

## “Superseded and lost sight of?” The Argument of the Code Napoleon during the Anglo-American Controversy of the Codification of Common Law (1820-1835)

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### Abstract

*During the period 1820-1835, the Anglo-American legal world was set ablaze. Like the reforms taking place in the United Kingdom, Louisiana, South Carolina and New York State, this was about finding the right moment to abolish common law and replace it with codes. Although the two Anglo-American controversies were originally independent of each other, they very soon became intertwined, in particular because the reviews were the cause of a transatlantic confrontation. At the heart of the respective arguments, the French Civil Code of 1804, or the Code Napoleon, was strategically drawn on by both sides. Supporters of codification were happier to turn to it than to Bentham, to show that the Napoleonic Code was working and had put an end to the legal chaos in France. Advocates of common law searched through the works of French jurists for evidence that the Napoleonic Code was a failure and that, far from ending the confusion in the law, it had aggravated it. This controversy helped stir up the opposition between the two legal systems by accentuating and reversing the respective vices and virtues.*

**Key words:** Common Law - Civil Law - Codification - Jeremy Bentham - Jean-Étienne Portalis-André Dupin-William Sampson - Peter S. Du Ponceau - James Humphreys - John Reddie - John J. Park - Charles P. Cooper

In September 1821, the famous North American jurist Joseph Story addressed the members of the Suffolk Bar in Boston. After deploring the state of the law in the different States of the Union, he justified reforming it by expressing his admiration for the French Civil Code, the Napoleonic Code that had entered into force fifteen years earlier (1804)<sup>1</sup>:

“The modern code of France, embracing as it does, the entire elements of its jurisprudence in the rights, duties, relations, and obligations of civil life; the exposition of the rules of contracts of every sort, including commercial contracts; the descent, distribution, and regulation of property; the definition and punishment of crimes; the ordinary and extraordinary police of the country, and the enumeration of the whole detail of civil and criminal practice and process; - is perhaps the most finished and methodical treatise of law, that the world ever saw.”

Here, Story offers us an overview of the North American interest in the French model, an interest that increased suddenly when, some years later, the Anglo-American legal world erupted during the Codification Controversy. From 1824 in the United States and from 1826 in the United Kingdom, the central question causing a stir was the appropriateness of codifying common law. Dozens of jurists clashed via speeches, written works and reports. They employed lecture halls, reviews and publishers. They wrote in literary reviews to expand their audience beyond members of the Bar and the Bench. They founded law reviews during this dispute. They created a battlefield with its champions, its values and its arguments. For all of these jurists, it was not simply an inconsequential intellectual joust, as the issue was also legislative: in Louisiana, South Carolina and the State of New York, codification and the revision of statutes had been under discussion since the 1820s and these projects were now at an advanced stage, while political life in the United Kingdom was focused on the works of the Reform Committee led by the Whigs (1819-1823), draft acts to consolidate the statutes (Peel's Acts 1826-1830) proposed by Robert Peel, the Home Secretary of the successive Conservative governments in power until the Tories were defeated in the 1830 election, then by the works of the reform commissions instituted by Brougham, The Lord Chancellor of Grey's Whig government (1830-1834).

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<sup>1</sup> Story, “Judge Story's Address [1821],” *The American Jurist* 1 (1829): 32. About Joseph Story, Steven J. Macias, *Legal Science in the Early Republic: The Origins of American Legal Thought* (Lanham: Lexington Book, 2016): 159-171; B. Clark, *The Invention of American Nationhood: Joseph Story and the Federal Common Law* (Washington: Catholic University of America Press, 2017); Symeon C. Symeonides, *American Private International Law* (Alphen: Wolters Kluwer, 2008): 108-125; R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: The University of North Carolina Press, 2004).

Supporters of codification believed that the time had come to enact codes in regard to civil, criminal and commercial law and, therefore, to abolish (radical version) or reform (moderate version) the common law system, as it lacked clarity and was incomprehensible and verbose, being based on unwritten principles of justice established by customs, statutes and above all by the decisions of judges. Common law advocates, while admitting that some improvements could be made, defended it as a system against its rival, the codified system.

Needless to say, the Code Napoleon during this controversy very quickly became one of the main battlefields, which led codifiers to refer to it more willingly than to the Bentham project in order to show that the Code was working, that it had ended the legal chaos and was having a positive impact on French society. For their part, the common lawyers sought to show that the French Code was a sham, that it did not work and that, far from ending the confusion of the law, it had actually aggravated it, because of its interpretation by the judges. In other words, it was already “superseded and lost sight of, in the multiplicity of judicial decisions which have arisen under it”. In the following pages, we intend to show how the controversy, with its strategies and challenges, led the Anglo-American opponents to take some of their reasoning from the other side of the Atlantic. We will try to understand why the use of the French codification offered codifiers a more secure position than relying on Bentham. We will then examine the intellectual progression that led North American common lawyers to look in the works of French jurists for weapons to use against the Napoleonic Code. Next, we will see how Sampson, one of the American codifiers, used Dupin, a well-known French jurist, to counterattack, before finally seeing how British common lawyers expanded on the idea that the Napoleonic Code was a failure.

### **1. The codifiers and the decision to use the Napoleonic Code**

#### **The danger of referring to Bentham**

When one thinks of codification in relation to common law, the name Bentham comes to mind. His project, which is more like a doctrine than a set of concrete texts, is based on a utilitarian philosophy that Bentham discovered during the third quarter of the 18th century in the works of his contemporaries, on which he theorised<sup>2</sup>: the nature of mankind is to find usefulness in all things, in other words maximum pleasure and minimum pain. To enable each individual to identify what contributes or fails to contribute to their well-being, and to enable the government to guide citizens towards what contributes to the general well-being, the entire body of law must be known to all. It must therefore be formulated exclusively as a set of laws. It must be accessible, certain, clearly expressed, scientifically organised, gathered in a single complete text: the code, the *Pannonium*. And because nature creates, everywhere and at all times, men who pursue the same ends, this code will be universal. As British common law is presented, disingenuously, as a set of principles of justice pronounced by the courts, retrospectively, during cases, it should not be reformed, but completely abolished. In the period between 1800-1820, Bentham developed and radicalised his codification doctrine “in tandem with the project for the fundamental and democratic transformation of the social and political order”<sup>3</sup>. He offered on several occasions to codify foreign law<sup>4</sup>, he maintained epistolary relationships on a more or less regular basis with reformers of various nationalities<sup>5</sup>, he wrote parts of his famous complete code, the *Pannonium*, he could count on Dumont to follow the publication of his works and to echo his views on radical reviews such as *The Edinburgh Review* and *The Westminster Review*<sup>6</sup>.

However, during the controversy of 1820-1835, Bentham did not actually have the role he would have liked to have had. On the one hand, the historiography of the 20th century exaggerated Bentham’s stature. It turned him into the central figure of the legal reform of the 19th century and although he did exercise a degree of influence, certainly direct and presumed, it was confined to a limited circle of reviews and reformers: Cooper and Livingston in the United States, Brougham, Wright, Macaulay and Stephen in the United Kingdom. In other words, those in the United Kingdom and the United States during the 1820s who participated in the debates on legal reform could have heard Bentham speak. Many would have read him, some would have been influenced by him, but he was not the epicentre of the reform, particularly because he did not so much offer concrete projects as a doctrine.

<sup>2</sup> J. Vanderlinden, “Code et codification dans la pensée de Jeremy Bentham,” *TijdschriftvoorRechtsgeschiedenis* (1964): 45-64; Gerald J. Postema, *Bentham and the Common Law Traditions* (Oxford: Clarendon Press, 1989); M. Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991): 116-132; D. Baranger, “Bentham et la codification,” *Droits. Revue Française de Théorie, de Philosophie et de Culture Juridique* (1997): 17-35; G. Guyon, *Les partisans de la codification en Angleterre. La question du droit pénal entre utilitarisme, modernisation du commonlaw et modèle juridique français* (Phd in Law: Université de Rennes 1, 2012): 55-75.

<sup>3</sup> D. Lieberman, “The challenge of codification in English legal history,” *Presentation for the Research Institute of Economy, Trade and Industry* (<https://www.rieti.go.jp/en/events/bbl/09061201.pdf>) (2009): 10.

<sup>4</sup> P. Schofield et J. Harris (eds.), *The Collected Works of Jeremy Bentham: ‘Legislator of the World’* (Oxford: Clarendon Press, 1998).

<sup>5</sup> L. O’Sullivan et C. Fuller (eds.), *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham* (Oxford: Clarendon Press, 2006), 14 vol.

<sup>6</sup> G. Guyon: 88-90.

On the other hand, caution prevailed amongst those who had read and been inspired by Bentham's works. In both the United States and the United Kingdom, he is often caricatured due to his semantic passion, his extremism and his eagerness to codify the law around the world. In other words, referring to Bentham is a trap. Being a British reformer at the time who was unlucky enough to be supported by Bentham amounted to the kiss of death, explains Keith Smith: the reform project was ranked among the flights of fancy of a radical prophet and was terminated. In the United States, explain Perry Miller and Maxwell Bloomfield, supporters of the codes knew that the strategy of their adversaries was both simple and cruel. If a codifier used Bentham's name, he would immediately be marginalised<sup>7</sup>. He was so badly thought of that any argument in favour of codes would become inaudible. So, when the codifiers provoked the controversy, they knew they had to pick and choose their references.

### ***The choice of referring to Napoleon***

In the United States, the common law system was an extremely controversial subject from the 1820s onwards due to doubts about its content, the jumbled and growing mass of decisions and statutes, and - in radical circles - its non-American and non-republican character<sup>8</sup>. In 1823, however, one William Sampson, a lawyer of Irish origins, caused controversy with a speech given in New York in which he censured common law, at length, in order to justify the development of a code, such as that of Louisiana<sup>9</sup>. At the time, in this territory purchased by the United States in 1803, a Civil Code (on the model of the Napoleonic Code), a Code of Civil Procedure and a Criminal Code were in preparation under the supervision of Edward Livingston, a New York jurist who was a convert to civil law<sup>10</sup>. Although his writing betrayed the fact that he had read Bentham, especially in the manner in which he put common law on trial, and in certain phrases, for example that in which he compared common lawyers to the priests of Egypt, Sampson was careful never to refer to the English philosopher<sup>11</sup>. Sedgwick, a codifier more radical than Sampson, advocated codification, but at the same time explained that it was necessary to avoid "the temptations of foolish theories of perfection", which was aimed at Bentham, though without mentioning him<sup>12</sup>. In 1821, Story had dismissed "the theoretical extravagances of these philosophical jurists" and, in 1826 at the height of the controversy, he proposed a middle ground, lamenting the fact that the codification works had "occasionally disparaged by the exclusive admirers of the common law, and still more so by the overheated zeal and extravagance of some advocates of codes", aiming, once again, at Bentham<sup>13</sup>. For Sampson, Sedgwick, Story, Grimke, Wilson and Watt, the constant references were the compilations of Justinian, the civil and criminal codes of Louisiana, and in particular the Napoleonic Code.

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<sup>7</sup> P. Miller, "The common law and codification in Jacksonian America," *Proceedings of the American Philosophical Society* (1959): 465; M. Bloomfield, "William Sampson and the Codifiers: The Roots of American Legal Reform," *The American Journal of Legal History* (1967): 245.

<sup>8</sup> William E. Nelson, *Americanization of the Common Law: the Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge, London: Harvard University Press, 1975); F. Thornton Miller, *Juries and judges versus the law: Virginia's provincial legal perspective, 1783-1828* (Charlottesville: The University of Virginia Press, 1994); M. Grossberg et C. Tomlins (eds.), *The Cambridge History of Law in America* (Cambridge: Cambridge University Press, 2008) 3 vol., t. 1. *Early America (1580-1815)*; L. Edwards, *The People and their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009).

<sup>9</sup> Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport: Greenwood Press, 1981); Robert W. Gordon, "The American Codification Movement," *Faculty Scholarship Series, 1370* (1983): 439-456.

<sup>10</sup> Richard H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (Baton Rouge: Louisiana State University Press, 1987); Vernon V. Palmer, "Two worlds in one: The genesis of Louisiana's mixed legal system, 1803-1812," in Vernon V. Palmer (dir.), *Louisiana: A Microcosm of a Mixed Jurisdiction* (Durham: Carolina Academic Press, 1999): 23-45; A. Guzmán Brito, "Las fuentes de las normas sobre interpretación de la leyes del Digeste des lois civiles (Code civil) de la Luisiana (1808/1825)," *Revista de Estudios Histórico-Jurídicos* (2009): 171-196.

<sup>11</sup> "Like the priests of Egypt, the Chaldeans, or Brahmins, they had a farrago of enigmatical common law verses, which they delivered to the multitude from little eminences, and inspired into them a fanaticism, that sometimes stood in the place of a more enlightened patriotism, and made them formidable to the all-conquering Romans" (Sampson, *An Anniversary Discourse... showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law* (New-York: Bliss and White, 1824): 25). Bentham writes: "They love unwritten law for the same reason that the Egyptian priest loved hieroglyphics, for the same reason that the priests of all religions have loved their peculiar dogmas and mysteries" (Bentham, *General View of a Complete Code of Law, Works of Jeremy Bentham* (Edinburgh: Tait, 1863) vol. 3: 206).

<sup>12</sup> Sedgwick, "The common law," *The North American Review* 19 (1824): 430.

<sup>13</sup> Story, "Dane's Digest..." *The North American Review* 23 (1826): 23-24.

This recourse was systematic, not only because it concerned a concrete legal item that set down civil law in 2,281 articles, not only because its content did not originate in the brain of a utilitarian philosopher, but substantiated the legal mechanisms of ancient law (Roman law and customs) reconciled with the benefits of the Revolution, but also because its authors recognised that the code once enacted had to be the subject, under the control of the Court of Cassation, of an interpretation by the judges and an adaptation of the rule to the case in point. In other words, concedes Portalis in the Preliminary Address of the Civil Code (1801), it is necessary to separate the questions governed by the Code from the “thousand unexpected questions” that are “abandoned to the empire of common practice, the discussion of educated men, the arbitration of judges”. In the United Kingdom it was James Humphreys, a London barrister, who opened hostilities by publishing a draft code of real property in April 1826. A legacy of the Anglo-Norman feudal system, the ownership of real property, its complexity, its vocabulary and its fictions have been the subject of concerns and debates among jurists since the 1800s<sup>14</sup>. Then, after demonstrating the technical shortcomings of English law, Humphreys put forward an original, thoughtful and detailed draft code that would unleash passions<sup>15</sup>. The Napoleonic Code was the model from which he drew and the method behind some of the content. Bentham was the model he never referred to. The same could be said one year earlier of the works of John Miller and Crofton Uniacke<sup>16</sup>.

In other words, the supporters of codification, whether they were hugely in favour of the French codification, the compilation of Roman law and the Louisiana projects, or whether they did not take Bentham’s work seriously, took care to pick and choose their references. What was the response of the common law advocates? Their tactic was to draw Bentham back into the controversy by systematically mentioning him and to look for evidence to discredit French-style codification. To assess the overall intelligence of the strategy, it should be remembered that one of the most frequent critiques of common law was the accumulation and superposition of law treaties and law reports (the compendia of judicial decisions). This dramatic increase in the legal literature was interpreted, in both the United States and the United Kingdom, as a symptom of the common law crisis. It was on this basis that its advocates, and then, in response, the supporters of codification, went abroad to look for their respective counterarguments. This is how it transpired.

## **2. The common lawyers and the use of Pailliet and Dupin against the French codification**

### **The commentaries of Pailliet and Dupin**

In 1812 in France, Jean-Baptiste Pailliet produced a *Manual of French law containing the five annotated codes* which included the interpretation of the doctrine and the jurisprudence beneath each article. This 1,270-page work in tiny print was copiously collated and re-edited<sup>17</sup>. In the preface – here we are using the third edition from the year 1818 –, Pailliet made an alarming observation (which, importantly, enabled him to justify his work to buyers): “It is only a few years since the Codes were published and they have already given rise to such a large number of treaties, commentaries and compilations, that the same thing could be said of our books of jurisprudence as Eunapius said of the books of Roman law before the compilation of the pandects: there are several camel-loads of them”<sup>18</sup>. Ten years later in 1822, Dupin published *La jurisprudence des arrêts*, a work that warned against the multiplication of compendia of judicial decisions. He stressed that the codes had led to the unity and uniformity of the law, as “the expression of Laws is general, that of Judgements is specific and personal”<sup>19</sup>. He stated the desirable qualities in a compendium of judicial decisions and the infallible method of properly using the decisions of the judges. At no time did Dupin write that these decisions in France replaced the codes, but he deplored the fact that “the taste for compilations of Judgements has not diminished”<sup>20</sup>. All of which once again justified the purchase of Dupin’s book to its buyers.

<sup>14</sup> Andrew R. Buck, “Property, aristocracy and the reform of the land law in early Nineteenth-century England,” *The Journal of Legal History* (1995): 63-73; John H. Johnson, “The reform of real property law in England,” *Columbia Law Review* (1925): 609-627; E. Spring, “Landowners, Lawyers, and Land Law Reform in Nineteenth-century England,” *The American Journal of Legal History* (1977): 40-71.

<sup>15</sup> M. Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991); Gunter A. Weiss, “The enchantment of codification in the common law world,” *Yale Journal of International Law* (2000): 435-474.

<sup>16</sup> Miller, *An Enquiry into the Present State of the Civil Law of England* (London: Murray, 1825); Uniacke, *A letter to the Lord Chancellor, on the necessity and practicality of forming a code of the laws of England* (London: Clarke, 1825).

<sup>17</sup> J.-J. Clère, “Pailliet,” in P. Arabeyre, J.-L. Halpérin and J. Krynen (dir.), *Dictionnaire Historique des Juristes Français XII<sup>e</sup>-XX<sup>e</sup> siècle* (Paris: Presses Universitaires de France, 2007): 606.

<sup>18</sup> Pailliet, *Manuel de droit français contenant les cinq codes annotés...* (Paris: Desoer, 3<sup>rd</sup> ed., 1818): XIII.

<sup>19</sup> F. Brami, “Dupin, dit Dupin aîné,” in P. Arabeyre, J. -L. Halpérin et J. krynen (dir.), *Dictionnaire Historique des Juristes Français XII<sup>e</sup>-XX<sup>e</sup> siècle* (Paris: Presses Universitaires de France, 2007): 281-282.

<sup>20</sup> Dupin, *La jurisprudence des arrêts à l’usage de ceux qui les font et de ceux qui les citent* (Paris: Baudouin frères, 1822): 79.

The dual analysis of Pailliet and Dupin had an unforeseen effect. It provided opponents of codification with a wonderful argument. Although, indeed, the promulgation of the French codes did not hamper the publication of legal works and compendia of judicial decisions, it was proof on the one hand that the codes were no more successful than common law at containing the proliferation of legal works, and on the other, that the case law formed a new common law (a French style of common law, a resurrection of the *ius commune*) which drew as heavily from ancient sources (Roman law, customs, doctrine) as from the codes; a new common law that gradually became the sole and authentic law applied by the courts. The fact was, therefore, that the code was not what the French believed it to be, i.e. a body of rules that alone make it possible to resolve legal issues. Therefore, the indisputable fact was that codification served no purpose... Pailliet and his camels, Dupin and the taste for compilations of judgements were, without being aware of it, the weapons of the counterattack. All that needed to be added to this defence was the famous quote of Portalis according to which “the codes of people develop over time; properly speaking, one does not make them”, to create a complete strategy.

### ***The use of Dupin and Pailliet against codification***

It is difficult to identify the source from which opponents of the codes acquired Pailliet and Dupin’s argument. Was it reading an article, a review or the works themselves? Was it based on a French, English or American reading? It should, however, be noted that Du Ponceau, a fierce opponent of codification in the United States, was born in France and that he read French works and translated them into English. As a result, in April 1824, in the speech he gave in response to Sampson – the supporter of codes who triggered the controversy in December 1823 –, Du Ponceau relied on Dupin’s *La jurisprudence des arrêts* (1822) to state that reference was made in France just as often as before to the Digest, the old laws and statutes, and the vast collection of the works of the civilists. In a note on the subject of Louisiana, Du Ponceau stated<sup>21</sup>:

“In France, although it abounds with codes, there are, nevertheless, voluminous collections of reports of judicial decisions, the knowledge of which is an important branch of the legal science, and is called la jurisprudence des arrêts. These decisions, although they are not considered paramount to the textual law, have nevertheless great authority. [...] Since a high Court for the correction of errors has been erected for the whole kingdom, under the name of cour de cassation, their opinions, though sometimes contradictory, have obtained a much higher degree of respect, and a common law is gradually establishing itself by the side of the ancient and modern codes. The degree of authority to which these supreme decisions are entitled, has lately become an important question among the French jurists.”

In May 1824, a review of Sampson’s *Anniversary discourse* that appeared in *The Atlantic Magazine* stated that however magnificent a code could be in theory, it should be noted that in just a few years it could be buried under a heap of commentaries and annotations, as is evident from the way each statute is interpreted differently in the United States: “Even the Napoleonic Code, to which the reformers are so fond of alluding, although it was only implemented a few years ago, has already given birth to fifty volumes of compendia of judgements”<sup>22</sup>. In October 1825, Haven relied on the authority of Du Ponceau to maintain that earlier texts (Digest and Code of Justinian, laws and statutes, doctrine of the civilists) were still used by the magistrates. “They constitute the common law of France and are gradually incorporated into the code as tools for judicial decisions; with the result that the French as well as the English and the Americans have voluminous compendia”<sup>23</sup>. In July 1825, the *Charleston Mercury* also took up this argument. Charleston is a city in South Carolina that was directly affected by the codification projects. Jurists, reviews and the daily newspapers also played an active part in the local controversy. In response to Sampson’s speech and the exchange of letters between Sampson and Cooper published in the *New York National Advocate*, the *Charleston Mercury* printed a two-page article on 28 July 1825 (picked up by the *New York Evening Post*) that developed a short but powerful argument. It is with curiosity, began the anonymous author of the article, that one must examine the idea of the codification or condensation of the law – Cooper had suggested the term condensation, in the chemical sense of the word, in order to preserve in a legislative text everything that in common law is sufficiently certain, succinct, substantial. The project was certainly tried out in Louisiana, but not, as its supporters like to say, in England or the State of New York. It was therefore necessary to be very cautious in South Carolina and wait to judge the experiments conducted elsewhere. The author explains<sup>24</sup>:

<sup>21</sup>Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States...* (Philadelphia: Small, 1824): 82.

<sup>22</sup>Anonymous, “Common law,” *The Atlantic Magazine* 1 (1824): 30.

<sup>23</sup>Haven, “English common law reports,” *The North American Review* 21 (1825): 383-384.

<sup>24</sup>*The Charleston Mercury*, July 28, 1825, in Thompson, *Sampson’s Discourse, and Correspondence with Various Learned Jurists, Upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject* (Washington: Gales & Seaton, 1826): 58-59.

“In our humble opinion, the scheme of simplifying or reducing to certain fixed principles the whole system of common law by legislative enactment is not only extremely difficult, but, even if it were perfectly feasible, would be useless and unavailing. The Code Napoleon itself, the great model of all these schemes, is already beginning to be superseded and lost sight of, in the multiplicity of judicial decisions which have arisen under it. In the course of twenty or thirty years, more of its authority will probably be entirely lost and the principles of law will be looked for only in the decisions of the courts.”

Let us imagine, continues the author of the *Mercury* article, the promulgation of a new digest in South Carolina. No legal principle can be certain when the court of appeal has not explained its true meaning. It would, therefore, be the opinion of the court on the digest and not the digest itself that would be the law. The cases, with the multitude of interpretations of the judges, would again start to multiply and give rise to new publications of reports. In just a few years, the entire system would degenerate and be buried under the accumulation of case law.

And because Cooper evoked in his correspondence with Sampson the possibility of comprehensively revising the code approximately every fifty years, the *Charleston Mercury* said with irony: by making this proposal, Judge Cooper implicitly recognises that a code becomes obsolete after a half-century. This shows that this manner of legislating does not meet the needs of the people of South Carolina:

“Before we think of digesting the common law, so as to adapt it to all the complicated concerns of a whole people, it would be necessary to alter the condition of society, and the very elements of human nature. Before a code of fixed principles could be introduced, mankind must be made of the same mind; to follow the same pursuits, to attend to the same objects, and to be governed generally by the same rules of conduct. A code of this kind, therefore, may answer very well for the government of the army and navy; for the government of masonic institutions, or of local societies established for particular objects; but it can never be made to apply to a whole people, infinitely diversified in opinions, occupations, and pursuits.”

The double counterattack – there is no point to a code, as is evident from the failure of the French code buried under the publications; a code suiting those who are subject to the same discipline, but not a free nation – is so clever that it can be found in all the articles of the advocates of common law. Sampson would also counterattack by addressing... Dupin himself.

### **3. Sampson’s appeal to Dupin in favour of French codification**

#### **The American publication of the correspondence between Sampson and Dupin**

In a letter dated 20 April 1826, Sampson firstly asked the French lawyer (using some of the very same terms as the *Charleston Mercury*) if it was true that “the French Codes were already nearly overwhelmed and would be soon be lost sight of in the multitude of decisions to which they gave rise”, and secondly whether he thought a national code of law would be beneficial for the country? In his reply dated 26 June 1826, Dupin explained that he could answer the first question without hesitation: the codes brought huge benefits to France in legal terms because they disposed of various confused sources, more than one hundred feudal, barbaric and flawed customs, as well as Roman law. Dupin, before reviewing the qualities of other codes, explained that the Civil Code was the best: it was clear and methodical, the language of the legislators was pure and noble, the rules were well defined. We are no longer tormented by the variability of the case law since the Court of Cassation has gathered all objections. Above all<sup>25</sup>:

“It is not true, sir, that the authority of precedents has at all prevailed against the text of our codes, nor that we are threatened, in the most distant manner, with the disappearance of the letter of the law under the heap of interpretations. In every discussion, the text of the law is first resorted to, and if the law speaks, then non exemplis *legibus judicandum est*. If the law has not clearly decided on the particular case under discussion, doubtless, it being silent or deficient, the defect is supplied by the judges; but where is the system in which the judgments have not necessarily furnished the complement of legislation.”

Dupin offered to send Sampson his small volume from the year 1822 (*De la jurisprudence des arrêts*) and asked him to translate it and introduce it to the United States. With regard to Sampson’s second question, Dupin was rather clever. He said it was his general opinion that it was desirable for any nation to have laws that were specific to it and that a single code of laws was always preferable to a multiplicity and therefore confusion of specific laws. However, he added, on the point of knowing whether that was a good thing for Sampson’s country, Dupin claimed that it was not up to him to say before correcting himself and attacking the common law system in which a judge’s decision becomes the rule for all other judges.

<sup>25</sup>Dupin, “Letter on the Napoleon Code,” *The United States Review and Literary Gazette* 1 (1826-1827): 127. The original French version of the response was anonymously published under the title “États-Unis. Législation. - Codification,” *Revue Encyclopédique* (1827): 600-604.

If, said Dupin, a poorly made rule binds judges and prevents them from gradually improving the system, is it anything other than arbitrary? Are there not serious drawbacks, as Bacon so eloquently put it in his time? Are judges therefore legislators? Would your nation alone, so advanced on so many political issues, be backward on the legal issues, despite the fact that you have the jury and, in several States, have even abolished the death penalty? Hence the conclusion. Although Dupin claimed not to want to give lessons to the Americans, he wrote<sup>26</sup>:

“From these indications, from your improved institutions of government, from the writings of your publicists, I am deceived if the United States of America is not already at that point, that it can produce codes of laws not unworthy of the opinion which Europe has conceived of that generous nation.”

In the immediate future, in June 1826, these were the words concerning the French codes that interested Sampson. He would also try to publicise Dupin’s response. On the one hand, he translated the letter, had it published in the second issue (November 1826) of the *United States Review and Literary Gazette* under the title “*Letter from M. Dupin on the Napoleon Code*” and introduced it by stating that “the following letter is from one of the most distinguished jurists in France” incidentally in order to make Dupin the arbiter of the dispute. On the other hand, he used it to respond to the *Charleston Mercury* on the occasion of a correspondence with Cooper published in the autumn of 1826. In this text, Dupin was described as “an eminent jurist of Paris”. In eight pages, Sampson identified the points under discussion.

He returned to the idea proposed by Cooper of a comprehensive review of the code every fifty years – this idea was obviously dangerous as it validated the idea that a code is obsolete after half a century. While congratulating and sparing Cooper, Sampson suggested adopting the method of the authors of Louisiana’s Civil Code. This code came into force in the autumn of 1826. Its authors planned that each time the judges had to rule without applying the code, they would have to make a judicial decision for reasons of justice and balance, but that their judgement would not have the force of a precedent unless it was sanctioned by the will of parliament. To do this they would have to file a detailed summary of each case in which they have had to use their discretionary power before the General Assembly, with the result that regular reports would be held by an officer so that the legislative body could be aware of the deficiencies of the laws and correct the flaws. Above all, Sampson denigrated the *Charleston Mercury* attack on the French Civil Code<sup>27</sup>:

“As to the Napoleon Code, so far from being superseded, or lost sight of, as is gratuitously asserted, it is so firmly fixed that, in France, and in most the extensive territories where it governed, it is still looked to as a polar star. When King Louis was restored, he could find no better way to tranquilize his subjects, secure their adherence, and show himself a Frenchman, than to promulgate in his own name the five codes with a royal edict or ordinance prefixed, forbidding the citing of any other as law: just as Charles II. Of England re-enacted, by his Parliament, many things of the Commonwealth which the people would not forego.”

“A polar star...” Sampson’s strategy – to appeal to Dupin as the arbiter of the dispute – was astute and undoubtedly reassured the North American codifiers. Thus, in an article entitled “The Law as it should be” which featured among the extracts published by Thompson, the anonymous author refers to the correspondence between Sampson and Dupin to reaffirm the success of the French codification<sup>28</sup>. However, this exchange of letters between Sampson and Dupin had a different effect: it led French jurists to strengthen the North American efforts in favour of the codification of the law.

### **French publicising of American codification projects**

The codification projects in Louisiana and the North American controversy found some echoes in France thanks to two reviews: *La Thémis*, a law review founded in 1819 and the *Revue Encyclopédique*, a general review whose readership was not restricted to the circle of jurists<sup>29</sup>.

<sup>26</sup>Dupin: 127.

<sup>27</sup>“Sampson to Cooper”, in Thompson, *Sampson’s Discourse, and Correspondence with Various Learned Jurists, Upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject* (Washington: Gales & Seaton, 1826): 66.

<sup>28</sup> “The Law as it should be,” in Thompson, *Sampson’s Discourse, and Correspondence with Various Learned Jurists, Upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject* (Washington: Gales & Seaton, 1826): 126.

<sup>29</sup>Renouard, “Notices sur un projet de *code pénal* pour la Louisiane, rédigé par M. Livingston,” *La Thémis* 7 (1825-1826): 335-342; Carré, “Observations [...] sur le projet de *code pénal* présenté pour la Louisiane par M. Livingston,” *La Thémis* 7 (1825-1826): 353-362 and 457-470; Daligny, “Notice sur une dissertation de M. Duponceau sur le droit des Etats-Unis d’Amérique,” *La Thémis* 7 (1825-1826): 410-426; “Notice sur les institutions judiciaires des Etats-Unis d’Amérique,” *La Thémis* 7 (1825-1826): 445-456; Blondeau, “Sur le nouveau Code civil de la Louisiane,” *La Thémis* 8 (1826): 62-75 and 187-199.

In April 1824, the readers were informed that Sampson had given a critical speech “on the various successive systems of jurisprudence in England”<sup>30</sup>. Belloc, the author of the very short review, stated that Sampson was particularly committed to demonstrating that none of these systems were appropriate for the United States and that the population was calling for a new code, before referring to the example given by Livingston’s draft criminal code. In April 1825, exactly one year after the speech in which Du Ponceau defended common law against codification, Dupin published a review of the *Dissertation*, explaining that its author proposed to address “a question of American jurisprudence which gave rise in his homeland to divisions of opinion and even to animated discussions of the intensity of the national sentiment”<sup>31</sup>. The manner in which Dupin addressed the question had serious consequences for his French readers when they subsequently began to contrast common law with the codified law. After relating the definition of English common law given by Du Ponceau – the tradition of some feudal customs which, helped on its gradual progression by the force of circumstances, was extended to all objects of national jurisprudence –, Dupin asked the question: is this law the common law of the United States? Summarising Du Ponceau he explained that at the time of independence this common law was adopted nowhere in its entirety, but, rather, piecemeal, and differently in each of the different States of the Union. In addition, the founding fathers provided a national basis for the legislation of the United States in their constitutions. At that time, within the circle fixed by the constitutions, the American common law, which is to say the improved English common law, was applied and quashed some of the earlier concerns (freedom of worship, freedom of the press, the improvement of habeas corpus, the abolition of primogeniture, the disappearance of feudal rules, reduced bureaucracy and delays). Dupin stated<sup>32</sup>:

“Let us hope that these liberal principles will be gathered together and coordinated in Codes in which America will find its national legislation, without needing to have recourse to the compendia of the customs of old England and be subject to the decisions of a foreign judge: a serious disadvantage, and one which appears inevitable if we continue to make do with the traditional legislation known by the name of common law.”

Indeed – and at this point Dupin sets aside the tone of a review and assumes one of personal analysis –, the miracle of English common law is related to the extreme concentration of the judicial system that assigns twelve Westminster judges the responsibility of ensuring jurisprudential unity. It is the advantage “which redeems in the eyes of the English its numerous and shocking imperfections. [...] In this vast chaos, the monuments of freedom are confused with those of the barbarism and feudalism of the Middle Ages”<sup>33</sup>. Dupin later refers to “obscure and uncertain traditions”. In the twenty-four States of the Union, the system cannot be easily transplanted. Dupin therefore concludes with a suggestion<sup>34</sup>:

“All that remains for them to do is to draw up a legislation in accordance with the principles of their fundamental pact, legislation for which they already possess all of the elements. The only example they must take from the English is that of preserving and ensuring the dominance in all their institutions of their *national individuality*. This will be better for them than referring to the judgements made in England in order to create the rule of judgements to be handed down by their own courts.”

In January 1826, Rey, a French jurist who was about to publish a comparison between the French and British judicial institutions (to the detriment of the latter), recalled the “very barbed speech [...] against the common law of England” given by Sampson in 1824. He announced that Sampson had translated and published in *The National Advocate* of New York the review Dupin had written on Du Ponceau’s *Dissertation* in the *Revue Encyclopédique* of 1825<sup>35</sup>. In January 1827, an anonymous contributor (Dupin himself?) took over the reins, beginning with these words: “The Americans do not agree on the advantages or disadvantages of a traditional legislation, on the usefulness, or lack thereof, of written codes and laws.” He published the letter in which Dupin explained to Sampson that, far from being buried under case law, the French Civil Code was doing wonderfully, before stating that the United States should now rid itself of the British legal system in favour of codification<sup>36</sup>.

In other words, when one compares the reviews of the Livingston project and the notes of the *Revue Encyclopédique* on the Sampson/Du Ponceau controversy, it is clear that the French jurists knew that the United States was at a crossroads between a system in which “the customs of old England” prevailed, in which “one continues to make do with the traditional legislation known by the name of common law” (Dupin, 1825), in which “a poorly made law would bind the judges” (Dupin, 1826), and a “legislation in accordance with their fundamental

<sup>30</sup> Belloc, “An Anniversary Discourse...,” *La Revue Encyclopédique* 22 (1824): 637.

<sup>31</sup> Dupin, “A Dissertation...,” *La Revue Encyclopédique* 26 (1825): 65-69.

<sup>32</sup> Dupin: p. 67.

<sup>33</sup> Dupin: p. 68.

<sup>34</sup> Dupin: p. 69.

<sup>35</sup> Rey, “New York. – Projets de nouveaux codes,” *La Revue Encyclopédique* 29 (1826): 304.

<sup>36</sup> Anonymous, “Etats-Unis. Législation. – Codification,” *La Revue Encyclopédique* 33 (1827): 600-604.



fact” in which “these liberal principles will be gathered together and coordinated in Codes” (Dupin, 1825). All of this sustained their comparisons in favour of the French codified law. However, during the same period, on the other side of the Channel, the use of Pailliet and Dupin against the French codification was just beginning.

#### **4. Amplification of the failure of the French code in the United Kingdom**

In the United States, despite the Sampson’s publication of Dupin’s letter, opponents of the codes would continue to use the argument of the failure of the Napoleonic Code<sup>37</sup>. It was in the United Kingdom that the argument would grow. Humphreys had published his draft Code of Real Property in the spring of 1826, inspired by the Napoleonic Code. An anti-Humphreys front was soon organised with the publication of the combined responses of Sugden, Beaumont, Cooper, Reddie, Park (with or without the pseudonym Eunomus) and with the founding in 1828 by Hayward – in 1831, he would translate Savigny’s *Vom Beruf* into English – of a review dedicated to the improvement of common law and the fight against codification. And so, mimetically, but each in his own way, all of these authors would state that the French Civil Code was an illusion. It is difficult to know who the first to have read and used the argument drawn from Pailliet and Dupin was. The fact remains, however, that it became a central argument constantly complemented by the use of other French authors.

In 1826, Sugden quoted, in French but without mentioning the name of the author, the passage in which Pailliet spoke of camels (as numerous as those of Justinian) with regard to the books needed to properly interpret the French Code<sup>38</sup>. In 1827 and 1828, Charles P. Cooper used Pailliet to show that an English code, once promulgated, would lead to disputes over the meaning of the articles and it would be necessary to turn to the courts to understand the meaning of the code<sup>39</sup>. Elsewhere, Cooper stated that a greater number of compendia had now appeared in France than those published in England. He gave a long list of them, which he extended to Germany where the new codes had been introduced<sup>40</sup>. In *A Brief Account*, an 1828 work in which Cooper defended his first publication, he again referred to the number of books and compendia of judgements needed to interpret and understand the French code<sup>41</sup>:

“Numerous as are our statutes and our reports, there are nothing when compared with what have been produced in France within the last twenty years, forming a supplement to the Code of Napoleon, which would not make so convenient a manual to go down to posterity with the hero and legislator as the neat little duodecimo now before me, a book which it is as absurd and ridiculous to hold up to the English public as containing the laws of France, as it would be to affirm that a Catechism supplies the place of a theological library.”

<sup>37</sup>“A Dissertation..., by Du Ponceau,” *The United States Literary Gazette* 1(1824-1825): 133, column 3; Kent, *Commentaries on American Law*(New York: Halsted, 1826, 4 vol.): t. 1, 437, which states that “though the French codes, digested under the revolutionary authority, are distinguished for sententious brevity, there are still numerous volumes of French reports already extant, upon doubtful and difficult questions arising within a few years after those codes were promulgated” and which mentions in a note fifty volumes based on the *Journal du Palais*; *The American Quarterly Review* 4 (1828): 80, which deals with the “jurisprudence des arrêts” needed to fill in the gaps in the new Louisiana codes; *The American Jurist* 2 (1829) states in its Index: “Code, French interpretation of has produced voluminous commentators”; Park, in *The North American Review* 29 (1829): 425: “No sooner were they published, than they became the subjects of litigation. Various constructions and differing interpretations were attempted to be put upon them; commentaries were written upon disputed passages; the old original laws and opinions from which these digests had been compiled, were dragged forth to elucidate the meaning of the digested text; and the evils of the dispute, necessary research and accumulation of volumes were but little, if at all, diminished”; *The Southern Review* 7 (1831): 391, explains that, of course, as soon as a code is passed, like any law, it will be subject to interpretation as soon as cases arise; so, no more in France than in Westminster can the content of the law be exposed; *The American Jurist* 8(1832): 111-119, provides a review of Dupin’s work in which the author proposes above all to show that the way judgments are collected is a shared evil in England and in the United States; *The American Jurist* 14 (1835): 456-464, states that the dream of having a code that controls everything has faded away: in 1826, there were already 26 volumes of reports of the decisions of the Court of Cassation; in each Court of Appeal there is one reporter who devotes one or two volumes a year to the rulings issued by the court; Dupin identifies 343 treaties essential for the practice of law, in his chosen Library...

<sup>38</sup>Sugden, *A Letter to James Humphreys, Esq., on his Proposal to Repeal the Laws of Real Property and Substitute a New Code* (London: Clarke, 1826): 46.

<sup>39</sup>Cooper, *Lettres sur la Cour de chancellerie et quelques points de la jurisprudence anglaise*(Londres: Roworth, 2<sup>nd</sup>ed., 1828): 191, note.

<sup>40</sup>Cooper: 228-229, note.

<sup>41</sup>Cooper, *A Brief Account of some of the most important proceedings in Parliament, relative to the defects in the Administration of Justice, in the Court of Chancery, the House of Lords and the Court of Commissioners of Bankrupt* (London: Murray, 1828): 426.

He then grossly exaggerated by adding that those who had conceived the code believed it would be necessary to recompile it. He concluded by referring to Berriat Saint-Prix who told his readers in his *Histoire du droit romain*: “You will never know the new Civil Code if you only study this code”.

In 1828, Reddie was pleased to quote Jourdan in French in an article taken from *La Thémis* (vol. 1), which disapproved, since the promulgation of the code, of “thousands and thousands of unexpected questions”, “ten thousand judgements”, “several hundred tracts and commentaries”. According to the French jurist’s own account, “Case law, doctrine, legislation, everything accumulates, everything multiplies in an ever-increasing progression and soon science will be nothing more than an inextricable labyrinth”<sup>42</sup>. In September 1828, Park quoted Dupin nineteen times, most frequently in French and always to focus on the “misconceptions of the code”. In fact, the heart of his attacks on Hammond, Uniacke, Twiss and Humphreys can be found in a very important paragraph (p. 124-154) in which he refers at length to Portalis, Jourdan and Lanjuinais and at even greater length to Dupin in his *Jurisprudence des arrêts*, his *Loi des lois* and his *Bibliothèquechoisie à l’usage des étudiants en droit*, in order to gather some damning figures, prepare a list of works and compendia of judgements a French jurist needs to be able to master the content of the Napoleonic code, and state that the interminable list of works on sale in Parisian bookshops proves that they find buyers. In short, Park exploits the flaw as far as possible to show his readers the failure of the French codifiers to simplify the law. Better still, in the following paragraph dedicated to codification projects in the United States, he even attacked Sampson by inviting the jurists and American senators to consider the true history of the codes rather than settle for writing letters to Monsieur Dupin... The correspondence between Sampson and Dupin was indeed known to the public as it had just been published in its English translation in the second volume of the English pro-codification review *The Jurist*(1828)<sup>43</sup>. Park included a very clever comment<sup>44</sup>:

“See the correspondence between Mr. Sampson and M. Dupin in the *Jurist*, no. IV. I beg to assure Mr. Sampson that there are plenty of advocates in London who give quite as flattering an answer to any enquiries as to the happy and flourishing state of the law of this country; and those, too, lawyers of as much eminence here as M. Dupin very justly is at Paris. I request the reader also to observe that most of the facts stated in this work with regard to the French law are proved from M. Dupin’s own publications.”

This note is revealing. Firstly, Park sought to tear Dupin in two. For one thing, he used him to support the idea of the chaos of French law and returned to this yet again: Dupin, caught in the trap of his own words, would be proof of the failure of the Napoleonic Code. For another, he marginalised him as the arbiter of the Anglo-American controversy: that the American lawyers turned to London lawyers rather than to those in Paris to understand the state of English law... Secondly, the intensity of the dispute led Park to also exaggerate. What reader in 1828 could truly believe in “the happy and flourishing state of the law of this country”? This was another of the collateral effects of the controversy with which it is appropriate to conclude.

### **Conclusion**

The period 1820-1835 constitutes a momentum, a time when the Anglo-American codifiers succeeded in taking the lead and rallying public opinion around the legal solution of codes. Their adversaries had to defend themselves as well as they could while awaiting a change of circumstances. This produced a huge and violent controversy in which two camps were face to face, with two legal models opposing each other, and in which, among other arguments, the Napoleonic Code was the subject of a subtle confrontation.

This Code represented a serious threat for the advocates of common law. It was easier for them to defend themselves against Bentham than against a code that appeared to be achieving good results in France. Rather than lashing out at Napoleon as a despot or attacking the French code on the content of its rules, the main tactic consisted of discrediting the success of its operation. For the North American and then the British authors, this was a most ingenious discursive strategy: the authors used were French; the effectiveness or ineffectiveness of the law and the judicial system in France could not be verified other than by general assertions; every year saw new French publications that could give credence to the theory of ‘being buried’. In total, this made it possible at the same time to make a dent in the prestige of the Napoleonic Code, to proclaim to Anglo-American public opinion that they had been lied to and to minimise the argument that common law was nothing more than a mass of incongruous publications. In fact, Pailliet, Dupin and the other French commentators were unintentionally allies of the anti-codifiers.

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<sup>42</sup>Reddie, *A Letter to the Lord High Chancellor of Great Britain, on the Expediency of the Proposal to form a New Civil Code for England* (London: Clarke, 1828): 33.

<sup>43</sup>“Codification of the Laws of the United States of America,”*The Jurist*2 (1828): 47; 55-57.

<sup>44</sup> Park, *A Contre-Projet to the Humphreysian Code; and to the Projects of Redaction of Mess. Hammond, Uniacke, and Twiss* (London: Clarke, 1828): 169-170, note.

For the advocates of the codes, the use of Dupin to adjust the truth and to make him the European arbiter of a North American controversy was most shrewd, but it did not have sufficient impact on the detractors as it was not given enough attention in the reviews. Sampson's opponents marginalised Dupin because they had no interest in allowing him the credit. No more than the British common lawyers.

Aside from the argument of the success or failure of the Napoleonic Code, there should be an evaluation of what the Codification Controversy of the 1820-1835 period actually was. Because the dispute lasted for more than a decade, because the respective opinions filled the columns not only of the law reviews, but also of the newspapers and the literary reviews, because the exchanges were fierce, because the subject of codification and the abolition of common law was the centre of attention for jurists in the United Kingdom and the United States, because a large number of European jurists and texts were used, the controversy helped stir up the opposition between the two legal systems by accentuating and reversing the respective vices and virtues. The controversy involved two camps, with the first one promoting the codified system in two versions (radical and moderate) in opposition to common law, and the second one defending and systematising common law, its particular genius and its qualities compared to the mirages of the codified law. In other words, this Anglo-American controversy convinced not only the jurists who were involved in the battle, but also their readers and audiences, of the existence of two opposing systems.