English code of laws must be limited to a particular subject and that it be based on established com-

and unimportant until the time of Lord Mansfield. The general principles of the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deduction from, the general propositions then laid down.

228. M. Chalmers, supra note 79, at xliii.
229. See pp. 196-98 supra. Chalmers gave credit for the passage of the bill to M. P. Sir Farrer Herschell who became later Judge Lord Herschell. It was he, wrote Chalmers, who "safely steered it through all the shoals and quicksands of the House of Commons." Herschell was the source of the advice which Chalmers believed was responsible for the bill's success, i.e., "that the Bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament." M. Chalmers, supra note 225, at xxxv.
230. M. Chalmers, supra note 228, at xlii-xliii.
231. Id. at xlvi.
232. Id. at xliii. He noted, however, that gaps did exist in the existing case law, and that the draftsman was required to bridge over them if the code was to be complete. Id. Chalmers in such instances adopted international majority rules to flesh out the common law principles based upon usages among bankers and merchants and legal rules adapted from American and Continental customs and laws regarding bills of exchange.
233. Id. at xlvi.
mon law principles and effect a change only in the form of the law and not its substance. To meet the further implicit requirement that the common law and its method continue to find expression through the legislation, the Act in section 97 included "saving" language.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this act, shall continue to apply to bills of exchange, promissory notes, and cheques.\(^{234}\)

This provision is the forerunner of section 1-103 of the Uniform Commercial Code.

Chalmers also was the principal draftsman of two of the other three codes of commercial law which have been enacted in England. Both the Sale of Goods Act (1893)\(^{235}\) and the Marine Insurance Act (1906)\(^{236}\) as drawn by Chalmers were codifications which were no more than declaratory statements of the existing law,\(^{237}\) and each of them has a common law saving clause similar to section 97(2) of the Bills of Exchange Act.\(^{238}\) The Partnership

234. Bills of Exchange Act, 1882, 45 & 46 Vict., c. 61. Commenting on this section in his Digest, Chalmers made it clear that merchants' usages of trade also should be considered a continuing source of law if the common and statute law are silent:

Questions relating to bills, when not concluded by authority, must as heretofore be determined by the usage of trade, if there be such. "The existence, nature, and scope of a given usage is a question of fact. A general usage once incorporated into a judicial decision becomes part of the law merchant, and evidence of custom to contradict is inadmissible."

Chalmers, supra note 225, at 263.


In fact, actual changes in the common law as restated in the bill were slight. Id.

The object of the Marine Insurance Act "was to reproduce as exactly as possible the existing law, without making any attempt to amend it." E. Ivamy, Chalmers' Marine Insurance Act, 1906 (Chalmers' Introduction to 1st Ed. of Digest, 1901) ix (6th ed. 1966).


(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

Marine Insurance Act, 1906, 6 Edw. 7, c. 41. "(2) The rules of the common law, including the law merchant, save in so far as they are in-
Act (1890),239 too, was merely a common law restatement, and it likewise saved explicitly the equitable and legal rules of the common law.240 The common law was to continue to serve as a major source of law in all of these commercial areas despite the codifying acts.

A reading of the English commercial codes reveals no intention to establish an hierarchial source of law relationship between the statutes and the common law for the resolution of doubtful cases. No provision in any of the codes calls for a liberal interpretation or an analogical development of the act, and the wording of each saving clause provides that the common law rules are to continue to apply unless displaced by the “express” provisions of the respective measures.

The civilian methodological technique of first exhausting completely the letter and the spirit of legislation before resorting to other sources of law was not intended to control the interpretation of the English commercial codes. Considering both the philosophy of the principal architect of the codifications, Sir Mackenzie, and the traditional approach to statutory interpretation in England, a fair conjecture is that the intended method was the exact opposite: When a case arises under a code for which its language does not provide a reasonably clear, certain and straight-forward solution, common law rules then are not “inconsistent” with the Act, i.e., have not been displaced,241 and thus are applicable. In other words, the preferred hierarchy between the code law and the common law is one of parity; but in the case of even slight doubt about the scope of a particular code section, resort should be had to the common law as a source of law and not to manipulation of the codes’ lan-

consistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.”


240. Partnership Act, 1890, 53 & 54 Vict., c. 39: “The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.”

241. Reference is made here to the operation of the saving clause which appears in each of the codes. See pp. 196-98 supra and notes 238-40 supra. Theoretically, the common law is applicable to any commercial law case unless expressly inconsistent with the Act. The clear implication is this: The saving clause means that in any case where a code provision is not applicable expressly, i.e., clearly and certainly according to the letter of the text courts should assume that the common law is applicable without further interpretation of or extrapolation from the statute.
guage by means of using liberal construction, analogy or other expansive interpretative technique. The major English cases on the issue of code interpretation also support the accuracy of this description of the English methodology.

1. **THE PHILOSOPHY OF CHALMERS.** A code's function, according to Chalmers, is simply to provide a form by which to exhibit the essential and general common law principles relating to a particular legal subject. He did not understand codification as precluding the application of other traditional rules and precepts omitted from the code but not designedly and precisely superseded by it. He did not draft the commercial codes with the purpose of introducing methods of judicial reasoning which abandoned the tradition and experience upon which each code was promulgated. Chalmers certainly understood that now the starting place in researching a commercial question was the appropriate code and not a group of cases. Solutions were to spring forth from the deductive application of statutes and not from inductive synthesizing of *ratio decidendi*. The statute was to supply the "major premises in syllogism," but the sources of those premises were "given statements" in the code and not analogies and the like which lay behind the code's letter. Yet any "given statement" in each code was no more than a restatement of a common law principle. If no code provision precisely accommodated the facts which composed the minor premise of any case, the major premise could be amended or a supplementary one could be found by searching among the common law which had supplied the basis of the code sections and not by construing the code or a particular provision "in the air" divorced from its history.

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242. In the case of a code the propositions of law are stated in the authoritative words of the legislature. When a particular case arises, the sole question is whether it falls or does not fall within some given statement in the code. The process of reasoning is purely deductive, and the code supplies the major premises in the syllogism.


Chalmers viewed a code as solving the problems of how and from where courts were to select a starting proposition with which to decide a case. He thought there was less chance for error in selecting a starting proposition if common law principles of commercial law were arranged neatly in code form and not left spread out among case reporters. *Id.*

His theory of codification did not extend, however, to include a new methodology to be used and a hierarchy of sources to be consulted in the later stages of judicial decision-making after finding that the major premise does not comport exactly with the facts of a case.

243. Chalmers wrote that the province of a code is not to invent prin-
Chalmers' own statement about the relationship between any code and the common law evidences the conclusion that this type of approach was proposed as the preferred method of deciding doubtful cases under the English commercial codes.

Whether we be American or English lawyers, we have in the common law the same foster mother, and from that foster mother we have all alike imbibed the principles which guide us in the practice of our profession. Though I am a strong advocate of codification, I am no disparager of the common law, which is unsurpassed for its collection of reasoned principles and applied precedents. Every American or English code must presuppose the common law. I think you may compare a code to a building, and the common law to the atmosphere which surrounds that building, and which penetrates every chink and crevice where the bricks and mortar are not. We cannot escape from the common law, and we should not try to do so.243

2. THE TRADITIONAL ENGLISH APPROACH TO STATUTORY INTERPRETATION. The approach to statutory interpretation which prevailed in England at the turn of the century also supports the conclusion that the common law was the preferred source of law in doubtful cases arising under the commercial codes and not the codes themselves as liberally construed and analogically developed.246 Roscoe Pound described the principles, id., and that a draftsman was “codifying in the air” if he went beyond experience in drafting a code. Id. One can reasonably imagine his arguing that a code should not be interpreted so as to invent principles which are deducible from code provisions but which are not traceable directly to the particular common law rules upon which those provisions are based. Chalmers would describe that form of interpretation as construing the code “in the air.”

244. After the Bills of Exchange Act, the Sale of Goods Act and the Marine Insurance Act were enacted, Chalmers published “digests” based upon each of the codes. In each work he set out every code provision and after each he listed and, in many instances, commented on cases which “illustrate or are modified by the Act.” M. CHALMERS, supra note 237, at x. His purpose was not solely to annotate the codes with cases decided under them; instead, he sought—for example in the case of the Sales Act—“to indicate the sources of the various provisions of the Act, and to elucidate the general principles of the law of sale by citations from eminent judges.” Id.

Displaying his belief in the continued viability of the common law even after the codes’ enactments, he wrote: “Our common law is rich in the exposition of principles, and these expositions lose none of their value now that the law is codified. A rule can never be appreciated apart from the reasons on which it is founded.” Id. 245. M. CHALMERS, supra note 242, at 10 [emphasis added].

246. How the four commercial codes were classified as statutes also bespeaks the very significant role the common law was intended to play in deciding doubtful cases under the Acts. Sir Chalmers anticipated a strong judicial disposition to construe the Bills of Exchange Act as “declaratory” (see M. CHALMERS, supra note 228, at xiii); and inasmuch as the other three codifications were formulated on the same design as the
orthodox manner in which courts in a common law system conceive legislative innovation. “They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.” He observed, however, that common law courts were tending toward a different conception. “They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.”

Bills Act, surely he expected a similar construction of them.

An 1875 treatise on statutory construction provides that Acts of Parliament are either “declaratory of the old law, or introductive of new, or both.” F. Dwariss, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 68 (1875). The significance of the English codes being classed as declaratory was the application to them of a corollary rule of construction peculiar to declaratory acts which were defined as expressions of parliamentary intent simply “to declare what the common law is and ever hath been.” Id.

Nor, ordinarily, will the Legislature be presumed to intend a departure from its own and an invasion of the judiciary’s proper functions, by a declaratory act contrary to the construction already put by the courts upon the law thus explained. . . .

G. ENDLICH, COMMENTARIES ON THE INTERPRETATION OF STATUTES, § 172, at 238 (1888).

In addition, to the extent that the codes re-enacted and replaced prior statutory law, this rule was applicable: “A statute which is expressly explanatory or declaratory of the meaning of an earlier statute may be presumed to be confined to the same subject matter as that statute.” 38 HALSBURY’S LAWS OF ENGLAND § 618, at 465 (3d ed. Simonds 1961).


248. Id. Pound also described two other ways in which courts in a common law system conceivably might deal with legislative innovation:

(1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.

(2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject.

Id. His conclusion was “that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.” Id. at 386.
Pound's observations were made in 1908, more than twenty-five years after the first and two years after the last of the English commercial codes were enacted. His article primarily reflected on the situation in the United States, and one knowledgeable commentator on comparative methods of statutory interpretation places the courts of England behind those of the United States in developing a liberal approach to the construction of enacted law.\(^{249}\) The English codes were prepared and were first effective during a period of legal history wherein obtained Pound's description of the orthodox judicial conception of legislation and wherein persisted the traditional view that "statute law is an intruder, a bare licensee, in the domain of the Common Law . . . ."\(^{250}\) This attitude towards legislation derives from a very early English conception about the relationship between common and enacted law.

Not only was the position of the enacted law subordinate; the principles of the Common Law were the sacred tablets, the source to which you always looked for expounding the law; and the general principle was soon laid down that a statute must not be taken to effect any alteration of the Common Law rights and duties unless its terms necessarily produced that result.\(^{251}\)

A revival of this view occurred in the late eighteenth century as evidenced by the development during that period of the maxim that statutes in derogation of the common law should be strictly construed.\(^{252}\) Interpretation in the nineteenth and early twentieth centuries was influenced by a conception of the common law as a fully matured legal system and by analytical theories of jurisprudence which characterized the nature of the

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judicial function as law finding only and which produced jurists with "mechanistic evolutionary concepts" requiring them "to oppose all legislation that sought to tamper with the germinal verities that they found inherent in the common law." The principles which dominated in the minds of lawyers and judges during this period were, according to Sir C. K. Allen,

that the Common Law is wider and more fundamental than statute, and that, whenever possible, legislative enactment should be construed in harmony with the established Common Law principles rather than in antagonism to them. A general intention is presumed in the legislature to fit new enactments into the general structure of the law and to effect no more changes than the occasion demands. In Coke's words, "The surest construction of a statute is by the rule and reason of the common law." Ten years after the passage of the Bills of Exchange Act and a decade before the Marine Insurance Act, a well-known English jurist wrote that the courts of his country had been unsuccessful in the interpretation of the written law; they had shown, on the other hand, "a really marvellous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances." There had been a time in earlier English history when judges exercised more creativity and greater independence in their approach toward the enacted law and were inclined to extend the scope of legislation by techniques such as analogy. Yet as late as

253. Landis, supra note 252, at 11.
254. C. Allen, supra note 252, at 456.
255. Pollack, Note, 9 L.Q. Rev. 106 (1893). The difference probably is attributable to the traditional reaction of an English or American judge when faced with a statute. His reaction has been to perform "a species of mental gesture, such as one does on the drill-ground when one stands to attention or slopes arms: he makes an appropriate and specific adjustment of his mind." Amos, supra note 250, at 174.

Amos observed that this notion of a rivalry between common law and statute law is peculiar to the Anglo-American system and, historically, has distinguished this system from the European civil law approach to law and its interpretation. The juridical difference between the body of statutes which exists in the U.S. or England and the written law of other Western countries is summarized in Bruncken, The Common Law and Statutes, 29 YALE L.J. 516 (1920).
256. Evershed, supra note 251, at 251, 257.

In the 16th century the theory of statutory interpretation was expounded fully in Heydon's Case, 76 Eng. Rep. 637 (Ex. 1584) which provided that the aim of the courts always should be to "add force and life to the cure and remedy, according to the true intent of the makers of the Act." The decision listed four things to be discerned and considered for the sure and true interpretation of all statutes in general:

(1) What was the common law before the making of the act.
the middle of the twentieth century, the cardinal rule of statutory interpretation was observed to be the "safe" rule, i.e., "close adherence to the ordinary meaning of the words used and the words only." 257 Even in the most modern times, the reported inclination of English courts has been to practice "narrow and rigid interpretation" 258 as a part of a "constricting process" in which they have been engaged vis-a-vis legislation. 259

3. **ENGLISH CASES ON CODE INTERPRETATION.** In only a few of the many cases applying the English commercial codes have opinions spoken directly to the point of the proper judicial method of interpreting codifications. Virtually nothing at all has been suggested forthrightly on the precise question of the hierarchy between the common law and the enacted law

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(2) What was the mischief and defect for which the common law did not provide.

(3) What remedy the Parliament had resolved and appointed to cure the disease of the commonwealth.

(4) The true reason of the remedy.

Later, legal giants like Bacon, Blackstone and Plowden all wrote that a statute should be construed according to such factors as the reason and spirit of the enactment, the intent of the legislature, and the cause which prompted the enactment.

See, Davies, *The Interpretation of Statutes in the Light of Their Policy by the English Courts*, 35 Colum. L. Rev. 519, 519-22 (1935).

The doctrine of the equity of the statute was developed during this period.

Under its authority exceptions dictated by sound policy were written by judges into loose statutory generalizations, and, on the other hand, situations were brought within the reach of the statute that admittedly lay without its express terms. No apology other than the need for a decent administration of justice was indulged in by judges who invoked its aid.

Landis, supra note 252, at 9. The principle of the equity of a statute enabled judges "to distill from a statute its basic purpose," and "they could then employ it to slough off the archaisms in their own legal structure." Id. at 10. See also, Thorne, *The Equity of a Statute and Heydon's Case*, 31 Ill. L. Rev. 202 (1936). The "equity of a statute" doctrine declined in use during the 17th and 18th centuries, and the principle had vanished by the 1800's. See C. Allen, supra note 252, at 455-56. See generally deSloover, *The Equity and Reason of a Statute*, 21 Cornell L.Q. 591 (1936).

Liberal rules of interpretation were set forth in the 17th century by Sir Thomas Egerton in his authoritative Discourse. For complete discussion and history of the Egerton collection of papers, see Radin, *Early Statutory Interpretation in England*, 38 Ill. L. Rev. 16 (1943). Yet in the era which preceded the period presently under discussion, more precisely 1500-1600, the attitude seems to have been one requiring a strict construction of enacted law. See generally, *The History of the Rules of Statutory Interpretation*, 175 L.T. 57 (1933).

257. Evershed, supra note 251, at 260.

258. Id.

259. Id. at 262.
as sources of law in deciding doubtful cases under the commercial codes. The best known and most often cited authority on interpretation of the codifying acts is *Bank of England v. Vagliano Bros.* The separate opinion of Lord Herschell has been especially influential. The circumstances of the case and Lord Herschell’s opinion will be discussed and quoted in some detail to illustrate the soundness of the assertions already made regarding the role of the common law in deciding doubtful cases under the English codes.

An employee of Vagliano Bros., a clerk named Glyka, forged some negotiable bills payable at the Bank of England and named one Vuncina as drawer, Vagliano Bros. as drawee, and C. Petradi & Co. as payee. C. Petradi & Co. on previous occasions had been the payee of genuine bills drawn by Vuncina on Vagliano Bros.

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261. For present purposes the facts of the *Vagliano Bros.* case have been simplified somewhat and summarized greatly. For a complete account of the facts, see their recital in the lower court’s opinion. See the report of the decision of Charles J., [1889] 22 Q. B. D. 103.

The reader should note that the Lord Herschell writing the opinion in *Vagliano Bros.* is the man to whom Sir Chalmers gave credit for passing the Bills of Exchange Act, and it was he who advised Chalmers to draft the code in a fashion so as to accomplish no more than a restatement of the common law. See p. 196 *supra* and note 229 *supra*.

262. Lord Herschell’s opinion in *Bank of England v. Vagliano Bros.* is cited in a British legal encyclopedia as the primary authority supporting this statement of the rule applicable to the interpretation of codifying statutes:

In construing a codifying statute the proper course is, in the first instance, to examine its language and to ask what is its natural meaning; it is an inversion of the proper order of consideration to begin with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. The object of a codifying statute has been said to be that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of roaming over a number of authorities. After the language has been examined without presumptions, resort must only be had to the previous state of the law on some special ground, for example for the construction of provisions of doubtful import, or of words which have acquired a technical meaning.


While this is a fairly accurate statement of the rule laid down in *Vagliano Bros.*, it cannot be understood fully without examining in detail the opinion in that case and subsequent cases which have adopted and applied the rule. After such an examination, the obvious conclusion is that the “rule” essentially does not preclude free access to the previous state of the common law, but, instead, it advocates a mere grammatical construction of statutory language and invites resort to the common law in practically all doubtful cases arising under the commercial codes.
The named drawee eventually accepted the bills and requested the Bank of England to pay them at maturity, and they were so paid. The litigated issue was the right of the Bank to debit the account of its customer, Vagliano Bros., for the amount of the bills.

The drawer's signature and C. Petridi & Co.'s indorsements had been forged, of course; and if the bills were treated as order paper, the Bank would have had no right to debit the account in question.263 The Bills of Exchange Act provides, however, "[w]here the payee is a fictitious payee or non-existing person the bill may be treated as payable to bearer."264 The crucial question in the case was whether C. Petridi & Co. was a "fictitious" payee of the bills. If so, the bills were bearer paper; and the Bank was safe in paying the holder.265 Otherwise, the paper was order paper; and the forged signatures rendered them non-enforceable "against any party thereto."266

The common law rule, as it stood at the time of the enactment of the Bills of Exchange Act, was that "a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious."267 For the amount of the bills rightfully to have been debited to the account under a literal application of the common law rule, Vagliano Bros. would have had to have known that the payee was fictitious. Vagliano Bros., of course, had no such knowledge, and the court of appeal below held in its favor and against the Bank.268 In accordance with "good sense" and "sound commercial principle,"269 Lord Herschell led the House of Lords to reverse the lower court and to hold that the payee had been fictitious in the sense that the payee never

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263. Section 24 of the Bills of Exchange Act provides:

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.


264. Id. § 7(3).

265. Id. § 31(2) provides, "A bill payable to bearer is negotiated by delivery."

266. Id. § 24.


268. Id. at 144.

269. Id. at 147.
had and never was intended by the drawer to have had any interest in, or right arising out of, the bills.\textsuperscript{270} According to Lord Herschell, the word "fictitious," as used in the Act, meant no more than its plain meaning and was in no way conditioned or limited by the statute.

"Where the payee is a fictitious or nonexistent person" means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I find no warrant in the statute itself for inserting any limitation or condition . . . . The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or nonexistent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is a person against whom the bill is to be treated as payable to bearer, "fictitious' must mean fictitious as regards the acceptor, and to his knowledge." With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious "as regards" the acceptor. I have difficulty in seeing how a payee, who is in fact a "fictitious" person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be "fictitious" as regards one person and not another . . . . It seems to me to import into the statute after the words "fictitious person" the words "as regards" the acceptor or drawer, as the case may be, and then to interpret these words as meaning "to the knowledge of," only tends to obscure the fact that the payee must be fictitious to the knowledge of the person sought to be charged as upon a bill payable to bearer is being introduced into the enactment.\textsuperscript{271}

The result and dictum in this case appear at first glance to contradict much of what has been asserted previously in this study about the character of the English commercial codes as

\textsuperscript{270} The case is noted in D. Smout, Chalmers on Bills of Exchange: A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Instruments 24 (13th ed. 1964), where it is said:

Vagliano's case . . . gave rise to a great conflict of judicial opinion as to whether C and Co. were fictitious payees. The lower courts had held that, inasmuch as there was a real firm of C & Co., the payees were not fictitious; but according to the majority of the House of Lords, C & Co. were fictitious payees, the bill was a forgery throughout, and the real C & Co. never were, and never were intended to be, payees. If by any means they had obtained the bill, they would not have been entitled to it, and their indorsement could have conveyed no title against the supposed drawer whose name was forged. It was as if the forger had inserted the first name he came across in a directory.

\textit{Id.}

\textsuperscript{271} [1891] A. C. 107, 145-47.
mere restatements of the common law and about the common law as the principal source of law in doubtful cases arising under them. Lord Herschell did indeed ignore the common law limitations on the "fictitious payee" rule; but a closer examination of his opinion reveals the error of taking the case to contravene earlier conclusions about the English approach to codes. First, as noted previously, the Bills of Exchange Act did introduce a few changes in the law of negotiable instruments. Second, and more relevant and important, Lord Herschell did not consider the Vagliano Bros. case to be a doubtful one under the code. The applicable section of the Bills Act, section 7(3), appeared to him "to be free from ambiguity." The proper construction of a codifying law in such a clear case, according to Lord Herschell,

is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

He places emphasis on the language contained within the four corners of the code only in a limited class of cases. "The law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was," wrote Lord Herschell; but, this approach was proper only "on any point specifically dealt with by it [the code]." His further caveat is important:

I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a

272. The proposed code as drafted by Chalmers and introduced into Parliament did not include changes in the common law, but some slight amendments to the restatement were made by the legislature. See supra note 237.

273. [1891] A. C. 107, 145. Lord Herschell confirmed his belief that the case was not even slightly doubtful when he wrote, "My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it." Id. at 147.

274. Id. at 144-45.

275. Id. at 145. References to and quotations in the Vagliano Bros. opinion from the court of appeal judges' opinions reveal an almost exclusive preoccupation with discussing and analyzing prior law. The reports of the parties' briefs in the case likewise show considerable attention paid to earlier common law. See, id. at 108-13.

276. Id. at 145.
provision may be of doubtful import, such resort would be perfectly legitimate . . . 277

Lord Herschell’s statements about the methodology to be employed in interpreting codes is consistent with traditional English attitudes toward statutory interpretation. He advocated, as a first step, a strict construction of statutory language according to its plain meaning in those cases where there is no doubt as to the applicability of the language so construed. If, thereafter, it is doubtful that the language can be construed grammatically to deal “specifically” with any point, Herschell sanctioned resort to common law and not to a liberal interpretation of the statute. The latter technique is not mentioned in his opinion.

The doctrine of Lord Herschell reflects the British notion that a codifying act is little more than a form for the presentation of established common law principles. The great utility of codification is simply to change the starting place for finding and applying traditional common law rules and methodology. The statute in the first instance should be examined as a source of law for the resolution of cases; but it is superior to the common law as a source of law only to the extent that grammatical construction of the plain meaning of a particular section reveals clearly its application to the specific point in issue. In the case of slightest doubt about the applicability of a statutory provision as literally interpreted, i.e., if the provision does not accommodate the facts of any case on all counts according to its ordinary meaning, resort should be had to the common law for the appropriate rule to be applied without first seeking a solution by liberally, extensively or expansively interpreting the code. Cases decided under the other three English commercial codes have followed generally the method of code interpretation as prescribed by Lord Herschell in Bank of England v. Vagliano Bros. and support the description and implications of the Herschell doctrine suggested above.

277. *Id.* On this subject, Lord Herschell made additional remarks: Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

*Id.*
Code interpretation has been discussed most frequently in opinions rendered under the Marine Insurance Act (1906). Noting that Lord Herschell had "put this point with great force and clearness in Bank of England v. Vagliano Bros.,"276 Viscount Finlay, in the opinion of a case arising under the Act, wrote:

When the law has been codified by such an Act as this, the question is as to the meaning of the code as shown by its language. It is, of course, legitimate to refer to previous cases to help in the explanation of anything left in doubt by the code, but if the code is clear, reference to previous authorities is irrelevant.279

In the opinion of another case arising under the Marine Insurance Act, Lord Wright praised the code as having simplified the law; but, he added, "[I]t would be an insufficient guide were it not supplemented by the decided cases."280 The view also has been expressed that the common law should be considered to have been altered by the Act only if so indicated by the plain and unambiguous language of the statute.281

The attitude of one judge deciding the case of Sanday & Co. v. British & Foreign Marine Ins. Co.282 implied an approach directly contrary to Lord Herschell's admonition to begin the decision of each case by at least reading the code's language. Instead of resorting to common law only after finding the Act's clear language to be of doubtful import, Chief Justice Reading suggested that the court first should establish what was the applicable rule at common law and then examine the statute to determine whether or not the latter had altered the law in any respect. The common law, he wrote, "must prevail unless inconsistent with the express provisions of the statute."283 After considering the facts of Sanday & Co. and the relevant common law rule, only then did Lord Reading look to the Marine Insurance Act and conclude: "I cannot find any provisions in the statute which are inconsistent with this rule of common law, and I come to the conclusion that the law as it existed before the Act of 1906 has not been altered . . . by the statute."284 Other cases decided under the insurance code have followed more closely the

279. Id.
284. Id.
prescription for code interpretation laid down in Vagliano Bros. 285

285. Hall v. Hayman, [1912] 2 K. B. 5, was a case which involved a question of interpretation similar to that raised in Vagliano Bros., i.e., the argument by one of the parties regarding the measurement of the total loss of an insured ship would have required reading into the statute (in this case the Marine Insurance Act) a proviso not present by a plain and natural reading of the relevant section. Consistent with the earlier common law rule, plaintiff urged that the ship, which had been abandoned after a wreck, was a constructive total loss based upon a method of figuring loss which added together the costs of repairs and salvage and the value of the un repaired ship. The defendant-insurer resisted that valuation citing section 60 of the Act and claiming that the value of the wrecked ship should not be added to the cost of repairs in determining whether the ship could be treated as a constructive total loss. Section 60(2) (ii) defined a total constructive loss by measuring only the cost of repairing the damage against the value of the ship when repaired. Bray, the trial judge, determined "that an appeal to earlier decisions could only be justified on some special ground, as, for instance, if the provision were of doubtful import. I must therefore first examine the language of the enactment." Id. at 12. The judge concluded that the pertinent subsection 60 (2) (ii) was "clear" and that he could see no "ambiguity in the language there used" (id. at 13), and he applied its plain meaning holding for the underwriter defendant even though the result was inconsistent with that demanded by the pre-existing law merchant. Id.

Atkin, L.J., reached a happy compromise in deciding whether to apply the Marine Insurance Act or to apply established law merchant rules in the case of Gaunt v. British & Foreign Ins. Co., & Standard Marine Ins. Co., [1920] 1 K. B. 903, aff'd, [1921] 2 A. C. 41. In question was a marine insurance policy's coverage of cargo (wool) which was damaged while being carried on the decks of local steamers insured by defendants. The policy did not mention specifically the protection extended, if any, to goods beings carried on the decks of insured ships. The common law rule was that an ordinary marine policy did not cover deck cargo, but there was an exception to the rule if it could be proved that there was "a usage of trade to carry on deck the particular class of goods on the particular transit, even though the particular underwriter did not in fact know of the existence of the usage." [1920] 1 K. B. 903, 915. "I am inclined to think that the Act of 1906 did not intend to alter the law," wrote Atkin, but, he admitted that

construing the words without reference to the then state of the law, the more natural meaning seems to be: deck cargo must be insured specifically, unless there is a usage that it need not be insured specifically, which makes the usage a usage in the business of marine insurance rather than a usage in the business of marine transport.

Id. at 915-16. The common law thus was changed by a plain reading of section 30(2) of the Act, and the change it wrought was the situs of this particular usage. The judge implied that the Act had two meanings regarding the origin of the custom, i.e., in the insurance business and/or in the transport business; but he reached no firm decision on the point because the evidence supported the establishment of the custom and the application of the no-coverage exception in favor of the insured regardless of the custom's origin.

As I have said, I do not think that the Legislature meant to alter
A case decided under the Sale of Goods Act (1893) produced an opinion which placed greater emphasis on the role of pre-existing common law in the construction of codes than did Lord Herschell's. Disputing the view that reference could be had to the common law only after determining that the "natural meaning" of the statute did not cover the specific point in issue, Chief Baron Palles in Wallis v. Russell\(^{286}\) voiced his dissatisfaction with the Herschell rule.

It in no sense binds us; and to prevent infringement upon the true principles of interpretation, I desire to put upon record my protest against a principle of construction which, in relation to even a codifying statute, excludes from consideration the previous state of the law upon the latter which is the subject of legislation.

It is, as I understand the law, presumed that the Legislature, in making any enactment, knows the previous state of the law upon the subject-matter, and legislates upon the basis of, and with reference to, it. If so, the meaning of the words cannot be understood in the absence of that which was their basis.\(^{287}\)

Other cases interpreting the Sales Act have followed and expounded upon the Herschell doctrine without questioning its correctness. Contending for the plaintiff that the defendant had

the law by introducing such a refined distinction into a well-known commercial transaction. But in this case, in either view of the meaning of the Act, it appears that the plaintiff established the necessary usage. The evidence clearly shows that the practice of conveying wool on the deck of local steamers had existed for many years, and was well known.

Id. at 916.


287. Id. at 590-91. "[I]n order to avoid raising in this particular case questions which do not, or at least, in my opinion, ought not to, arise," Judge Palles decided to adopt "Lord Herschell's mode of construction, and first consider the particular words used without reference to the previous law, and then see whether, consistently with his view, I can refer to the previous law." Id. at 591. A caveat to his acquiescence is important, and it suggests that regardless of "rules" of construction a single judge's or an entire legal system's traditions and inclinations will prevail eventually. "In doing so, the principle which I shall apply is not, in my opinion, strictly speaking, the correct one (referring to the Herschell rule); but at the same time the result arrived at will be exactly the same as if I adopted my own view." Id. at 591 [emphasis added]. After "grammatical construction of the words" (id. at 592) of the code provisions relevant to the case, Palles was unable to understand the reason for the introduction in the Act of certain language. He was required, therefore, to ask this question: "What, then, was the existing law on the subject immediately prior to the Act of 1893?" Id. at 593.

He determined ultimately that there had been a change in the common law intended by the Legislature, according to the "express terms" of the statute (id. at 596), but, of course, the terms did not become explicit until he had referred to earlier law.
accepted goods within the meaning of section 4 of the Act, Lord Esher boldly asserted in Abbott Co. v. Wolsey that cases decided before the code’s passage were immaterial. “The statute was passed to declare the law. We are bound by it, and can look to nothing else.” Yet this was another instance where, in the words of the judge, the pertinent code section “seems to me very clear.” As has been established under the Bills of Exchange and the Marine Insurance Acts, it also has been decided under the Sales Act that “[w]here any difficulty arises in construing the Act, it is legitimate to consider the previous decisions which it codified . . . .”

The Herschell rule of code interpretation as explained herein has been applied also to the Partnership Act (1890) and to

289. Id. at 100.
290. Id. Bristol Tramways, &c., Carriage Co. v. Fiat Motors, Ltd., [1910] 2 K. B. 831, involved an implied warranty of fitness of seven Fiat omnibuses sold by the defendant to the plaintiff. Cozens-Hardy, M. R., stated, “This case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions. . . .” Id. at 836. Note carefully the remainder of his thought on this subject about the relevance of earlier law in interpreting the code:

The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law.

Id. [emphasis added].
293. British Homes Assurance Corp. v. Paterson, [1902] 2 Ch. 404. The facts as summarized at the beginning of the report were these: The plaintiffs appointed B their solicitor, and instructed him to act for them in a mortgage transaction. While the venture was pending, B took the defendant into partnership, and gave the plaintiff notice in writing of the new association. The plaintiffs paid no attention to the notice, continued to correspond with B in his own name, and finally sent him money to advance on the mortgage by cheque made payable to his order, and accepted receipt in his own name. B paid the money into his own account and misappropriated it. Id. Plaintiffs then sued B’s partner (the defendant) on account of B’s fraud. The issue was whether as claimed by the plaintiffs the defendant was liable as a partner under sections 10, 11 and 12 of the Partnership Act, dealing, inter alia, with money being received by the firm in the course of ordinary business and partners’ being severally liable therefor. Plaintiffs alleged that “the case of the defendant falls within the exact terms” of the sections. Id. at 410. Stating that the “Act is declaratory only” (id.), the court concluded that the Act “states the law as it affects partners in relation to third
the construction of a consolidating statute.\textsuperscript{294} Ironically, one English case held the doctrine applicable to the construction of a European-styled code of civil law. At issue in \textit{Robinson v. Canadian Pacific Railways Co.}\textsuperscript{295} was the survival in favor of a widow of a decedent's cause of action for bodily injuries (or the existence of the widow's independent right of action) against his employer who, it was alleged, negligently caused his death. The original cause of action arose under section 1056 of the Civil Code of Lower Canada which provided, \textit{inter alia}, that the right of action should survive for the benefit of relatives for one year after the decedent's death.\textsuperscript{296} The widow's suit based on this provision was brought within seven months of her husband's death. Another section of the Code required, however, that actions for bodily injuries must be prosecuted, if at all, within one year of the injuries' occurrence.\textsuperscript{297} The decedent had

persons under \textit{ordinary} conditions and in the \textit{absence of special circumstances}.” \textit{Id.} In this case the decision was to the effect that “special” circumstances were present, \textit{i.e.}, the plaintiffs had refused to contract with or recognize the defendant partner as a partner of B, and, therefore, that “the defendant does not come within the \textit{words} of the Act. . . .” \textit{Id.} at 411.

\textsuperscript{294} Earlier in this section of the study a distinction is noted between a consolidating and a codifying act (see p. 175 \textit{supra} and note 156 \textit{supra}), but the terms often are used interchangeably in the English literature. As an example of this confusion the case of \textit{R. v. Abrahams, [1904] 2 K.B. 859}, sometimes is cited by authorities as illustrative of the proper method for code interpretation. The act in issue in the case—the Merchant Shipping Act, 1894—is not a code, but the opinion of C. J. Lord Alverstone declares as a rule of construction about resort to prior legislation a view almost identical to Lord Herschell's in \textit{Vagiano Bros.} concerning resort to common law under codifications. Lord Alverstone wrote:

\begin{quote}
If the language of . . . the Act of 1894 had been quite clear, it is not suggested that we can put a different construction upon it merely because the Act is a consolidation Act; but the contention is, and to that extent I think it is well founded, that in a consolidation Act, where there are ambiguous expressions, regard may be had to the previous Acts of Parliament in pari materia for the purpose of interpreting those ambiguous expressions.
\end{quote}

\textit{Id.} at 863.

\textsuperscript{295} \textit{[1892]} A. C. 481.

\textsuperscript{296} In all cases where the person injured by the commission of an offence or quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his descendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by his death.

\textit{Id.} at 485-86.

\textsuperscript{297} “Section 2262(2) of the Code provides that actions ‘for bodily injuries’ are prescribed by one year, ‘saving the special provisions contained in art. 1056, and cases regulated by special laws.’” \textit{Id.} at 486.
lived for fifteen months after the date of his injuries, and during that time no action was filed. The issue was whether the widow's cause of action was dependent upon the survival of the husband's original cause of action for bodily injuries suffered by him or was one arising anew in her favor upon decedent's death. The answer, according to the court, "depends upon the construction of the two sections of the Code which have just been referred to."\textsuperscript{298}

Certain rules of earlier French and English law, including Lord Campbell's Act, were suggestive of a decision against the plaintiff-widow, and lower courts had consulted this prior law in their decision interpreting the Code and holding for the defendant-employer. The opinion of the House of Lords reversed. The court stated that prior law on the subject had been superseded by the Civil Code and was, therefore, foreign to the present case. Yet the court found earlier law foreign only to the extent that the Code's provisions "are in themselves intelligible and free from ambiguity."\textsuperscript{299} The House of Lords applied to a civilian code the rule of Lord Herschell as stated in \textit{Vagliano Bros.}— a rule developed for interpreting common law restatements.

Their Lordships do not doubt that . . . resort \textit{must} be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory code can only be justified on some special ground.\textsuperscript{300} The court found no such special grounds, but it reached this conclusion only because it did find that section 1056 of the Civil Code was intelligible and unambiguous and that "read in its ordinary and natural sense" it gave to the widow a right of action for damages.\textsuperscript{301}

The idea of applying English conceptions and methods regarding common law codifications to a civilian-type code stresses the fundamental difference between the civil and common law approaches to the interpretation of codifying acts. It emphasizes dramatically the English courts' tendency to recognize no hierarchy of sources of law existing under any code, to prefer in doubtful cases immediately to resort to unwritten law for solutions, and not to seek them first through exhaustive statutory interpretation as is demanded by civilian methodology.

\textsuperscript{298} \textit{Id.}
\textsuperscript{299} \textit{Id.} at 487.
\textsuperscript{300} \textit{Id.}
\textsuperscript{301} \textit{Id.} at 488.
F. The Inappropriateness Of Basing U.C.C. Methodology On The English Approach To Code Interpretation

The concluding part of Section II of this study was devoted to presenting arguments against the application en bloc of civilian methodology to the Uniform Commercial Code. Now the English approach to code interpretation is discovered to be a dissimilar—if not an antipodean—method. Is it then the methodological model to copy in deciding all doubtful cases arising under the U.C.C. The answer clearly is No, and the reasons for not adopting the English approach en bloc are even more apparent than those which oppose the full-fledged adoption of the civil law method.

(1) The sources of law provisions common to the English commercial codes and the U.C.C. are similar but far from identical. First, the saving clauses in the British acts indicate that the common law is to continue to be applicable unless inconsistent with “express” statutory provisions. Section 1-103 of the U.C.C. is not so strictly confined regarding the possible displacement of the common law under the Code. Legal and equitable principles are subject to displacement by the Act’s “particular provisions” but not necessarily only by its “express” terms. Second, the Uniform Commercial Code through section 1-102 and its commentary permits a liberal construction and analogical development of code principles in cases where justified by the purposes and policies of the Act. None of the English codes contains an equivalent provision.

The common law under the English codifications has a wider scope of potential applicability, i.e., in any case where its principles are not inconsistent with express statutory provisions. A greater chance also exists that the potentiality will be realized since the codes are not to be liberally construed, and, therefore, the scope of the statutes’ applications is more clearly defined and comparatively finite. In relative contrast, the use of the U.C.C. as a source of law beyond its literal language is encouraged and the role of the common law as a principal source of law in doub-

302. See p. 47 et seq. supra (SECTION II, D. Factors Opposing The Application of Civilian Methodology To The Uniform Commercial Code).
303. See pp. 197-98 supra and supra notes 234, 238, and 240.
304. U.C.C. § 1-103 provides in part: “Unless displaced by the particular provisions of this Act, the principles of law and equity, . . . shall supplement its provisions.”
305. U.C.C. § 1-102(1) and Official Comment 1 to § 1-102.
ful cases is lessened by the existence of section 1-102 and the singular wording of 1-103.

(2) Samuel Williston described the four commercial codes of England as having "simply attempted to photograph the existing case law and [to] put it in briefer form." The codifications were restatements declaratory of the common law as it existed and regardless of how it existed. The English draftsmen felt bound to reflect in the codes judicial decisions which were inharmonious with general principles.

Since the statutes included undesirable elements and rules of the common law, the courts have been expected to amend the acts judicially by resorting freely to the common law in efforts to distinguish and to limit the statutory provisions containing "bad" law. And inasmuch as the codes as enacted were mere restatements intended only to alter the form and not the substance of the law, Judge Palles' method of interpreting them appears most reasonable: The state of the law existing prior to the acts should be included in the judicial consideration of all cases arising under the codes because the meaning of the words of the acts cannot be understood in the absence of their common law bases.

If a statute is no more than a remodeling of the common law, in fact the sounder methodology probably is first to establish the rule applicable under the previous law and then to examine the statute to determine if the latter has altered the former in any respect. By recasting as exactly as possible the common law, the British Parliament added no innovations of its own and therefore breathed no new substance and policy into the already

307. Williston, The Uniform Partnership Act, With Some Remarks on Other Uniform Commercial Laws, 63 U. Pa. L. Rev. 196, 205 (1915). On this subject, see comments of Chalmers quoted pp. 199-200 supra. For example, the common law doctrine of "Caveat emptor"—described as a "bugbear, disturbed commerce and making foreign merchants nervous in entering into transactions with English traders"—was incorporated into the Sale of Goods Act. See, Hirschfeld, Jurisdiction and Statute Law, 9 J. Comp. Lec. 322, 327 (1909). Professor Hirschfeld attributed the failure to dispel the doctrine to the draftsmanship of Chalmers which was characterized as "a strict adherence to the judiciary law, avoiding all and any attempts at altering or improving the law." Id.
308. See pp. 195-96 supra.
existing commercial law. In short, there is no legislative intent beyond the desire to continue in force and effect the common law as articulated and rearranged in the form of codes. Interpretation which seeks legal principles beyond the letter of the written law woven into the fabric of the legislation is unnecessary and fruitless.

The result in the case of each English commercial code is an enactment which derives its official existence as “law” from the legislature but which bases its potential value as a “source of law” in the common law. In doubtful cases the statute itself is not considered to have independent viability because its sections have no value in terms of legislatively infused policy and principle; and solutions are not found by liberal and expansive readings of statutory provisions apart from the common law which continues to serve as the true source of their content and authority. Instead, the method is to trace the provisions to their common law origins and to continue to use those traditional legal and equitable metacode rules as springboards for judicial reasoning. This method is not altogether appropriate for the U.C.C. because it is more than a restatement of the common law and in substantial part legislatively declares fresh policy and new principles.

The two principal uniform acts which formed the bases of the U.C.C. and which were subsumed within it are the Negotiable Instruments Law\(^{311}\) and the Uniform Sales Act.\(^{312}\) Each was modeled after its earlier English counterpart\(^{313}\) and each in vary-

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311. The drafting of the N.I.L. was directed by Mr. John J. Crawford and was the first bill of any length promulgated by the National Conference of Commissioners on Uniform State Laws. It was referred to the states for adoption in 1896, and twenty-eight years later it had been enacted in every state.

312. The draftsman of the Sales Act (1906) was Samuel Williston. Among other of the important uniform acts regulating commercial transactions the subject matter of which were subsumed within the U.C.C. are The Conditional Sales Act, The Warehouse Receipts Act, The Bills of Lading Act, The Trust Receipts Act, and The Stock Transfer Act.


ing degrees was drafted in the English tradition of codes, being mere restatements of the common law.\textsuperscript{314} Like the codes of England, the N.I.L. and the Uniform Sales Act had common law saving clauses\textsuperscript{315} and lacked provisions calling for liberal interpretation.\textsuperscript{316} The N.I.L. and the Sales Act as applied by the courts were largely ignored beyond their express letter in those states which adopted them. Furthermore, many opinions failed even to cite the statutes as controlling when in fact they were. Courts openly derogated even from their express letter and clear

Bar Association, Brewster described the Sales Act as being built on the work already done in the “mother country” and declared that it would “to some extent, follow the English ‘Sales of Goods Act’ of 1893.” Brewster, \textit{A Commercial Code}, 37 Am. L. Rev. 348, 349-50 (1903).

\textsuperscript{314} There were like the Restatements of the following generation. \textit{See} Gilmore, \textit{On Statutory Obsolescence}, 39 U. Colo. L. Rev. 461, 466 (1967). Though the N.I.L. was almost an exact copy of the English Bills of Exchange Act, Williston drafted the Uniform Sales Act to include numerous changes from the English Sales Act. “As a result of these changes, a bill was sent out which was not only at variance with the English Sale of Goods Act, but with the existing rules of law in most of our States.” Burdick, \textit{A Revival of Codification}, 10 Colum. L. Rev. 118, 123 (1910). The American Sales Act was less a restatement of common law than the N.I.L. because Williston went “above and beyond experience,” and it was a movement in 1940 to revise further the law of sales which eventually gave rise to the U.C.C. project. \textit{See generally}, Braucher, \textit{Legislative History of the Uniform Commercial Code}, 58 Colum. L. Rev. 798 (1958), 2 Am. Bus. L.J. 137 (1964); Braucher, \textit{Legislative History of the Uniform Commercial Code: 1964 Supplement}, 2 Am. Bus. L.J. 155 (1964). A good example of how legal principles evolved and changed from their common law form through the English and American codes is the handling in each case of the problem of the buyer's right of rejection in sales law. \textit{See} Honnold, \textit{Buyer's Right of Rejection: A Study in the Impact of Codification Upon a Commercial Problem}, 97 U. Pa. L. Rev. 457 (1949).

\textsuperscript{315} \textbf{The Negotiable Instruments Law} (1896), § 196: “In any case not provided for in this act the rules of law and equity including the law merchant shall govern.” The Uniform Sales Act (1906), § 73:

In any case not provided for in this act, the rule of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy and other invalidating cause, shall continue to apply to contracts to sell or to sales of goods.

\textsuperscript{316} Arguments nevertheless were advanced that these earlier uniform acts were “codes” and not ordinary statutes. About the N.I.L. it was claimed:

It contains within itself an embodiment of the law on the subject which it covers. Therefore its words are to be given a broad meaning rather than a strict construction, and where the plain meaning of the words does not cover a point then they are to be used as examples of principles of law which are deduced from the code itself and not from previous cases.

intent. Generally, lawyers and judges not only failed to recognize the statutes as sources of law within their respective fields, but they also neglected to recognize them as statements of law superior to the traditional common law which largely was unchanged by the acts.

The Uniform Commercial Code is different from the earlier uniform acts in this country and from the English codes. Though a large part of the U.C.C. is an amended restatement of the previous uniform statutes, it is not simply a common law restatement to the extent that its predecessors were. The coverage of the various articles of the U.C.C. is far greater than their analogues among the earlier acts:

The Sales Article of the Code consists in considerable part of material not touched by the Uniform Sales Act; the Investment Securities Article is far more comprehensive than the Stock Transfer Act; the Secured Transactions Article is a great deal more than a redoing of the Conditional Sales and Trust Receipts Acts.

Not only is the coverage of the Code broader than that of the earlier acts taken collectively, but significant departures have


319. A related difference between the U.C.C. and the prior uniform acts is that the earlier commercial acts "were adopted and recommended piecemeal. In a number of respects, there is overlapping and duplication, and in some instances, inconsistency, in dealing with negotiable instruments, bills of lading, warehouse receipts, stock transfers, sales and trust receipts." [1940] HANDBOOK NAT'L CONF. COM'MRS ON UNIFORM ST. LAWS 58. On difficulties presented by such "piecemeal" codification, see Beutel, supra note 316 at 372-73; Beutel, The Proposed Uniform Bank Collections Act and Possibility of Recodification of the Law on Negotia-
been made from the pre-existing common and statutory law; and new legal principles and devices have been created by it. Prime examples are the abandonment in Article 2 of the mirror-image rule in contract formation and the development in Article 9 of the notice-filing concept.

Among the early proponents of the U.C.C., the need for the law to reflect social and economic conditions had become apparent. A simple common law restatement could not accomplish the motivating task, which was "to state basic principles under which business transactions can be carried out." To the extent that the Code reflects legislative innovation by deviations from traditional common law principles and by infusing fresh legal arrangements, rights and duties, it embodies contemporary social and economic and commercial policies. Its provisions thus may constitute potential sources as well as statements of law, and in

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320 See U.C.C. § 2-207(1).

321. The most common pre-Code security devices such as the chattel mortgage and the conditional sales contract required actually recording the instrument itself that granted the lien on, or retained title to, the secured property. For a review of the U.C.C.'s concept of notice filing as it has been received by the courts, see Welsh, Judicial Interpretations of the Filing Requirements Under Article Nine of the Code, 37 Tex. L. Rev. 273 (1970). To use Professor Gilmore's characterization, Article 9 is the most "revolutionary" part of the Code. Why it is and how it departs from tradition has been outlined in these Gilmore articles: Article 9: What It Does For the Past, 26 La. L. Rev. 285 (1966); Article 9: What It Does Not Do For the Future, 26 La. L. Rev. 300 (1966); The Secured Transactions Article of the Commercial Code, 16 Law & Contemp. Prob. 27 (1951).


323. Gilmore, supra note 318 at 365.
doubtful cases these U.C.C. sections should be cultivated thoroughly for the solutions they may yield and pressed beyond their express and clear letter. To the extent then that the Code goes beyond merely restating traditional common law rules, the English approach to code interpretation may not in all cases be applied to the U.C.C.

(3) Finally, the English approach to code interpretation is not suitable for application en bloc to the U.C.C. because to apply it would reverse a progressive trend in the United States to accept statutes more fully into the corpus of the law. American courts have been adept at developing a liberal approach to the construction of statutes.\textsuperscript{324} The English courts to a greater degree have tended to constrict the application of statute law through a process of narrow and rigid interpretation of legislation.\textsuperscript{325}

The trend in the United States which developed just prior to the promulgation of the U.C.C. was in the direction of liberal construction, i.e., seeking "to arrive at the legislative intention through ascertaining the chief purpose of the statute, its context, subject matter, and consequences, rather than from the strict import of the words used."\textsuperscript{326} In the year in which the U.C.C. project was begun, 1940, Professor Harry Jones reported, based on an analysis of judicial decisions, that federal and state courts to varying degrees "are coming increasingly to determine the application of statutes by reference to their legislative history and to their underlying objectives, rather than by the mechanical . . . employment of the traditional canons or rules of construction."\textsuperscript{327} Jones noted that the greater number of legal rules which courts apply today are of legislative origin, and he cautioned that if the growth of the law is to be consistent in its direction, "judges must approach the statute law scientifically, sympathetically, and with full comprehension of its legislative and social backgrounds."\textsuperscript{328} The prevailing attitude about statutory construction in the United States demands more than mere grammatical interpretation of the enacted law according to the traditional rule of construction in the case of the English codes.

\textsuperscript{324} See p. 202 supra.
\textsuperscript{325} See pp. 203-04 supra.
\textsuperscript{326} Sither, Statutory Interpretation and the Plain Meaning Rule, 37 KY. L.J. 66, 69 (1948).
\textsuperscript{327} Jones, Statutory Doubt and Legislative Intention, 40 Colum L. Rev. 957, 959 (1940).
\textsuperscript{328} Id. at 974.
A frequent writer on statutory interpretation in America has suggested instead that every statute must be construed in the light of,

(1) [T]he subject-matter with which it deals; (2) the reason or purpose behind its enactment as found in the text and the evil toward which it was directed; and (3) the meanings of the several other relevant parts of the same statute or of the statutes in pari materia.329

In the years just preceding the drafting of the Code, a new and more fruitful conception of law and the law-making process was emerging in the United States. Harlan Fiske Stone in 1936 described the tendency he saw developing in the legal thinking of American lawyers:

We are coming to realize more completely that law is not an end, but a means to an end—the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another.330

According to Stone, the common law method of developing legal principles was to continue to play a vital role in this judicial law-making process. Yet the greater recognition and acceptance of the role of legislation in the balancing of social and economic interests brought with it in the United States a better appreciation of the judicial use of statutes. As the balancing role of enacted law is recognized, statutes become increasingly valued as postulates from which to reason and by which to find solutions to analogous problems.331

329. deSloover, Contextual Interpretation of Statutes, 5 Fordham L. Rev. 219 (1936).
331. See Page, Statutes As Common Law Principles, 1944 Wis. L. Rev. 175; Traynor, Statutes Revolving in Common-Law Orbits, 17 Cath. U. L. Rev. 401, 43 Cal. St. B.J. 509 (1968). The U.C.C. itself has served to provide analogies to decide cases clearly not within its scope. See Hogan, Sales, Bulk Transfers and Documents of Title, 20 Bus. Law. 697 (1965); Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L. Rev. 447 (1971); Comment, The
At least four circumstances account for the more progressive tendency in the United States regarding the liberal construction and analogical use of statutes. First, an increasing awareness has developed among American courts, practitioners and scholars about the importance of making greater use of legislative history to determine and, therefore, to appreciate the scope of statutes.\textsuperscript{332} Second, the rule of precedent has been more loosely applied in the United States than in England.\textsuperscript{333} The results have been that American courts have not been bound as tightly to previous statutory interpretations and have refined techniques transferable to the process of statute construction by which to escape precedents or to rationalize their extension. Third, many American jurisdictions have abrogated the common law rule of construction which espouses narrow and limited interpretation according to the canon that statutes in derogation of the common law should be strictly construed.\textsuperscript{334}

The final and most important reason accounting for the progressive trend in statutory interpretation in the United States is that the early twentieth century movement in this country away from mechanical jurisprudence and toward legal realism "has been an American exclusive: it has had no counterpart in

\textbf{Uniform Commercial Code as a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880 (1965).}

\textsuperscript{332} See generally, Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930). With particular reference to uniform acts, see Jones, supra note 327, at 970, on the importance of courts, considering explanations of legislation by non-legislative expert draftsmen. But, the value of legislative history has been questioned. See, e.g., Nunez, The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination, 9 Cal. W. L. Rev. 128 (1972); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930).

\textsuperscript{333} On the reasons why the American rule of precedent is weaker, see Friedmann, A Re-Examination of the Relations Between English, American and Continental Jurisprudence, 20 Can. B. Rev. 175, 176-77 (1942). See also generally B. Cardozo, The Nature of the Judicial Process 158 (1921); Covington, The American Doctrine of Stare Decisis, 24 Tex. L. Rev. 190 (1945); Goodhart, Case Law in England and America, 15 Cornell L.Q. 173 (1930); Hanna, The Role of Precedent in Judicial Decision, 2 Vill. L. Rev. 367 (1957).

England . . . . It was a response to an American crisis—a crisis which was precipitated by our phenomenally rapid national growth in population, in wealth, in diversity of economic organization and cultural circumstance. Legal realism was a demonstration that the case law system had become “intolerably overburdened and unworkably complex,” and a conjunctive reaction to this fundamental crisis peculiar to the United States was progress by the courts in learning to construe statutes broadly rather than narrowly. In fact, writes Professor Gilmore, courts showed signs of going even further. “If the light of what might be called the principle of statutory radiation, they apply the legislative mandate even beyond the area to which the statute, according to its terms, is limited. In short, the courts have been learning to treat statutes as if they were codes.

In the final analysis, the essential reason why the English approach to code interpretation is not applicable en bloc to the U.C.C. is that American jurisprudence has progressed further than has the English toward the ideal judicial conception of legislative innovation described by Pound.

They [the courts] might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy.

To apply the English approach in deciding every doubtful case under the U.C.C. would retard this progress in the field of commercial law, and so would obstruct or nullify those legislatively infused social and economic policies inherent and identifiable in the letter and the spirit of the integrated and unified Uniform Commercial Code.

SECTION IV.

AN HYPOTHESIS: A METHODOLOGICAL UNION AND SUBSTITUTE FOR U.C.C. SECTIONS 1-102 AND 1-103

Section I of this study is devoted in part to explaining two

336. Id.
337. Id. at 1045. Some writers recognizing this trend have cautioned against courts extending the scope of a statute according to what the judiciary thinks best and not according to legislative intention. See Scott, The Judicial Power to Apply Statutes to Subjects to Which They Were Not Intended to Be Applied, 14 TEMP. L.Q. 318 (1940).
methods suggested by scholars for resolving doubtful cases under the Uniform Commercial Code. The first is the technique of “artful interpretation” for which authority is found in the language of section 1-102(1). The other is the development through section 1-103 of “meta-Code” concepts to supplement the coverage and application of statutory provisions. The former stresses the importance of the law as written and enacted in the Code as a source of law in doubtful cases; the latter emphasizes the coexistence and viability of the unwritten common law as a source of law in disputes arising under the Code.

In sections II and III the historical and foreign antecedents of Code provisions 1-102 and 1-103 and the methodologies from which they derive are investigated in detail. The research documents the conclusion that each method explained in the paper’s introductory section and the Code provision authorizing it are traceable to comparative contexts the circumstances of which are not altogether present or relevant today in the case of the Code. Therefore, attempting to apply exclusively either approach to the resolution of doubtful commercial law cases is inappropriate. Both methods admittedly have applicability under the Code, but the question is how to decide when to apply which one.

The central issue in the conflict between the two methods is this: What is the extent of displacement required by Code provisions (literally or liberally construed) to preclude resort to “meta-Code” concepts? An analysis of that issue translates into a dispute over the hierarchy of sources of law in deciding cases under the Code. What is to be the principal source of law to consult in resolving doubtful cases? Is it to be provisions of the Code interpreted according to its language and policy inferred only from its language? Or is the primary source of law in doubtful cases to be principles of law and equity developed into concepts which respond to the needs of the Code but which are not dictated by it? The answer requires an examination of sources of law relationships under the Code in the contexts of specific cases and particular articles and sections, but a general hypothesis can be stated now and tested in later research.

Section 1-102(1) prescribes that “[t]his Act shall be liberally construed to promote its underlying purposes and policies.” There are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties:
(c) to make uniform the law among the various jurisdictions.\textsuperscript{339}

Clearly these objectives are intended to further a broader goal of insuring the orderly conduct of commercial affairs and transactions within each state and throughout the country.\textsuperscript{340} The key to understanding the relationship between intra- and extra-Code law in meeting this goal was recognized by the drafters. Commercial practices will change, and the proper construction of the act requires a method of construing and applying it which allows flexibility to respond to unforeseen and new circumstances and practices.\textsuperscript{341}

Section 1-102(1) obviously should be understood to mean that the Code should not be liberally construed and applied to resolve a doubtful case if the purposes and policies of the act are not thereby promoted. Section 1-103 in concert with the section preceding it must be read as a corollary: The principles of law and equity are not displaced\textsuperscript{342} by the provisions of the Code and should supplement them in any case where their application more definitely will promote the orderly conduct of commercial affairs and transactions regulated by the Code. Therefore, the decision about which is to be the principal source of law in resolving a doubtful case should be based upon factual and policy considerations which exist beyond the circumstances of any particular case.\textsuperscript{343}

\textsuperscript{339} U.C.C. § 1-102(2).

\textsuperscript{340} Conducting commercial affairs and transactions in an orderly manner requires effecting a proper economic and social balance between mercantile and consumer interests, and the thesis that the Code is intended to effect such a balance surely is correct. See Carroll, Harpooning Whales, of Which Karl N. Llewellyn is the Hero of the Piece; Or Searching for More Expansion Joints in Karl's Crumbling Cathedral, 12 B.C. IND. & COM. L. REV. 139, 140 (1970). Also, it requires that the Code as any other body of law should have "justice" in one sense or another as its highest aim. Patterson, The Codification of Commercial Law in the Light of Jurisprudence, 1 N.Y. ST. L. REVISION COMMISSION, 1955 Rept. 11, 55 (1955).

\textsuperscript{341} Official Comment 1 to U.C.C. § 1-102 in part provides:

This Act is drawn to provide flexibility so that, since it is intended to be a semipermanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.

\textsuperscript{342} "Unless displaced by the particular provisions of this Act, the principles of law and equity ... shall supplement its provisions." U.C.C. § 1-103. According to Official Comment 1 to 1-103, "[T]his section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act ... ."

\textsuperscript{343} Consider the following set of facts illustrating a doubtful case
The law embodied in the Code is to be developed in light of changing commercial conditions, and these conditions define what constitutes "order" in commercial activities. Necessarily under the Code and the contrasting approaches to resolving the issue involved.

SP financed the farming operations of D. SP's loans to D were secured in part by Article 9 security interests in D's farm products (crops and/or livestock). The security agreement between the parties provided that D was not to dispose of any collateral without written consent of SP. However, as a general practice and as a general course of procedure, SP permitted D and all other similarly situated debtors of SP to sell or dispose of collateral at will without written consent and to apply the proceeds to the satisfaction of the obligation. If D sells part of his farm products to B, does SP's security interest continue in the part of the collateral sold to B? The real issue is whether a secured creditor may waive his security interest in collateral under 9-306(2) in favor of a third party purchaser simply by his course of dealing with the debtor rather than by express or written waiver.

The Arkansas Supreme Court has held that a secured party may waive his security interest by his course of dealing with the debtor. Planters Prod. Credit Ass'n v. Bowles, 256 Ark. 1063, 511 S.W.2d 846 (1974). See, however, Ark. Stat. Ann. § 85-9-306(2) (Add. 1961 & Supp. 1975), for the reaction to this decision by the Arkansas General Assembly which changed the rule announced by the court. The best known case in accord with the Bowles decision is Clovis Nat'l Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967), on which the Arkansas Court relied for authority in Bowles. The Supreme Court of New Mexico decided that these facts presented a proper case to supplement the provisions of the Code with principles of law and equity. The court found that the secured party had waived his security interest in the debtor's cattle by implied acquiescence or consent and concluded: "There being no particular provision of the code which displaces the law of waiver . . . the code provisions are supplemented thereby." 425 P.2d at 732.

The Nebraska Court has reached a contrary result. In Garden City Prod. Credit Ass'n v. Lannan, 186 Neb. 688, 186 N.W.2d 99 (1971), the implied waiver theory was rejected. The court acknowledged that a course of dealing or usage of trade can modify the parties' agreement, but stresses the language of section 1-205(4) that unless the express terms of an agreement and course of dealing between parties can be construed consistently with each other the agreement terms should control. Id., 186 N.W.2d at 103-04. The actions of the secured party in accepting the proceeds of sales by the debtor (which were without the written consent required by the agreement) did not constitute an intention to waive the security interest. "Our decision herein is in harmony with the general rule that in order to establish a waiver of legal right there must be a clear, unequivocal and decisive act of a party showing such a purpose, or acts amounting to estoppel on his part." Id., 186 N.W.2d at 104.

The Garden City opinion stresses the language of the Code as written and enacted as a source of law in reaching its result. Clovis and Bowles relied on common law principles of waiver to decide the issue. One author criticizes the Clovis decision and courts adopting it as subverting the express legislative intent of the Code.

Clovis has been too readily accepted by courts interested in mollifying the harshness of the creditor's conversion suit against an innocent marketing agent or purchaser. This writer feels that
then the Code should be construed according to 1-102(1) or supplemented through 1-103 only after careful analysis of the current state of pertinent commercial practices and circumstances. These considerations give content to the purposes and policies underlying the Uniform Commercial Code, and the proper method in deciding doubtful cases is one which tends more certainly to promote them.

the best argument against loose acceptance of the waiver argument is that it is contrary to the Code policy expressed in section 9-307(1) that a farmer does not have the power to sell farm products free of a security interest. Unfortunately, the courts following Clovis disregard the clear language of the section and its policy implications when considering the waiver argument.

The courts should not subvert this express legislative intent. It is for the legislature, not the judiciary, to remedy any inequity which flows from the rules embodied in the Code. Thus, absent express consent or an highly unusual circumstance, a creditor should not be considered to have waived his security interest.


All of these courts in reaching their decisions properly considered courses of dealing and usages of trade between the particular parties involved. Possibly, however, 1-102(2) (b) envisions that expanding commercial practices through custom and usage as a policy and purpose of the Code requires examining commercial customs and usages as they affect the circumstances of commerce generally, state-wide and nationally. The courts did not analyze in their interpretations of the Code which construction would promote the modernization of the law governing commercial transactions, and the Act's objective of uniformity of commercial law was given slight, if any, consideration.

In Garden City the Nebraska court wrote:

We must assume that section 9-306(2) was drafted with an awareness of the practical realities of farm credit financing, the market movement of chattel property, and the practical problems of securing and contesting sale and payment. This provision of the code must clearly have been designed to accommodate to and fit the practical realities of financing a farming and business operation contemplating the raising, feeding, and processing, and sale of livestock and tangible property.

Garden City Prod. Credit Ass'n v. Lannan, 186 Neb. 688, 186 N.W.2d 99, 102 (1971). However, the courts, reaching a different result than did the Supreme Court of Nebraska on facts identical to Garden City, must not share that assumption. Furthermore, as Professor Miller has indicated, today's agriculture is vastly different from that of the time when the U.C.C. first appeared, and he argues that many of the Code's rules dealing with agricultural transactions do not conform to the reality, needs or practices of modern agriculture. Miller, herein at 515.

To decide doubtful cases arising under the Code requires an analysis of modern needs and realities whatever the context, be it farm financing or inventory factoring. Courts which attempt to resolve disputes without such an analysis are not equipped to decide which source of law should be the principal one to resolve doubtful cases, and they are diminishing the prospects of promoting an orderly conduct of commercial transactions and affairs which is the ultimate goal of the Uniform Commercial Code.
Further research about the resolution of doubtful cases under the Code and the proper methodology to apply in deciding them should consider a substitute for the present sections 1-102 (1) (2) and 1-103. The alternative suggested below combines their language, interrelates their methods, and incorporates the findings and conclusions of this study. It is a proposed new section which unites the existing ones and thereby eases the tension existing between the conflicting methodologies deriving from them.

PURPOSES; RULES OF CONSTRUCTION;
SUPPLEMENTARY PRINCIPLES OF LAW APPLICABLE

(1) This Act shall be construed and applied to further the orderly conduct of commercial transactions by promoting underlying purposes and policies of this Act which are

(a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.

(2) The purposes and policies stated in subsection (1) shall be promoted either

(a) by liberally construing and applying the provisions of this Act, or
(b) by supplementing its provisions with principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause,

whichever method tends more certainly in any particular case or class of cases to further the orderly conduct of commercial transactions.

This union of U.C.C. sections 1-102 and 1-103 establishes an approach to deciding doubtful cases under the Code which resolves the sources of law problem in favor of a hierarchical ranking on a case-by-case basis. The proper source to consult in any particular doubtful case is the one permitting a result more consistent with the broadest and ultimate purpose the U.C.C. was designed to advance. In Part III of this study the application and desirability of the proposed approach will be demonstrated by using it to resolve a sampling of Article 9 doubtful cases and perhaps a few arising under other articles.