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# SIMON GREENLEAF ON DESUETUDE AND JUDGE-MADE LAW: AN UNPUBLISHED LETTER TO FRANCIS LIEBER

*M.H. Hoeflich\**  
*Ronald D. Rotunda\*\**

Time has not dealt fairly with Simon Greenleaf. One of the great jurists of his time, his fame has been overshadowed by that of one of his Harvard colleagues, Joseph Story.<sup>1</sup> Yet Greenleaf was one of the most thoughtful and productive legal scholars of his age.<sup>2</sup>

Greenleaf was born in 1783 and spent his youth in Maine.<sup>3</sup> It was there that he studied law and, after his necessary apprenticeship, was called to the Bar. When Maine gained statehood in 1820, it created a Supreme Judicial Court, and Greenleaf was named as its first law reporter. He held this crucial position until 1832. In 1821 he published his first major scholarly work, his *Collection of Cases Doubted and Overruled*,<sup>4</sup> which became a necessary practice handbook for his fellow lawyers. At the same time he carried on a successful law practice. During this period, Greenleaf's reputation grew and, in 1833, Harvard appointed him a law professor.<sup>5</sup> He and Joseph Story (appointed in 1829) oversaw the growth of

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1. On Story, see R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (U. of N.C. Press, 1985). See also, the still useful biography by Story's son (and successor at Harvard) William W. Story, *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University* (C.C. Little and J. Brown, 1851), and Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (Simon & Schuster, 1970); James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought with Selected Writings* (U. of Okla. Press, 1971); Ronald D. Rotunda and John E. Nowak, *Joseph Story: A Man for All Seasons*, J. of S. Ct. History: 1990 Yearbook of the Supreme Court Historical Society 17.

2. Unfortunately, there is no modern biography of Simon Greenleaf. Instead, one must use Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America*, v. 1, pp. 480-543 & v. 2, pp. 1-46 (Lewis Pub. Co., 1908) ("*History of Harvard*"). Professor Alfred S. Konefsky of the University of Buffalo is presently engaged in writing a biography of Greenleaf, and the authors wish to thank Professor Konefsky for his help with this article.

3. Warren, 1 *History of Harvard* at 480 (cited in note 2).

4. Simon Greenleaf, *A Collection of Cases Overruled, Denied, Doubted, or Limited in Their Application, Taken from American and English Reports* (Arthur Shirley, 1821).

5. Warren, 1 *History of Harvard* at 484 (cited in note 2). In fact, Story himself recom-

Harvard Law School into the leading law school in the United States. During his years at Harvard he produced a number of notable works, foremost among which was his *Treatise on the Law of Evidence*.<sup>6</sup>

In addition to his scholarly writing, Greenleaf was also an active letter writer. Among his many correspondents was Francis Lieber, to whom the letter printed here was addressed.

Lieber was a German emigré scholar who led an active and varied life.<sup>7</sup> Exiled from his native Germany, he spent time in Italy in the household of the great Roman historian B.G. Niebuhr and made his way eventually to the United States.<sup>8</sup> He lived first in Boston where he founded a swimming academy; then in New York where he became the founding editor of the *Encyclopedia Americana*; then in Philadelphia where he helped advance Girard College and wrote a study of current American penal methods; and then in Columbia, South Carolina where he became a professor at South Carolina College.<sup>9</sup> It was here that his correspondence with Greenleaf first flowered (he was already a correspondent of Joseph Story).<sup>10</sup>

During the 1830's and 1840's Lieber established himself as one of the leading American legal and political theorists of his age. He authored the *Legal and Political Hermeneutics*,<sup>11</sup> the first American work on legal interpretation, and two major treatises on politics and political theory, the *Civil Liberty*<sup>12</sup> and the *Manual of Political Eth-*

mended Greenleaf. Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* 122 (Belknap Press, 1967).

6. Simon Greenleaf, *A Treatise on the Law of Evidence* (C.C. Little and J. Brown, 1842).

7. On Lieber, see Frank B. Freidel, *Francis Lieber, Nineteenth-Century Liberal* (La. State U. Press, 1947) ("Francis Lieber") see also Joseph Dorfman and Rexford G. Tugwell, *Francis Lieber: German Scholar in America*, 30 Colum. U.Q. 159-90, 267-93 (1938).

8. See M.H. Hoeflich, *Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey*, 1984 U. Ill. L. Rev. 719, 728-30.

9. This was the predecessor of the modern University of South Carolina.

10. While the Lieber correspondence is scattered in a number of American libraries, the Story-Lieber correspondence is found especially in the collection, bought from Lieber's family, now at the Henry E. Huntington Library in San Marino, California. On this collection, see Charles B. Robson, *Papers of Francis Lieber*, 3 Huntington Library Bulletin, 135-55 (1933). Lieber's letters and papers relating to his tenure at South Carolina College are now to be found in the Carolina Collection at the University of South Carolina in Columbia, S.C. A selection of Lieber's letters are in Thomas S. Perry, ed., *The Life and Letters of Francis Lieber* (J.R. Osgood and Co., 1882).

11. The *Hermeneutics* appeared in three editions, the last of which, edited by W.G. Hammond, was published in St. Louis in 1881 as Francis Lieber, *Legal and Political Hermeneutics* (Hammond, ed., F.H. Thomas and Co., 1880). On this text see Hoeflich, 1984 U. of Ill L. Rev. at 728-30 (cited in note 8) and A. Arthur Schiller, *Roman Interpretatio and Anglo-American Interpretation and Construction*, 27 Va. L. Rev. 733 (1941).

12. Francis Lieber, *On Civil Liberty and Self-Government*, 2 vols. (Lippincott, 1853).

ics.<sup>13</sup> During this period, too, he tried desperately to convince his Northern colleagues (including Story and Greenleaf) to secure for him a position in the North away from the Southern problems of nullification, secession and slavery.<sup>14</sup> Finally, in the late 1850's he managed to be appointed to a professorship at Columbia College in New York, where he remained until his death.<sup>15</sup>

Obviously, the subject of statutory desuetude interested Lieber as a political theorist. The doctrine that a statute still on the books could become obsolete and be declared so by a judge is one that has found a congenial home in the civil law countries of the European continent, but it has never been popular in the Anglo-American world.<sup>16</sup> The concept had particularly significant political ramifications at the beginning of the nineteenth century, because this was a time during which the idea of judge-made law and of judicial review of statutes was still quite controversial.<sup>17</sup> It was also a time when Jacksonian populism had made its tenets felt and feared and when, as a result, talk of a connection between "popular will" and law was particularly notable.<sup>18</sup>

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The work was reprinted several times; on this, see Freidel, *Francis Lieber* at 267 n.18 (cited in note 7).

13. Francis Lieber, *Manual of Political Ethics Designed Chiefly for the Use of Colleges and Students at Law*, 2 vols. (C.C. Little & J. Brown, 1838-39). The second edition of Philadelphia, 1875 is standard; on this, see Freidel, *Francis Lieber* at 145 n.3 (cited in note 7).

14. Lieber was generally unhappy at South Carolina College; see William M. Geer, *Francis Lieber at the South Carolina College*, Proceedings of the South Carolina Historical Association, 3-22 (1943).

15. See Friedel, *Francis Lieber* at 293 (cited in note 7). See also Julius Goebel, Jr., ed., *A History of the School of Law, Columbia University* 44-67 (Colum. U. Press, 1955). In spite of Lieber's frequent entreaties to Story and Greenleaf he was never offered a position at Harvard.

16. See Theodore F.T. Plucknett, *A Concise History of the Common Law* 337-39 (Butterworth, 5th ed. 1956). Recently there has been some renewed American interest in the concept. See Guido Calabresi, *A Common Law for the Age of Statutes* (Harv. U. Press, 1982). A rare exception is, *Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 187 W.Va. 182, 416 S.E.2d 720 (1992), which dismissed charges because of desuetude.

17. See, e.g., *Eakin v. Raub*, 12 Serg. & Rawle 330, 347-49 (Pa. 1825) (Gibson, J., dissenting): "But it is by no means clear, that to declare a law void, which has been enacted according to the forms prescribed in the constitution (sic), is not a usurpation of legislative power. . . . If the judiciary will inquire into anything beside the form of enactment, where shall it stop? . . . [[T]he judiciary is not] infallible . . ." As late as 1807 and 1808, the Ohio legislature impeached state judges because they had held that state laws were unconstitutional. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 134 (1893).

In 1804, President Jefferson said: "But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch." Paul L. Ford, ed., 8 *The Writings of Thomas Jefferson* 311 (G.P. Putnam's Sons, 1897).

18. For example, President Jackson in his message regarding his veto of the bill to recharter the Bank of the United States, said: "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their

It is, therefore, quite interesting to notice the substantive content of Greenleaf's letter to Lieber. Greenleaf declares himself to believe that law can only be properly understood as an expression of the sovereign will. Within the political universe of the early United States, a reference to the sovereign will, of course, must be to the "popular will" and, indeed, Greenleaf makes this connection. From this point, Greenleaf moves on to declare that the popular will is expressed in two forms: by the legislature and by the courts. While both are authoritative, Greenleaf suggests that the legislative "mouth" is, perhaps, of greater authority. More important, however, Greenleaf denies that there can be such a thing as a "legislating judge," but only a judge who "ascertains" and "declares" the "sense of the community." Judges should find, not make, law. If he is right in this declaration, he will be affirmed by legislative action. If he is wrong, he will be overruled.

With this background, it would seem difficult for Greenleaf to support a true doctrine of desuetude, separate from statutory revision. And, indeed, this was the case. But nonetheless Greenleaf found a way of mediating his discomfort with either allowing judges to declare statutes obsolete or allowing such statutes to stand in force. For this purpose, Greenleaf looks to the pardoning power and suggests that this power, when exercised properly by the executive of the state, will avoid both improper judicial legislation and injustice in those cases where the legislature has failed to abolish a statute no longer in accord with the popular will.

In the context of a letter written in the late 1830's, Greenleaf's theories are quite significant. He favored a weaker judiciary than many of his contemporaries; one cannot underestimate the democratic ideal of the importance of the "sovereign will of the people" as the ultimate source of law.<sup>19</sup> This expression of Greenleaf's

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legislative capacities, but to have only such influence as the force of their reasoning may deserve." James D. Richardson, 3 *A Compilation of the Messages and Papers of the Presidents* 1145 (Bureau of National Literature, 1897).

19. See Thayer, 7 *Harv. L. Rev.* at 129 (cited in note 17). Judges are "the depositaries of the laws; the living oracles." William Blackstone, 1 *Commentaries of the Law of England* 69\* (Rees Welsh & Co., 1902). Even if the courts overturn a precedent, the early decision is not really "bad law" rather "it was *not* law; that is, that it is not the established custom of the realm, as has been erroneously determined." *Id.* at 70 (emphasis in original). Blackstone's *Commentaries* were very influential in eighteenth century America. See, e.g., Griffith J. McRee, 1 *Life and Correspondence of James Iredell, One of the Associate Justices of the Supreme Court of the United States* 91 (D. Appleton & Co., 1857); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 *N.Y.U.L. Rev.* 731 (1976). The decisions of courts are merely "evidence" of what the law is. See, e.g., Rupert Cross, *Precedent in English Law* 23-25 (Clarendon Press, 2 ed. 1968); Robert A. Leflar, *Appellate Judicial Innovation*, 27 *Okla. L. Rev.* 319, 323-35 (1974).

Even Justice Holmes, who argued that the "common law is not a brooding omnipresence in the sky," quickly added—"but the articulate voice of some sovereign or quasi-sovereign

views is particularly interesting historically, for it did not remain a private matter between Greenleaf and Lieber. In 1838 Greenleaf published an introductory lecture he had given at the Harvard Law School in the then popular legal periodical, the *Law Reporter*.<sup>20</sup> This published lecture, is, in fact, a mélange of the actual lecture he gave at Harvard (now Huntington Library manuscript LI 218) and the letter printed here.<sup>21</sup> Thus, the ideas Greenleaf set forth in this letter to Lieber in 1837 appeared in print the next year, as part of a published lecture. This letter, then, lets us see, for a formative period in American law, the notions Professor Greenleaf was developing on the proper roles of the judiciary and legislature and, thereby, to understand the views of an influential jurist and Harvard professor on this important question of public law.

#### Note on the Text

The text printed here is transcribed from a manuscript now in the Huntington Library in San Marino, California, catalogued as Huntington Ms. LI 1568.<sup>22</sup> It is written and signed by Greenleaf and is among the Lieber papers. Another manuscript in this collection, Huntington Ms. LI 218, contains the text of Greenleaf's introductory lecture as given at Harvard and published, in part, in the *Law Reporter* for December 1838.<sup>23</sup> Following the text of the letter are printed the first five paragraphs of the introductory lecture published in the *Law Reporter*, which derive from the letter to Lieber.

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[Huntington Ms. LI 1568]

Cambridge, Oct. 26, 1837

My Dear Sir:

I have great pleasure in sending you the enclosed official acknowledgment for your kind donation of the Bavarian Code to our Law Library, but I will confess to you the livelier and mellow pleasure with which I pasted inside the cover your *yellow* letter to Sumner in which this gift is mentioned as a memorial of personal regard for the trio composed of the Judge, Sumner and your humble

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that can be identified," in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

20. See published extract to follow.

21. The authors wish to thank Professor Alfred Konefsky for drawing their attention to the version printed in the *Law Reporter*.

22. The authors wish to thank the Trustees of the Huntington Library with whose kind permission the letter is printed here. They also wish to acknowledge the financial support of the National Endowment for the Humanities for a "Travel to Collections" grant.

23. The unpublished lecture is discussed by Perry Miller, *The Life of the Mind in America From the Revolution to the Civil War* 161-62 (Harcourt, Brace & World, 1965).

servant.<sup>24</sup> I begged it of him for the purpose; and we will go to our successors together.

He desired me to send you a note of some English statutes still existing on the statute book, not repealed *in terms*, yet fallen into profound desuetude. (Pardon this word.) As our collection of English statutes is incomplete I suppose it out of my power to give you an example on which reliance can be placed, and therefore have not searched. On this matter of obsolete statutes, and of what is termed by men of a certain school "Judge-made-law," as well as of the source of all legal obligation I have some notions, perhaps crude, which I should like, above all things, to discuss with you in person; but as that is out of the question, I will state very briefly the heads and "catch words," if you will not regard it as too severe an infliction; and then ask you for a simple yea or nay expressive of your opinion.

I think you will agree with me, that law is but another name for the will of the sovereign. The sovereign is the people. Disguise it as we may, the real basis of sovereignty, at the present day, and under whatever form of government, is the will of the people. This invisible but resistless power is also called public opinion. By this is meant, not the blind will of the populace; but the consenting suffrages of reflecting minds, including both unlearned and learned.<sup>25</sup> Against this will or opinion no statute can be *executed* however solemnly *enacted*, and what this will require, *must* inevitably soon assume some external norm of law.

This sovereign has two modes of declaring its will;—two *mouaths*, from which to speak its mind; namely, the legislature and the judiciary. The former gives form and body to its express and mandatory will, by statutes; and is supreme—the latter, to its will as inferred and deduced from allowed customs, usages and habits of social life; and it also expounds and interprets as well as continues the statutes.

When public opinion, or the will of the sovereign changes, in a matter not contained in an express statute, the change is shown in the decisions of the judicial tribunals.<sup>26</sup> [For example, the old opin-

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24. The "judge," of course, is Story. "Sumner" refers to Charles Sumner, a leading Massachusetts lawyer and statesman and sometime lecturer at Harvard. On Lieber and Sumner, see Frank Freidel, *Francis Lieber, Charles Sumner, and Slavery*, 9 J. of Southern History 75-93 (1943).

25. See Ronald D. Rotunda and John E. Nowak, *Introduction to Joseph Story: Commentaries on the Constitution of the United States* §§ 153, 178, 186 (Carolina Academic Press, 1987) (Story's rules of interpretation).

26. *Id.* at § 190-98. See also Walter V. Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 20-22 (1966); Robert E. Keeton, *Venturing to Do Justice; Reforming Private Law* 15-24 (Harv. U. Press, 1969); John Hanna, *The Role of Precedent in Judicial Decision*, 2 Villa-

ion that a "heathen" could not be admitted as a competent witness, because he could not appeal to the Christian's God; now exploded, by appealing to his conscience through the solemnities of his own religion, so of many others.]<sup>27</sup> This is not because the law is uncertain, in its very nature. It was equally clear before, though the other way. It is not that former Judges were ignorant, or inconsiderate, or rash. They were as wise and learned and able then, as now. It is not that they have usurped the province of the legislature. There is no such being as a legislating Judge, no "Judge-made law." What if the doctrine today pronounced from the bench is not found, in so many words, in any law book? It does not follow that the Judge *made* it. He has merely ascertained and declared the sense of the community, as already evinced in its usages and habits of business. If he has not expressed it correctly, his decision would be reversed tomorrow, or corrected by a statute. Indeed, a doubtful decision is not unfrequently followed by a statute, either affirming or overruling it, as the Judge may have succeeded or failed in expressing the public will. [For example, the British public in Queen Ann's time, were in favor of permitting the endorsee of a promissory note to sue in his own name. The exigencies of commerce required it. The Judges ruled that it was contrary to the doctrines of the common law. Whereupon the public will to the contrary was declared in the Statute of Ann.]<sup>28</sup> In fine, the Judge is one functionary, declaring the public will, the legislator is another declaring the same, yet in a more emphatic and authoritative manner. The former is the Vizier, expressing what he supposes to be the will of the Prince, the latter is the Kal Hatrè—the "*word* of the King,"—the officer who stands next his person, and knows his intentions. I say this much in vindication of the Courts and their decisions, and the law itself.

But then what are we to do with *obsolete* statutes. This term, *obsolete*, is applicable to various statutes in various degrees, from the first stage of neglect, to the deepest slumber of forgetfulness. Yet they may all be still, in some degree, the depositories of the public will, though not of a will so intense and active and imperative as at first. There are other statutes which are now dead bodies, from which the soul of public opinion has departed. But all this last class, I think, and probably most of the former, will be found to be

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nova L. Rev. 367 (1957); Benjamin N. Cardozo, *The Nature of the Judicial Process* 19-21 (Yale U. Press, 1921).

27. On this, see Simon Greenleaf, 1 *A Treatise on the Law of Evidence* § 328 (C.C. Little and J. Brown, 5th ed. 1850).

28. The reference is to 3 & 4 ANNE, ch. 9 (1704), in Danby Pickering, ed., 11 *The Statutes at Large* 106-07 (Joseph Bentham, 1758); see Frederick K. Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 Harv. L. Rev. 813, 842-43 (1938).

penal in their enactments, for in regard to statutes remedial and directory, as these are of daily use, they are always changed by other statutes, as soon as they are found inadequate to the exigencies of the community.

Now in regard to obsolete penal statutes, there is yet a third functionary, or mouthpiece of the sovereign will. I mean the *Executive*, in the exercise of the *pardoning* power. Morally speaking, the Executive *cannot* punish a man whom the public have pardoned nor pardon one whose punishment is demanded by the deliberate sense of the people.<sup>29</sup>

A wise legislature will occasionally revise its penal code, for the sake of obliterating these dead statutes, which sometimes put citizens to the expense and vexation of a trial at law, in order to reach the Executive organ of the public will. I say sometimes for in a clear case of obsolescence, no public prosecuting officer will be so unwise as to draw a bill of indictment.<sup>30</sup> The more common inconvenience of obsolete statutes is that they may entangle the conscience of the upright citizen, who feels bound to obey the law, in all the extent of its requirements. But where the question of obsolescence is not clear, let him obey the language of the statute. And if the usage and practice of the community is clearly and universally the other way, and the matter is indifferent in a moral view, let him obey the public will, as shown in the universal usage; and if he is prosecuted and convicted, the pardoning power will absolve him. If the statute is merely prohibitory, the good man can always refrain from the thing prohibited. And where the matter is not indifferent in a moral view, let him obey God rather than man. The Quaker, by refusing to bear arms and to swear, because it was contrary to what he believed to be the law of God; though at first convicted and punished, was soon pardoned, and next was absolved by express statutes in his favor.

These hints may enable you to understand my views in general of this matter. If you entertain others in regard to obsolete statutes, I shall profit by them, when made known.

I am greatly edified by your work on Hermeneutics;<sup>31</sup> and have cited it in Moot Court as the *best* authority on Interpretation and

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29. For an historical review and analysis of modern developments of the pardon power, see Ronald D. Rotunda and John E. Nowak, 1 *Treatise on Constitutional Law: Substance and Procedure* § 7.5 (West Publishing Co., 2d ed. 1992).

30. This is a theme worked out in greater detail in the version printed in the *Law Reporter*.

31. See *supra* note 11.

Construction, commending it earnestly to the study of the School.<sup>32</sup> My wife also is reading it, *con amore*—or rather we are reading it together—for she is fond of such studies—as well as myself.

Now adieu, my dear sir; and pardon this long epistle, from

Very truly yours,  
Simon Greenleaf

Dr. Lieber

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[Extract from *The Law Report*, vol. 1, n.8  
(Dec., 1838), pp. 217-218]

However jurists may differ in their definitions of municipal law, they come substantially on the same result—that it is the expression of the sovereign will, or, “the expression of the will of human Society, Constituted into a State.” (Lieber’s *Pol. Eth.* 106.) It is that, whatever it be, by which we are obliged to regulate our civil conduct.

This public will is either organized, or unorganized. In its latter state it is usually termed public opinion. By public opinion, we are to understand the general sentiment of the community, made up of individual opinions, modified by one another. It is that invisible but resistless agent, which regulates our political and civil conduct, in all cases not provided for by express and positive laws. Nay, it may be said, in some sort, to control even these laws; since, in general, against the public opinion, it is seldom that any statute can be executed; and whatever it demands, must inevitably assume some external form of law.

In the organization and promulgation of the public will, there are two principal agents—the legislature and the judiciary. These are the two principal means by which the sovereign will is declared. The former announces its express mandates, by statutes; and is supreme, except as it is controlled by constitutional provisions. The latter gives expression to the public will, as inferred and deduced from the allowed and general customs, usages and habits of social life; and is also the expositor of the statutes.

When public opinion, or the will of the sovereign changes, in a matter not contained in an express statute, this change is shown in the decisions of the judicial tribunals. It is not that the law is uncertain. It was equally clear before. It is not that former judges were ignorant or inconsiderate. They were as wise, and as learned, and

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32. Lieber’s book, while generally held in high regard by academics, never had widespread success, though it was, in fact, cited twice by the United States Supreme Court.

as able then, as now. Their decisions, in both cases, were but reflections of the public mind. It is not that they have usurped the place of the Legislature. The phrase, "Judge-made law," belongs only to the ignorant and unreflecting. What though the doctrine pronounced from the bend to day, is not found in any existing law book? It does not follow that the judge has made the law. He has merely ascertained and declared the sense of the community, as it is already evinced in its usages and habits of business. If in this he has erred, his decision will be overruled tomorrow or corrected by a more emphatic and direct expression of the public will, in a statute. A decision of doubtful correctness is not unfrequently followed by a statute, either affirming or overruling it, as the judge may have succeeded, or not, in expressing the law, or in other words, the public will. The judge is one functionary, declaring this will; the legislator is another, declaring the same, with higher authority.

Statutes which regulate the daily private intercourse of men, and define and protect their private rights, never become obsolete; but are changed, as the circumstances of men change, and new phases of society call for new modifications of law. Statutes which have become obsolete, will, in general, be found to be those which provide for the punishment of offenses against the State. In regard to these there is yet another functionary, expressing the public will—I mean the executive, in the exercise of the remitting or pardoning power. The executive magistrate of a popular government, cannot, morally speaking, suffer a man to be punished, whom the public have pardoned; he is coerced, by this circumstance, to give to this pardon its legal form and force. Nor, on the other hand, can he pardon one, whose punishment is demanded by the deliberate voice and general sense of the community, as justly due to its violated laws. He may, and he ought to withstand the blind will of a passionate and excited populace. It is only the sober and matured judgment of the great body of society that he will find himself unable to disregard. A fainter and less perfect expression of the public will is made through grand juries and the prosecuting officers; when, in the exercise of sound discretion, they forbear to charge as criminals those who may inadvertently have been betrayed into a solitary violation of the penal or fiscal codes, and whose offence has already, in some other mode, been substantially atoned for and forgiven. Though no such discretion is legally and expressly vested in these functionaries, yet in the practical working of the system, it is found that offenders of this kind are, in fact, seldom brought under their official notice. It is one of the modes in which the general sense of the community does, in fact, cause itself to be respected, in cases where the community alone is the party injured. Thus the

penal code is made ultimately to bear upon none but real offenders; penalties unwittingly incurred are remitted, and the great objects of penal justice being obtained, the penitent and reformed culprit is forgiven.