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Decius S. Wade's Necessity for Codification

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Decius S. Wade, former Montana Territorial Supreme Court Justice and Code Commissioner, delivered this address to the Helena Bar Association on April 5, 1894. The address came slightly more than two years after Wade, as one of the three Code Commissioners, had reported draft Civil, Political, Penal, and Procedural Codes to the State Auditor and slightly less than one year before Governor John E. Rickards signed the four codes as passed by the Fourth Legislature. Wade’s address came just after the Third Legislature, split three ways among the Democrats, Republicans, and Populists and unable to settle on United States Senators, had failed to even consider the codes (or anything else of substance.) By some accounts, Wade’s address played a major role in persuading Montanans to adopt the four codes.

Wade was a significant figure in Montana’s legal community. Coming to Montana early in the territorial period from a relatively humble background, Wade served as Chief Justice of the Territorial Supreme Court for over sixteen years—longer than any other member of that court. He authored 192

* Decius S. Wade’s Necessity for Codification is edited and annotated with an introduction and conclusion by Andrew P. Morriss, Associate Dean for Academic Affairs, Galen J. Roush Professor of Business Law and Regulation, Professor of Law & Associate Professor of Economics at Case Western Reserve University, Cleveland, Ohio and Senior Associate, Political Economy Research Center, Bozeman, Montana. Thanks to Cindy Hill for her usual excellent secretarial assistance.

2. Governor Rickards signed the codes between February 20 and February 25, 1895. See Morriss, Plenty of Laws, supra note 1, at 396-397.
3. See Morriss, Plenty of Laws, supra note 1, at 384-386.
4. See ROBERT RAYMER, MONTANA: THE LAND AND THE PEOPLE 383 (1930) (Wade’s address “probably had a stronger influence than any other single factor in bringing about the desired end (codification).”).
5. Hiram Knowles, the second longest serving territorial court member, served slightly less than eleven years. All calculations concerning Wade’s tenure and output are
opinions, roughly thirty percent of that court's output, including many of its most important decisions. Wade also wrote several important articles on Montana's legal history. His address to the Helena Bar Association was thus a major event in the new state's legal development.

Wade does not break new ground in his speech — the arguments he marshals are largely ones articulated earlier by others in other states. Sometimes he acknowledges this, as when he quotes directly from Judge John F. Dillon's remarks to the American Bar Association in 1886; sometimes he does not. It would be surprising if Wade had been able to articulate original arguments for codification. The subject had been debated in the United States since at least 1811, when Jeremy Bentham wrote to President James Madison to offer to compose an American code. New York had just finished a decade of often bitter debate during the 1880s. That debate had involved two of the most prominent lawyers in America, David Dudley Field and James C. Carter, and their writings on the subject were widely circulated.

What Wade did in this essay is pull those earlier arguments together and apply them to Montana. In doing so, he helped persuade Montana to undertake a revolution in her statute law — replacing the volumes of session laws with four comprehensive and weighty (170 pounds, according to contemporaneous estimates) codes. Moreover, Wade's position as one of the leading lawyers in the state, and possibly the leading lawyer, enabled him to speak with authority. Who better than the author of almost a third of the territorial court's opinions to

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7. Wade made extensive use of unattributed and unacknowledged paraphrases and quotations in his later speech, The Common Law. Compare the pamphlet version published in the PROCEEDINGS OF THE MONTANA BAR ASSOCIATION, supra note 6, with the corrected and annotated version in Morriss, Common Law, supra note 6 (correcting and citing to quoted sources). I did not find unattributed quotations in this speech, although we cannot rule out the possibility that they exist.


9. See Morriss, Plenty of Laws, supra note 1, at 360 (citing newspaper accounts of codes' weight).
speak to the coherence and utility of the statute law? Who better than a code commissioner to assure the public that the codes would not be a radical change? No other advocate of codification could speak with such authority on the subject.

As later events would show, Wade was over-optimistic about the benefits of codification, but his optimism was catching. Less than a year after his address the Fourth Legislature adopted the four codes in a whirlwind of activity. Perhaps the only excuse for that body’s failure to consider the substance of the codes was their reliance on Wade’s participation in drafting and selling the codes. When Wade told Montanans in this speech that “codification, as I understand it, was never intended to change the law,” members of the legislature might be forgiven for believing him and neglecting to read the codes carefully themselves. Wade’s address is thus worth reading today as the primary source that enables us to understand why Montana chose codification in 1895.

REPRINT OF DECIUS S. WADE’S 1894 ADDRESS:

Necessity for Codification

Mr. President and Gentlemen:

In our country all persons of full age and of sound mind and memory, except judges and lawyers who make the law their life study, are conclusively presumed to know the law. Their rights are adjusted, their liabilities fixed, and their conduct regulated, upon the theory that they are informed as to all their legal rights and duties, and as to the consequences of all their acts.

As to judges and lawyers this presumption holds good concerning their own rights and liabilities, but when they come to determine and to adjudicate upon the rights and liabilities of other persons, the presumption vanishes, and they are compelled to study and learn the law before they know it, and even then their conclusions are often contradictory and

10. See Morriss, Plenty of Laws, supra note 1, at 386-397.
11. In fact, the codes introduced significant changes into Montana law and the discovery of these changes led to some surprises after their passage. See Morriss, Plenty of Laws, supra note 1, at 397-402.
12. Field made the same argument in similar terms. See, e.g., David Dudley Field, Codification, reprinted in 3 DAVID DUDLEY FIELD, SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (Titus Munson Coan, ed., New York, D. Appleton & Co. 1890) ("they who are required to obey the laws should all have the opportunity to know what they are. These laws are now in sealed books.").
uncertain.

There is no person in our country, however learned he may be, who knows all the law, but there is no person, however ignorant he may be, even though he never saw a law-book and cannot read or write, who is not presumed to know all the law and to regulate his conduct accordingly. He is charged with knowledge he does not possess and cannot acquire; he must observe rules that he cannot see, and obey commands that he cannot hear.

Not only is he charged with a knowledge of that small fraction of the law which is contained in our constitutions and statutes, but with the whole body of the common law, which, when not in conflict with the written law, is, as to our country, the law of the land.

What is the common law which every one is charged with knowing at his peril, and where is it to be found? It is case-made law and is evidenced by the decisions of the courts of England and America, and is contained in seven thousand volumes of reports, covering a period of a thousand years.

Without an opportunity to study or examine these ponderous volumes, and not having the necessary training to understand, if they should read them, our people are presumed to know all the law they contain, though hidden away and covered up by the accumulated rubbish of centuries.

When we look into these volumes - into this great reservoir of the common law, that law which we have been taught to revere as the perfection of human reason - that law which not very long ago authorized the settlement of legal controversies by wager of battle; which, far into the present century denied to persons accused of crime the benefit of counsel; and which authorized capital punishment for larceny and one hundred and sixty other crimes - we find decisions contradictory and irreconcilable; decisions overruling, modifying, limiting or enlarging other decisions; right decisions supported by wrong reasons, and wrong decisions supported by good reasons, by technicalities, or by no reasons at all; verbose and involved decisions, obscured by obiter dicta and speculative theories; broad and learned decisions, and narrow and ignorant ones; and decisions that decide the same thing over and over again.¹³

¹³ Field made a similar point: in a code state, Field argued, the lawyer citing multiple precedents, “piling Ossa on Pelion,” could be cut short with a simple reference to a code section, prompting the judge to say “Yes, that ends the discussion.” Having listened to a great deal of legal argument during his career as a judge, this must have
Common law judges and lawyers are very much influenced and controlled by precedent. They spend their lives in searching for decisions that will determine the question in hand, but as precedents may generally be found on both sides of the question, the law is rendered doubtful and uncertain as to the most learned, and as to those who by intuition are presumed to know it in all its length and breadth, with its thousand variations and exceptions, it is a dark and insoluble mystery.

The Emperor Caligula has received the contempt and hatred of mankind because he made decrees and laws and punished his subjects for disobeying them before they had been published or made known. Duruy, in his history of the Roman people, in speaking of this Emperor says:

Taxes of all kinds were established, - two and a half per cent on all sums in litigation before the tribunals of the Empire; taxes upon porters, on courtesans, and even, which was more serious, on all articles of food offered for sale in Rome. These taxes were levied before they had been publicly announced; and when there arose complaint, he [the Emperor] caused the decree to be written in so small characters, and put up so high that it could not be read, - which gave him the opportunity to find many people guilty of disobedience.


Perhaps because he was helping to create Montana's jurisprudence, Wade did not seem to be particularly "controlled" by precedents in his career as a judge. His opinions, and those of many of his colleagues, often cited no case law precedents at all but simply explained a rule based on a statute or simply through reasoning. This was not due to the failure of the parties to cite relevant authorities—many volumes of the Montana Reports included summaries of the parties' briefs and even where the parties cited numerous cases, Wade often discussed only a few. His sense of frustration with the volume of authorities may have come from having to deal with the cases litigants cited, but there seems to have been surprisingly little difficulty in Montanans finding out-of-territory case authority. Even English cases were often cited or relied upon. See Morriss, Legal Argument, supra note 5, for a more detailed discussion of this issue.

Gaius Caligula was Emperor of Rome from 37 to 41 A.D. Although his reign began with popular measures dismissing arbitrary criminal charges by his predecessor against innocents, he quickly became a rather bloodthirsty tyrant. See MATTHEW BUNSON, A DICTIONARY OF THE ROMAN EMPIRE 166-167 (1991).

IV:2 VICTOR DURUY, HISTORY OF ROME AND OF THE ROMAN PEOPLE 504 (J.P. Mahaffy ed., M.M. Ripley trans. 1885). Minor changes have been made in the text of the quote to conform it to Duruy. Wade also cites to remarks by John F. Dillon at the 1886 American Bar Association convention which mentioned the Caligula example. See John F. Dillon, Remarks, IX REPORTS OF THE AMERICAN BAR ASSOCIATION 11-12 (1886) ("History has held up to reprobation Caligula, who is said to have framed his laws in such small characters, and to have hung them so high upon the pillars, that they could not be read, and it has been the practice from the beginning in this country that all laws
If this was the refinement of despotism and cruelty, it was not much more cruel than to charge all the people at their peril with full and perfect knowledge of the law, which knowledge they cannot obtain, and which law is so obscure and uncertain that the most learned lawyers disagree as to what it really is.

Placing the decrees so high on the pillars that they could not be read by the people was not a more effectual obscuration of the law than to secret it within the chaff of seven thousand volumes of contradictory reports.

The theory that the people are presumed to know the law is undoubtedly correct, for it would not do to determine the rights of one by the ignorance of another, but the wrong about it is in permitting the law to remain in such a condition that neither lawyers nor laymen can determine just what the law is.17

But very many principles of the common law have, by the decisions of the courts, become fixed and settled beyond dispute. This being so, what valid objection can there be to collecting these principles together, from the unwieldy mass of reports, and enacting them into statutes clothed in plain and simple language, and made accessible to all? And should not the principles and questions which the decisions leave in doubt, or make obscure, be rendered certain and clear in the same manner?18

Codification, as I understand it, was never intended to

which prescribe what I may term the civil rules for the conduct of the citizens, so far as penalties are annexed to them, should be reduced to the form of a statute. . . .”). The direct taxes in Rome referred to are Gaius Caligula’s “most innovative measure” according to a recent study of his reign, which notes that:

Italians had long been in a sense sheltered from financial reality, and their exemption from direct taxes had given them a distinctly unfair advantage over other parts of the empire. They were not likely, however, to be popular, and perhaps represent the only measures of Caligula that caused serious resentment among the ordinary people, to the extent that there were outbreaks of unrest at public games when petitions for annulment of the new taxes were presented.


17. Determining what the law is from the codes was not a simple matter. First, the codes were large – an estimated 10,000 sections according to Wade’s own estimate in this speech, and 784,000 words according to a contemporaneous newspaper account. See General Baggs’ Army, HELENA DAILY HERALD, Feb. 2, 1895, at 1.

18. Wade cites to Dillon’s remarks in the American Bar Association debate without giving a page reference. It seems likely that his reference is to Dillon’s following statement: “Now, if in going through these many volumes of judiciary law we find a principle applicable to the civil conduct of men in the daily transactions of life, can any man give a substantial reason why that principle, clearly settled, with all its limitations and boundaries, cannot be put into writing, embodied in a statute, so that it may be accessible?” Dillon, Remarks, supra note 16, at 13.
change the law, its only purpose being to hunt up, gather together and put in form that which the courts have declared to be the law, and to make certain that which by the decisions, by reason of conflict or otherwise, is obscure or doubtful. Any settled principle of the law may easily be reduced to the form of a statute, and any uncertain or doubtful principle may be made certain in the same manner. Nor does codification tend to prevent the growth or development of the law. That which does hinder and delay its growth, is the doubt and uncertainty that comes from contradictory or obscure decisions. Principles firmly established by time-honored precedents or uncertain ones that may be made certain, will not be dwarfed in their influence, nor will their power be diminished by being enacted into and preserved in statutes. The gathering together and classification of these principles does not put any limitation upon the progress of the law.

No code ever did, and probably no code ever will, embody all the principles of the common law, but such well defined principles as have been settled by the adjudications or as the courts have attempted to settle, ought to be rescued from the oblivion and confusion of the ever multiplying reports.

The common law has grown up out of particular instances and cases. Hence its growth has lacked symmetry and regularity. Unsettled questions and principals, made so by

19. Wade is wrong about this. In the final report of the New York Code Commission accompanying the completed codes in 1895, the Commission concluded: "while it has been the general purpose of the Commissioners to give the law as it now exists, they have kept in mind the injunction of the [New York] Constitution to 'specify such alterations and amendments therein as they shall deem proper.'" Final Report of the Code Commission in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 320 (A.P. Sprague, ed., 1884). Since the Montana codifiers relied on the 1865 New York draft, Wade was surely aware of this.

20. New York common law proponent James C. Carter saw growth out of cases as an advantage. He argued that the common law was superior because it "takes the transactions of the past, and, by classifying them, makes its rules; but it makes them provisionally only." As a result, Carter contended, statute law "affirms that it has made an absolute classification of all possible transactions; and its rules are not subject to change or modification however ill-adapted they may prove to be to the business of the future to which they are to be applied." JAMES C. CARTER, THE PROVINCES OF WRITTEN AND UNWRITTEN LAW 29-30 (1889).

21. Having served in a key role for more than sixteen years during the development of the Montana legal system, Wade was certainly in a position to speak with authority about the episodic nature of case law development. Yet his own opinions seem to contradict his point here. Even in the early years, when Wade and his colleagues were creating the body of written case law, the opinions do not deal with legal issues as if they were open questions that provided the judges with multiple options for resolving them. Far more frequently, Wade (and others) saw the answer as determined by the
contradictory or doubtful decisions, have had to wait the uncertain and accidental coming of a case whose decision would settle and put to rest the doubt and uncertainty. Case-made law does not anticipate. It is for the case in hand. It does not provide for the future, except by leaving precedents, sometimes contradictory and antagonistic, for its guide. And so the growth of the law has been irregular, and to a certain extent accidental, depending upon the uncertainty of the coming of the right kind of a case to add anything to its substance. Codification, while it will not impede, will harmonize and make symmetrical this development of the law.

It has been said of the common law that its principles are so universal, so just, and so elastic, that they may be applied to solve any complications or difficulties which may arise between nations or men, but these principles will be none the less elastic or comprehensive, if from time to time, as they are declared and established, they are made accessible by being enacted into statutes.22

On this subject Judge Dillon says:22 "We find in the English and American law an already unwieldy mass of reports (1886). In twenty years they will number ten thousand volumes; in fifty years twenty thousand volumes...."24 I only call attention to the fact that these six thousand volumes, are, in the first place,

“common” law – law common to many jurisdictions. An answer in an opinion from California, New York, or even England might thus serve to establish an answer to a legal question in Montana Territory – not because it was the “best” rule, but because it was “the” rule. See Morriss, Legal Argument, supra note 5, for a more detailed discussion of this point.

22. The elasticity of the common law was a major point of dispute between code proponents and code opponents. Code proponents argued that an elastic law was no law at all: “A changeable law is no law at all. You may call it what you please, but it is not a rule for the guidance of intelligent beings who wish to make their conduct square with the laws of the land.” Field, Law Academy, supra note 13, at 253. Code opponents, on the other hand, argued that the unknowability of the facts of future transactions required a degree of adaptability and elasticity in the legal system. Carter illustrated this claim by pointing to the evolution of contract rules – faced with a rule holding minors’ contracts void and a minor who had reaffirmed his contract after coming of age, the common law permitted development of a new rule allowing enforcement in those circumstances, a code would not. See CARTER, PROVINCES, supra note 20, at 26.

23. Wade presents the next few paragraphs as a single quotation, with numerous ellipses. The passages from Dillon that follow are indeed quotes, but quotes from two separate sections of the American Bar Association Reports and rearranged to suit Wade’s point. He eliminates much of Dillon’s references to civil law jurisdictions as superior and much of Dillon’s criticism of judges. The complete versions of Dillon’s remarks appear at Dillon, Remarks, supra note 16, and John F. Dillon, Law Reports and Law Reporting, in IX REPORTS OF THE AMERICAN BAR ASSOCIATION 257 (1886).

24. These sentences are taken from Dillon, Law Reports, supra note 23, at 271.
full of obsolete law, or law which will be held to be obsolete when 
brought into direct adjudication before the courts. In the next 
place these volumes are full of conflicting cases, or if not 
absolutely conflicting, cases which have refined upon previous 
cases and introduced exception and limitations. In the next 
place they are full of cases of repetition, thousands of cases 
adding nothing substantially to the body of the law. Some 
learned gentleman has written three volumes on the Statute of 
Frauds. Does any one doubt that a commission to do the work 
could take that vast volume of decisions, many of which are 
conflicting, many of which are spun out to the greatest nicety of 
refinement, and reduce them to some practicable order?

Another difficulty with case-law, well known to the 
profession is this – that since its development depends upon the 
accidents of litigation, upon the casual exigencies of litigation, 
it being a matter entirely accidental when such a point will 
arise, it has had a very irregular and anomalous development.

Now, it is perfectly obvious to every lawyer that many 
principles of the law are perfectly settled.... In Lord Bacon's 
time it was his judgment that it was not necessary any longer to 
report any more than the ultimate results or judgments in many 
cases. Now, if in going through these many volumes of judiciary 
law we find a principle applicable to the civil conduct of men in 
the daily transactions of life, can any man give a substantial 
reason why that principle, clearly settled, with all its 
limitations and boundaries, cannot be put into writing, 
embodied in a statute, so that it may be accessible? ....

When we come to other principles, we find conflicting 
decisions, so that the law on any given point may be said to be 
uncertain and obscure. If such points are met with, shall it be 
left longer to the accidents of litigation to settle it, or is it not the 
better wisdom, if the clear rule which ought to be prescribed and 
to obtain in such case, can be known, to settle it? Therefore, it 
has always seemed to me that the argument in favor of a more

25. Wade erroneously quotes Dillon as saying “case-made law” rather than “case-

law”.

26. Wade erroneously quotes Dillon as saying “incidents of litigation” rather than 
“accidents of litigation.”

27. Wade erroneously quotes Dillon as saying “clearly stated” rather than “clearly 
settled.”

28. The omitted sentence from Dillon is: “So that, I insist, if any principle of the 
law is well settled, so as to be capable of being clearly stated, as a mere matter of 
convenience, it is expedient that it should be reduced to the form of a statute.” Dillon, 
extended legislation could be very clearly stated; namely, that what is settled can be put into the form of a statute, and that which is obscure or doubtful ought to be. . . .

The Roman law, by means of commentaries on the text of the XII Tables, by imperial constitutions, decrees, edicts and rescripts, had, before Justinian, attained to such proportions that it was said to be the load of many camels. The Roman situation was tolerable compared with ours. Our judiciary law which embraces that of England and America, now runs back through several centuries to the reign of Edward II, without revision or authentic restatement. It is scattered through volumes so numerous that the memory is taxed to its utmost to remember even their names, that only the rich can buy them, and that the practicable industry and strength of no human being can examine, much less study and digest them.\(^{29}\)

The testimony of many other eminent judges and lawyers might be added in favor of codification, or a more extensive reducing of the common law to the form of statutes, and among them that of the lamented Justice Miller,\(^{31}\) late of the United States Supreme Court, and that of the late Thomas M. Cooley,\(^{32}\) one of the best law writers this country has produced. In 1886, the American Bar Association, by a large majority, passed a resolution substantially in favor of codification.\(^{33}\)

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30. This paragraph is taken from Dillon, *Law Reports*, supra note 23, at 261. Interestingly Wade omits the final sentence of the paragraph: “In short, the bulk of our judiciary law is not such that it may be, without exaggeration or metaphor, be fitly described as the load of many cars.” *Id.*

31. Samuel F. Miller was Associate Justice of the U.S. Supreme Court from 1862 to 1890 and was most famous as the author of the *Slaughterhouse Cases*. He wrote an article favorable to codification. See Samuel F. Miller, *Codification*, 20 Am. L. Rev. 315, 322 (“I favor codification.”).

32. See, e.g. Thomas M. Cooley, *Codification*, 20 Am. L. Rev. 331 (1886).

33. The resolution to which Wade refers was: “The law itself shall be reduced, so far as its substantive principles are settled, to the form of a statute.” ABA Reports at 73. It passed by a vote of 58-41. *Id.* at 74. Whether this resolution could be interpreted as a vote in favor of codification, however, is open to some doubt. An attempt to amend the resolution to add “This Association does not, however, favor or oppose what is known as codification” was defeated by a vote of 29-49. *Id.* at 73. Field, a sponsor of the resolution, accepted an amendment that substituted “so far as its substantive principles are settled” for “so far as possible” and then stated during the debate:

The resolution does not affirm that we must have a code. I think we must, and I think that the adoption of this resolution will logically lead to a code, because it will be found, when you follow up the proposition, that it is possible to reduce a great many of the branches of law, if not of all, to the form of a statute. That would be a general code. This conclusion presents, however, another question. I
More than two hundred and fifty years ago, when the common law was contained in a mere handful of Reports, Lord Bacon proposed a scheme to King James, for recompiling that law, which was in effect a scheme for codification, in which was to be observed the following points (As stated by Judge Dillon):

1. All overruled cases are to be left out.

2. There are also to be left out "all cases wherein, that is solemnly and long debated, whereof there is now no question at all, but the judgments only and resolutions shall be included, without the arguments, which are now but frivolous, i.e., unnecessary, accompanied, hereafter, with memorandum explaining why the cases are not given at length, and where they may be found."

3. All cases "merely of iteration and repetition are to be purged away, and cases of identity which are best reported and argued, to be retained, instead of the rest, with a proper reference to the omitted cases where the point is argued at length."

4. Conflicting cases to be specially noted and collected, that they may be put into certainty, either by assembling all the judges in the Exchequer Chamber, or by Parliament.

5. All idle queries, which are but seminarians of doubts and uncertainties, are to be left out, and no queries set down, but of great doubts, well debated and left undecided for difficulty, but no upstarting queries, which were better to die than to be put into the books.

6. Cases reported with too great prolixity, to have their tautologies and impertinences cut off and put into more compendious report.34

If this plan of Lord Bacon had been carried out and continued until the present day; if the compilation had contained no overruled cases; no case that was merely the repetition of a settled principle;35 no idle or upstarting queries; no tautologies or impertinencies; no conflicting cases; and if doubtful questions had been settled by parliament or legislature, then it is probable that no further codification of the law would have been necessary. Such a plan carried into effect would have been an annual and perpetual codification, and would have kept and preserved the law in a wieldy and accessible condition.

prefer to take one thing at a time, and I put it to you as reasonable men whether you should not first adopt the abstract proposition that you prefer written to unwritten law.

Remarks of David Dudley Field, ABA Report at 66.

34. Dillon, Law Reports, supra note 23, at 263-64.

35. Wade certainly knew how to deal with this as a judge. See, e.g., Simonton v. Kelly, 1 Mont. 483 (1872) (152-word opinion resolving issue by stating "This case involving the same questions as those decided at this term in the case of Mochon v. Sullivan, [1 Mont. 470 (1872)], reference is here made to that decision.").
Lord Bacon's scheme contained the vital essence of codification, which is certainly as to settled principles, and as to those which have been rendered uncertain or doubtful by contradictory or obscure decisions, to make them certain by legislation.

But the effort has seemed to be to multiply the volumes of reports, under the apparent belief that the greater the number published, the greater amount of law to be known, when in fact this multiplication of reports has added to the contradictions and obscurity of the law, while thousand of cases reported are but "iterations and repetitions," adding nothing to the substance of the law. The number and size of the volumes have been also much increased, by the inclination among the judges to write long opinions, when by the use of more time and study they might write shorter and better ones, and of the lawyers to make long drawn out briefs, which are added to the report of each case. The number of volumes has also been greatly multiplied by the publication of the decisions of courts, other than those of last resort.

In some of the states there are three, four, five and perhaps more sets of reports, all going on at the same time. The decisions of the inferior courts are reported and published; then the case is taken to the next higher court, and the decision there is also reported and published; and then the case is appealed again, and then again, and perhaps this time to the court of last resort, and the decision of this court is also reported and published, and so a set of reports is made and published for each court. If the case is finally reversed, it goes back to the trial court, and this process is gone over again, and is sometimes two or three times repeated, and every time adding material for the numerous sets of reports. The same thing happens in the District, Circuit, and Supreme Court of the United States. And after all this appealing and reporting it may happen that nothing of value or use has been added to the law.

36. This was the practice in some volumes of Montana Reports during Wade's tenure as judge.
37. This was not an issue in Montana during Wade's tenure.
38. This was not, of course, a problem with respect to Montana cases, where there were only the official reports. Even where there were multiple reporters, however, this did not seem to trouble code supporters like Dillon. See, e.g., Dillon, Law Reports, supra note 23, at 272-73 ("There are, so far as I am aware, no special evils in the manner of reporting in this country, which seem to call for correction. One fortunate circumstance in the situation is the low price at which enterprising and rival publishing houses are now furnishing the state and federal reports.").
Surely, of the making of law books there is no end. Besides these numerous volumes of reports, the seven hundred thousand or more decisions they contain is a fountain from which flows a constant stream of textbooks[,] commentaries and digests. These are the result of efforts to bring order and system out of this great chaos of material, and to classify and codify it.

Blackstone’s Commentaries is a codification. It was an attempt to classify and arrange under their appropriate titles and subjects, the principles and doctrines of the common law which the decisions of the courts up to his time had brought to light.

Story, Kent and Greenleaf followed in the footsteps of Blackstone, and by leaving out the obsolete matter, and by making a more extended and minute classification and codification, did much to bring to light and make accessible the principles of the common law.

Those text-books are the best which the most clearly and succinctly classify and state the principles of the law, as derived from the decided cases. And even when law students and clerks make commentaries, digests and cyclopedias, their labors are not altogether in vain, for the mere making of an index does something for system and classification.

In reducing the common law as far as possible to the form of a statute, and in order to make such statute useful to judge,

39. In the introduction to a recent edition of Blackstone, legal historian Stanley Katz wrote: “Sir William Blackstone’s Commentaries on the Laws of England (1765-69) is the most important legal treatise ever written in the English language. It was the dominant lawbook in England and America in the century after its publication and played a unique role in the development of the fledgling American legal system.” Stanley Katz, Introduction to Book I, in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND iii (1979). Labeling Blackstone’s treatise a code, however, is possible only if we agree with Judge Dillon that “the word 'code' is a word which has no fixed and certain signification.” Dillon, Remarks, supra note 16, at 15-16. Code opponents drew a distinction between works like Blackstone’s, that found a response in the market, and works like Field’s draft codes, which had not. For example, during the debate over Field’s drafts in the 1880s in New York, code opponent James C. Carter argued: “[D]o you suppose that the lawyers of the State [of New York] would have failed for twenty years to find out the fact that our law just as it exists could be found out in this one volume of 400 or 500 pages? If there is a good book published, is there any failure on the part of lawyers to find it out?” JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE, BEFORE THE SENATE JUDICIARY COMMITTEE, ALBANY, MAR. 23, 1887, at 20 (1887).

40. Joseph Story and Simon Greenleaf were the members of the Massachusetts commission that produced a report on codification in 1836. See Joseph Story et al., CODIFICATION OF THE COMMON LAW, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 698 (William W. Story, ed., Boston, Charles C. Little & James Brown 1852). Story, Greenleaf, and Chancellor Kent wrote major treatises on a variety of areas of the law.
lawyer and people, there must be orderly system and arrangement as to subjects, sub-divisions and sections; and where, by the accidents or uncertainty of litigation, subjects are left unfinished, they must be made complete and symmetrical by appropriate legislation.

Testing the statutes of Montana by this rule, or by any rule, that requires order and completeness, they do not appear to good advantage. As to fragmentary legislation, confusion, the mixing of subjects, inadequacy and want of finish, they are in and of themselves the strongest argument in favor of codification. They are "seminaries of doubts and uncertainties," and thereby breed litigation and delay justice.

The first legislative assembly of Montana met at Bannack, Beaverhead County, December 12th, 1864, and continued in session until the 21st day of January, 1865, enacting what is known as the Bannack statutes, which were published sometime in the year 1866.

Before the close of 1866 the second and third legislative assemblies had met and enacted statutes and adjourned, all of which statutes were abrogated by Congress.41

In the year 1867 the legislative assembly again met and enacted what has been known as the California Practice Act, and other statutes.

The legislative assembly of 1869 appointed the judges of the Supreme Court, Warren, Knowles and Symes, a commission to codify and arrange the statutes of the Territory. Of this work Warren undertook the Civil Practice Act, Knowles the Criminal Laws and Procedure, and Symes the General Laws. The work of Judge Knowles was most excellently performed, the system of criminal laws and procedure codified and arranged by him having now been in force in the Territory and State for nearly a quarter of a century with but slight changes. Judge Warren made but few amendments to the Civil Practice Act of 1867, containing substantially the California Practice Act then in force in that State.

Judge Symes, who had in charge the codification of the General Laws, which then involved what is now known as the Probate Practice Act, followed a system which required the bringing together, under their appropriate chapters and titles,

41. See 14 Stat. at Large Chap. CL, §6 (1867) ("And it be further enacted, That all acts passed at the two sessions of the so-called legislative assembly of the Territory of Montana, held in eighteen hundred and sixty-six, are hereby disapproved and declared null and void . . . .").
all of the statutes, whether repealed or unrepealed, that the legislative assembly had ever enacted upon any given subject, intending to note the decisions of the courts under the repealed and unrepealed statutes.

The work of this commission came before the legislative assembly of 1871-2. At that period the sessions were but forty days in length, including Sundays. The judiciary committee of the two houses changed, or attempted to change, the system of Judge Symes, by striking from his codification all of the repealed Acts, or parts of Acts, which it contained. But the shortness of the session and other duties prevented thoroughness in this work, and here is the source and beginning of the confusion and contradictions of our statutes. Acts that had been long since repealed were re-enacted, together with those that had been substituted for them.

The work of this commission, after having been passed upon by the legislative assembly, and enacted to law, is seen in the volume of laws entitled “Codified Statutes, 7th Session, 1871-2.”

Another cause of confusion and lack of system in our statutes is the fact that the members of our legislative assemblies have generally been men who came to Montana from widely separated States, and they, as we all did, brought with them recollections of the statutes in force in the place of their former homes, and thereby have been enacted into the statutes of Montana detached, fragmentary, and incomplete portions of the statutes of other States. For instance, our statutes in relation to the settlement of deceased persons is a collection of fragments, part of it coming from California, part from Missouri, part from New York and Ohio, while the parentage of the balance is happily unknown.

We have statutes giving to the widow and to the surviving husband community property, but we are not informed as to what community property is. Our sections in relation to this kind of property are detached fragments of the California system, which with us have no meaning, and perform no office except to make confusion worse confounded.

Our statute of 1876 gave to the widow dower, authorized her to make her election under the will of her husband, and abolished tenancy by courtesy. This Act, without ever having

42. See 1872 Mont. Laws at 357-362.
43. See 1876 Mont. Laws at 63-69.
been repealed or suspended, was left out of the revision of 1879. That revision purports to contain all the laws of a general nature in force at the expiration of the 11th regular session of the legislative assembly on the 21st day of February, 1879, and it does contain all such Acts, with all their contradictions and imperfections, except the dower Act, and such other Acts as the compiler failed to have inserted therein.

These statutes provided that the homestead selected by the husband or wife during coverture and recorded, should vest, upon the death of either, in the survivor, but did not provide how or in what manner the homestead should be selected, or where the certificate of selection should be recorded. 44

Who can determine from our statutes what interest a surviving wife is entitled to in the estate of her deceased husband, or what interest a surviving husband is entitled to in the estate of his deceased wife? Is the widow entitled to dower? May she make her election under the will of her husband? What is she entitled to as heir?

These statutes also provided, in one section, that there should be no imprisonment for debt, 45 and in another section authorized such imprisonment; 46 in one section it was provided that the county superintendent of schools should appoint school trustees to fill vacancies, 47 and in another section that such vacancies should be filled by election. 48 There is one whole chapter upon the subject of county roads, 49 but we are nowhere

44. Wade appears to be referring to §§310-318 of the Code of Civil Procedure, as published in the Statutes of 1879, which describe the exempt homestead. (I will use the 1879 compilation as a comparison throughout as it represents the alternative to the sweeping codification proposed by Wade – a simple collection of statutes then in force.) The prior laws are not quite as bad as Wade suggests, however. §319 makes it clear that the debtor can select any tract meeting the valuation and acreage limits at any time up to the foreclosure sale. There is thus no need to record a designation of the homestead in advance. This may be bad policy but it is not bad drafting.

45. See General Statutes of 1879 § 699 ("There shall be no imprisonment for debt in this Territory; and all laws or parts of acts conflicting herewith are hereby repealed.")

46. General Statutes of 1879, Code of Civil Procedure (First) §119 provides for arrests of people before judgment "when the defendant is about to depart from the Territory with intent to defraud his creditors" and in other similar circumstances. The remaining sections also deal with fraud. This is hardly a general authorization for imprisonment for debt, particularly when read in conjunction with §699 of the General Statutes. In the 1895 Code of Civil Procedure, equivalent authority was provided by §1261. The new codes did not include a provision explicitly outlawing imprisonment for debt.

47. See General Statutes of 1879 § 1100.

48. See General Statutes of 1879 § 1109.

49. See Chapter LIV, Roads and Highways. Article I deals with "Powers of County
informed what a county road is.

The statutes relating to private corporations have many imperfections, and under the language used corporations are authorized for almost every conceivable purpose, until our people, instead of being men and women, responsible for their acts and obligations, are walking corporations and responsible for nothing at all. 

The statutes upon the subject of eminent domain, the right of way through mining claims, for roads and highways, for railroads and for ditches, are conflicting, confusing and

Commissioners, Road Supervisors, Etc." in §§1052-1082 and Article II deals with “Toll Roads and Bridges” in §§1083-1087. These sections do not contain a definition of “county roads” but they do provide that official action is necessary to create a new county road. A definition might, therefore, be necessary with respect to earlier roads whose status was ambiguous or to limit the commissioners’ discretion in creating new roads, but was not needed to resolve whether any roads created after the act passed were county roads. Since there were other limits on the creation of county roads (e.g. §1061's requirement that they be sixty feet wide or that there be an explicit waiver of the width requirement), it is not clear whether there were any cases in which a definition would have been a meaningful addition to the statutes. The 1895 Codes defined "public roads" (but not county roads.) The definition provided is not particularly clear: “All highways, roads, streets, alleys, courts, places, and bridges laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways.” Political Code §2600. The sixty foot requirement was continued, except where waived. See Political Code §2602. Although the Political Code provided for better records of the existing roads (§§2603-2604), it did not significantly alter the substance of the requirements for public roads or resolve the ambiguities possible in the earlier definition, except with respect to pre-existing roads.

50. Corporations could be organized “for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business, dig ditches, build flumes, run tunnels, or to carry on any branch of business designed to aid in industrial or productive interest of the country,” see General Statutes of 1879 §244; “for the purpose of establishing and conducting churches, lyceums, libraries, lodges of Free and Accepted Masons, Odd Fellows, Good Templars, granges of Patrons of Husbandry, and all other associations, societies, and orders of like character, Agricultural Societies, Stockgrowers’ Associations, and other associations and institutions of a like character,” see General Statutes of 1879 §292; or “for the purpose of locating, constructing, maintaining, and operating railroads” see General Statutes of 1879 §299.

51. The 1895 Civil Code provided a much more extensive system for regulating corporations (Part IV of Division I), including separate regulations for eleven kinds of corporations. It is not obvious, however, that these many detailed rules were either clearer or more restrictive in practice than the rules they replaced.

52. See General Statutes of 1879, Code of Civil Procedure §§ 579-597. The new codes dealt with eminent domain in both the Code of Civil Procedure (§§2210-2233) and the Political Code (§§ 63, 2570, 2822, 2823, 4800, 4898, according to the index). Again, to the modern reader, the increase in clarity is not obvious.

53. See General Statutes of 1879 §§ 886-898.

54. See supra, note 49.

55. See General Statutes of 1879 §§299-322 (railroads); §§147, 176, 203, 271-275, 732, 736, 739, 740, 1074 (ditches).
incomplete.

After the revision of 1879, four regular sessions of the legislative assembly intervened, and then came the Snell compilation of 1887, but neither the subsequent legislation nor the Snell compilation did very much towards curing the defects and imperfections contained in the revision of 1879.

Chapter XXII of the Compiled Statutes of 1887, relating to municipal corporations, has been hammered at, wounded and butchered, by five successive legislative assemblies, and is left in a sickly, dazed and hopeless condition.56

At the session of 1889 an Act was passed authorizing the creation of a Code Commission, whose duty it should be to prepare for submission to the legislative assembly four codes, viz.- a Civil Code, a Penal Code, a Code of Civil Procedure and a Political Code.57 This commission expanded two and one-half years labor in the preparation of these codes.58

It was required that the Civil Code consist of the body of the common law reduced to the form of statute as far as possible, the Penal Code to treat of crimes and punishments, the Code of Civil Procedure to treat of the procedure and practice in civil actions and proceedings in all the courts, and the Political Code to treat of the sovereignty of the people, of political rights and duties, of the political divisions of the State, of the government of counties, cities and towns, and of such other general laws as to the commission should seem best.

Any lawyer can see at once that if each of these proposed codes should contain exactly what was required and no more, the statutes of the State would be reduced to a harmonious system, properly arranged and classified.

It would have been a strange lack of judgement on the part of the members of the commission if they had supposed that the whole body of the common law could be reduced to the form of a statute in two and a half, or in ten years. That task has never yet been performed, but David Dudley Field, one of the most eminent lawyers of this age, and whose definitions and powers of classification were never surpassed, spent the best part of a lifetime in the great work, and produced a civil code, which more

56. See 1889 Mont. Laws at 178-188.
57. See 1889 Mont. Laws at 116-118.
58. The Code Commission originally consisted of former Territorial Supreme Court Judge N.W. McConnell, former Territorial Governor B. Platt Carpenter, and F.W. Cole, a prominent Butte attorney. McConnell resigned in 1890 and was replaced by Wade. See Morriss, Plenty of Laws, supra note 1, at 381-82.
than twenty years ago, was in substance enacted into the law by
the legislature of California, and which has been tried by the
experience of nearly a quarter of a century.59

In preparing this Civil Code for Montana, the commission
used the material contained in the Field Civil Code of California,
so far as the same was applicable and appropriate to our State
and constitution.60 There was no experimenting by the
commission, and no wandering in untried paths.

This code also contains the provisions of our statutes, freed
from confusion and contradictions, and reduced to form, which
properly belong to a civil code.

Much time and great care was expended in making the
Penal Code comprehensive and clear as to the description of
crimes and definitions, and simple and certain as to procedure,
and in conformity to the requirements of the constitution.

The preparation of the Code of Civil Procedure was a much
greater task, as it defines, under the constitution, the
jurisdiction of all the courts of the State, and gives the mode and
form of procedure in all civil actions and proceedings. The
intention was to make each code contain all the law that
naturally and properly belonged to its separate department, so
that there would be no confusion, or the commingling of what
belonged to one code in any of the others.

And so the Code of Civil Procedure contains the procedure
in all kinds and forms of civil actions, in all of the courts, and
the procedure in all special proceedings of a civil nature, such as
writs of review, mandate and prohibition, contesting elections,
enforcement of liens, contempts, voluntary dissolution of
corporations, eminent domain, change of name, arbitration,

59. Field drafted the Civil Code in the early 1860s, with a preliminary draft issued
in 1862 and a heavily revised final draft issued in 1865. The changes made after 1865,
largely in the 1880s, were made in response to criticism. The vast majority of Field's
codification efforts were thus lobbying efforts, not drafting. Assuming Field worked
largely alone on the Civil Code draft (as he claimed), he put in, at most eight man-years
of effort (from 1857, when he was appointed to the code commission in New York, to
1865, when the final version was issued.) The three Montana code commission members
had available to them nine man-years (from 1889 to 1892, when the codes were
reported.) They did have to produce all four codes in that time, of course, but they did not
have substantially less time available than Field had had.

60. Montana in the 1890s was a strikingly different place than either California in
the 1870s or New York in the 1860s. See Morriss, Plenty of Laws, supra note 1, at 417-
420 (discussing differences). Laws derived from those places might be expected to require
a substantial amount of changes to be made appropriate to Montana. When I reviewed
the Civil Code, however, and compared it to the California and New York source codes, I
was surprised to find how few substantive changes actually were made. (This work will
be discussed in more detail in future articles.)
settlement of estates, for the assignment of dower, to perpetuate testimony, etc. To this volume is also added 250 sections upon evidence.

But the most complicated and difficult task of all, (since the commission took advantage of the labors of another in preparing the Civil Code) and the one that required the most time and labor, was the preparation of the Political Code.

This code contains all the law in relation to the state, county, city, town and municipal government, and defines the duties of all the state, county, city, town and municipal officers.

It also contains the law in relation to elections, school and school officers, public institutions, (insane asylum, deaf and dumb and blind asylum, state library, university of Montana, school of mines, agricultural college and state normal school), public ways, including public waters, navigation, highways and roads, general police of the state, (board of health, registry of marriages and deaths, cemeteries and sepulture, lost and unclaimed property, animals, their care and protection, weights and measures, trade marks, local option, poor, fences, etc.,) property of the state, mines and mining and revenue of the state.

This code also contains in one group all the law in relation to salaries and fees of all state, county, city and town officers; also of jurors and witnesses, and for boarding prisoners, and provides that all fees shall be paid into the treasuries, and that the officers be paid salaries.

The Penal Code also provides for the government of the state prisons and jails.

The Civil Code also provides a law regulating assignments for the benefit of creditors. At present we have no statute on that subject, though assignments for that purpose or some other frequently take place in our state.

In these four codes the commissioners endeavored to revise, simplify, arrange, perfect and consolidate all the public statutes of Montana, and to classify them under the titles and subjects where they naturally and properly belong.

I am not vain enough to think that these codes are perfect and complete, but I do believe that there is not a contradiction or inconsistency between or among their more than 10,000 sections, and that each code contains that which by its subject properly belongs to it.61 The effort was to make the codes

61. See infra, notes 67-80 for a discussion of one of the contradictions that escaped
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absolutely harmonious, and to create a system of laws that should accurately define the rights of the people under the constitution, and that should put in effective operation the legislative, executive and judicial departments of the government under clear and systematic forms of law, without guess-work or the exercise of doubtful or arbitrary powers. I believe if these codes were adopted they would set in motion the government of state, county and municipality without jar or friction, and that officers and people would be glad to find the statutes of the state properly classified and completed, and easily found and understood. To this codification should be added, in their appropriate places, if they are not already provided for therein, the enactments of the legislative assembly since the codes were completed.

The adoption of these codes could not work injury or damage to anyone. All existing rights are saved and protected, and those to arise are amply provided for. It may be they contain sections and provisions that would not receive the approval of the people, or of the legislative assembly. If so, the remedy is easy. But that the great body of the provisions would be endorsed does not admit of doubt. Their enactment would give to Montana a classified and comprehensive system of statutes, something it has never had, and never will have until codification takes place, and after being put in force the defects of the systems, if any, would be quickly seen and easily remedied.

It is better to have a classified system of laws, even though defective, than to have no system at all. It is better to have a foundation upon which to build, something to work upon and improve in a systematic manner, as time and experience shall dictate, than to go on adding detached and incomplete statutes to the chaotic mass which now puzzle alike judge, lawyer and people.

Wade's notice.

62. The reaction to the codes was not quite as happy as Wade predicted. See Morriss, Plenty of Laws, supra note 1, at 397-402.

63. Fixing problems turned out not to be as easy as Wade predicted. In 1897 new Governor Robert B. Smith told the Fifth Legislature that "I am disposed to advocate that policy which will as far as possible maintain the permanency and stability of our law . . . therefore where the laws in the codes are not too conflicting or erroneous, leave them. We would better endure some inconvenience in the law and have it fixed and certain than to be in ignorance of the law by reason of its manifold changes and uncertainties." Governor Smith to Montana Law-Makers, HELENA DAILY HERALD, Jan. 5, 1897, at 7. The Fifth Legislature evidently took this message for it produced relatively few changes, despite a widespread sense that changes were needed. See Morriss, Plenty of Laws, supra note 1, at 410-417.
These four codes were completed and filed with the state auditor on the 4th day of February, 1892. At the session of the legislative assembly of January, 1893, they were submitted to that body by the governor, in pursuance of law, with a recommendation in favor of their adoption. They were referred to the judiciary committee of the two houses, and there they remain, not having been acted on or reported.  

The constitution which was adopted and the state admitted into the Union, more than four years ago, by its ordinances continued in force the Territorial laws not in conflict with the constitution. This but added another element of doubt and uncertainty to the statutes.

The people of the state are entitled to the full benefits and advantages conferred by the constitution. But these they never can have or enjoy until, by direct legislation, the provisions of that instrument are put into effective and vigorous operation. That will never be done so long as we continue in the old Territorial ruts, nor until we wipe out the incongruities and imperfections of the Territorial statutes, and make them conform to, and carry into effect all of the provisions of the organic law.

This result will not be reached by careless or ignorant legislation. To establish a harmonious system of laws under the constitution, and to carry that instrument into effective operation, will require the best learning and skill that the state affords.

When after thirty years of legislation our statutes have become so confused and uncertain that codification is a positive necessity, and is being attempted, common sense requires that the members of the legislative assembly, if codification under the constitution is to take place, should be entirely familiar with the constitution, with the statutes now in force, and with the scope and effect of each of the proposed codes.

The people of Montana naturally look to the members of the Bar of the State for counsel and assistance in giving to our statutes such order, efficiency and harmony as will bring into action every power and guarantee of the constitution, for the protection of rights, for the redress of wrongs, and for the

64. The Third Legislature was deadlocked over selection of Montana's U.S. Senators and so accomplished little. A special session was sought to consider the codes, but Governor John E. Rickards declined to call one as he thought the codes required the full length of a regular session to properly evaluate them. See Morriss, Plenty of Laws, supra note 1, at 385-386.
promotion of the general welfare.

The saying that lawyers are generally dishonest is an obsolete myth, one of the William Tells of folk-lore, which never had any foundation in truth, and the lawyers would deserve and receive the gratitude of the people if they would make a united and earnest effort to give to this commonwealth, so full of promise, such a system of laws as its importance demands.65

**READING NECESSITY FOR CODIFICATION TODAY**

Wade's speech is more than a historical artifact. Despite Wade's, and other code proponents', optimistic picture of a Montana freed from legal uncertainties by the Codes, significant interpretative issues remain more than one hundred years later. Some of these problems were raised by Professor Burnham in the debate published in this issue; others undoubtedly still lie undiscovered in the statute books. In addressing those questions, Wade's address is a significant piece of legislative history - the only extended articulation of the rationale for codification by any of the individuals involved in codification. This could assist the Montana courts in interpreting those provisions of the Civil Code still surviving in the statutes.

For example, Wade writes that he believes that there is "no contradiction or inconsistency between or among [the codes'] more than 10,000 sections. . . . The effort was to make the codes absolutely harmonious . . . ." This tells us something about how the codes should be read when a conflict appears to exist between two sections. Admittedly this is not the equivalent of the Rosetta Stone for some of the code's more obscure choices,66 but it does shed light on the intent of the drafters.

Consider, for example, the Montana Supreme Court's 1929

65. The bar in New York led the opposition to the codes, something code proponents there attributed to self-interest. For example, the *Albany Law Journal* editorialized:

[It will certainly give the lawyers some trouble, and may possibly hurt their occupation in picking out the law as it is (or rather in guessing what it will be), from the reports and text-books, and advising their clients. That is the real reason [for opposition to the codes], and avowed reason, when the lawyers are candid.](current-topics-23-alb-l-j-241-241-mar-26-1881)

66. Professor Burnham, in his transcribed remarks published in the immediately preceding article, illustrated the obscurity of some of the most basic provisions of the Civil Code in his discussion of the code's distinctions among contracts to buy, contracts to sell, and contracts to buy and sell.
decision in *Barth v. Ely*, which involved a relatively routine business transaction: the plaintiff-landlord owned a hotel and leased it to the defendant-tenant, the defendant failed to pay the rent, and the plaintiff sued for the reasonable value of the premises. The lease included a provision that the rent was payable in advance and gave the landlord a lien on the tenant's personal property in the hotel "in the same manner as in the case of chattel mortgages on default thereunder."

Two code sections covered remedies that might apply to the contract at issue. Civil Code Section 8233 provided that "the existence of a lien, as security for the performance of an obligation, does not affect the right of a creditor to enforce the obligation without regard to the lien." This provision codified the rule that efforts to gain additional protection by the creation of a lien should not reduce a creditor's options, enabling credit markets to function more easily. Section 9467 of the Code of Civil Procedure provided that "there is but one action for the recovery of a debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter." This section was adopted for the sensible purpose of simplifying the complex set of common law and equitable remedies for default on mortgages. The two code provisions thus were both well drafted and sensible rules standing alone.

Looking back at its earlier decisions interpreting section 9467, the court first noted that those decisions had held that section 9467 prohibited any action other than that provided by the statute for foreclosure of a mortgage and that a creditor could waive a mortgage and sue on the underlying debt. Its earlier interpretation, the court concluded, "would be unhesitatingly approved, were it not for the existence of section 8233 ..." The court conceded, however, that none of these earlier decisions mentioned section 8233. As a result, if section 8233 required a change in interpretation of section 9467, the

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67. 85 Mont. 310, 278 P. 1002 (1929). The discussion that follows is based in part on Andrew P. Morriss, Lessons from the American Codification Debate for Environmental Law, in THE COMMON LAW AND THE ENVIRONMENT (Roger Meiners & Andrew Morriss, eds. 2000).
68. There were some other minor issues that need not concern us, such as whether the tenant was holding over or present under a lease.
69. *Barth*, 85 Mont. at 312, 278 P. at 1003.
70. See id. at 316, 278 P. at 1006.
71. Id.
72. See id. at 317, 278 P. at 1007.
court would have to disturb a long standing interpretation of that section.73

The problem was that section 8233 clearly conflicted with the earlier interpretation of section 9467. Worse, the court concluded that "were it not for our decisions above, or had section 8233 been enacted after those decisions were rendered and the question was now presented as one of first impression, we would as unhesitatingly hold that the latter section impliedly repealed the former and permits a mortgagee to waive his mortgage security and sue upon the mortgage debt 'without regard to the lien.'"74

The court was thus caught in a bind. Both sections had plain meanings at odds with each other. How to reconcile these two irreconcilable sections?75 The solution the court chose was to limit section 8233 to "the general subject of the chapter in which that section is found, 'Liens,' other than mortgage liens."76 This is not quite the end of the story, since the new rule had to be applied to the case at hand.

Even if section 8233 applied only to liens "other than mortgage liens," the court still had to determine "what is meant by the term 'mortgage.'" To do this, the court examined earlier decisions interpreting section 9467, decisions which had not considered the issue of the applicability of section 8233.77 It found that its prior decisions interpreting section 9467 supported a view that section 9467 applied to securities "in the form of a mortgage, or, adopting the most liberal view, to be what the law would deem the equivalent of a mortgage."78 Thus,

73. Id.
74. Id. at 317, 278 P. at 1006-07. § 8233 had been enacted after § 9467, of course, seemingly solving the court's problem. The normal technique of statutory interpretation, examining the dates of passage of the two conflicting statutes, was not available here, however. Although § 8233 was first adopted over thirty years after § 9467, the court could not consider that fact. § 9467 was first passed in 1864, one of Montana's earliest statutes, but it was included in the Civil Code passed in 1895. § 8233 first appeared in the 1895 Code of Civil Procedure. As an aid to interpretation of the codes, the codes provided that they "must be construed as though each had been passed on the last day of the session during which they were passed and the provisions of the Codes must be construed." Hence the court was required to treat them as if they were passed simultaneously.
75. The court noted: "[I]t must be presumed that the Legislature intended that both should be operative and each should govern as to the title in which it is found, and it becomes our duty to construe them together and reconcile them, if possible." Barth, 85 Mont. at 317, 278 P. at 1007.
76. Barth, 85 Mont. at 317, 278 P. at 1007.
77. See Id.
78. Id.
despite that the contract in question "treats the lien as something other than a chattel mortgage and provides for satisfaction 'in the same manner as' in the case of a chattel mortgage," powerful evidence that the parties did not believe they had created a mortgage, the court found that it must be a mortgage.79

Barth illustrates the trap for the law provided by complicated, comprehensive laws. The conflict between these two code provisions lay waiting to be discovered for 34 years. During that time the Montana Supreme Court decided at least six cases interpreting section 9467 without reference to section 8233.80 Undoubtedly individuals entered into transactions during that time in reliance on both sections. The potential for major changes in interpretation hangs over all transactions—in this case those who relied on section 9467 prevailed, while those who relied on section 8233 found themselves suddenly with less valuable rights. That we do not know how many exist on either side prevents an explicit cost-benefit analysis. It does not prevent the instability from undermining the benefits of clear rules.

How could Necessity for Codification help? Obviously, the best case would have been for the Montana Supreme Court to recognize the potential conflict between the two sections when it first interpreted section 9467. But the second best solution would have been to consider the codification process that produced the conflict when the conflict was finally noted. Wade, and based on his assurances, the Montana Legislature, believed that there were no conflicts in the codes and that the codes formed a harmonious whole. That seems to me to add weight to the position that a coherent reading should have replaced the earlier reading of section 9467 alone. The plaintiffs, the losing side, could, therefore, have strengthened their argument by looking to Wade and the history of codification. Had they done so, the Montana Supreme Court should have paid attention to such an argument.

Decius S. Wade played a major role in shaping Montana's legal system from the territorial period through the early years of statehood. As an influential judge and citizen, he made his

79. Id. at 318, 278 P. at 1008. The court also rejected the plaintiff's argument that the statute contemplated formal mortgages (i.e. those the parties understood to be mortgages) rather than mortgages generally, noting that the existence of a code definition of "mortgage" prevented the court from "read[ing] in" the word formal. Id.

80. The court lists these opinions at 85 Mont. at 316, 278 P. at 1006.
mark on both the substance and form of law in Montana. Lawyers and judges still rely on his work today, both in his opinions and in those sections of the four codes that survive in the Montana Code Annotated. Understanding Wade's motivation for and conception of the Civil Code he helped create can help Montana lawyers and courts today in resolving the conflicts that inevitably arise among code provisions.