

# Washington Law Review

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Volume 18 | Number 4

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11-1-1943

## Report of the State Committee for Recompilation of the Code

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### Recommended Citation

Mark H. Wight, State Bar Journal, *Report of the State Committee for Recompilation of the Code*, 18 Wash. L. Rev. & St. B.J. 221 (1943).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol18/iss4/7>

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In an excellent speech, which was very well received, he called attention to the survey of this problem which was made by Mr. George Warren and published under the auspices of the National Conference of Judicial Councils. Judge Hodson generally endorsed the conclusions reached by Mr. Warren, pointed out their applicability to the situation in this state, and reminded the Bar that the American Bar Association, particularly through the Junior Bar Conference, has become actively interested in the topic. Several resolutions proposed by Judge Hodson were referred by the Association to the Board of Governors with the direction that that body should determine whether they should properly be referred to the Judicial Council or to a committee of the State Bar Association for subsequent action by the Association at its next meeting.

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In connection with the new adoption law (Laws 1943, Chapter 268), the Superior Court Judges Association adopted a new General Rule of the Superior Courts as follows:

"Any report filed by the next friend of the child in any adoption proceeding shall be open to inspection by the adopter and his attorney. Such report at the close of the entire proceeding shall be sealed and filed by the clerk in the record of the adoption proceeding, or in the discretion of the court shall be destroyed, and in any event, it shall not be disclosed to any person without a special order in writing by the judge, and shall thereafter be sealed as before."

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## Report of the State Committee for Recompilation of the Code

(EDITOR'S NOTE: This committee is not technically a committee of the Washington State Bar Association, but is rather a legislative commission created by specific statute. Its three members are the State Law Librarian, the Law Librarian of the University of Washington and the Executive Secretary of the Judicial Council of Washington. These three positions are now respectively occupied, as they have been for several years, by Mr. Mark H. Wight of Olympia, Dr. Arthur S. Beardsley of Seattle, and Mr. Alfred J. Schweppe of Seattle. The report, which was the unanimous report of the committee, was delivered by Mr. Wight. The report follows.)

The Legislature of 1941, by Chapter 149, Laws of 1941, created a committee, consisting of the Law Librarian of the University of Washington, the Executive Secretary of the Judicial Council and the State Law Librarian, and provided that it should determine upon and adopt a complete recompilation of the laws of this state now in force and of a general and permanent nature and also adopt a uniform and perpetual system for the numbering of the sections thereof.

This committee concluded that, in order to accomplish this task, it must—

First, adopt a systematic plan of compilation for the present and future general and permanent statute law;

Second, regroup the 16,686 sections of the present code according to that plan;

Third, position each section with relation to other sections;

Fourth, adopt a system of perpetual numbering and give a specific number to each statutory section, and

Fifth, prepare and file with the secretary of state as required by the law a tabulation which would show all the section numbers and identify the law to which each number applied.

No appropriation was made for this work but, nevertheless, the committee undertook to do it. It had a number of meetings—some by itself, others with representatives of the publishers of our present codes, and one at which representatives of the supreme and superior courts and a special bar association committee were also in attendance.

At the very outset, certain problems confronted the committee which made it feel that a recompilation alone, without any revision, would be futile, of no real benefit, and would in fact, only tend to add to the confusion which already exists in our statute law, since to recompile is to reassemble without altering the form or substance of the laws.

The present statutes include unconstitutional, obsolete, superseded and duplicative laws and the only way to get rid of them is through legislative action. Unless disposed of by legislative action, the code committee would have to treat them as unrepealed and give to them section numbers and a place in the recompilation, since, under the act of 1941, it would have no power to determine the force and effect of such laws. Then there are those laws which are necessary only because they operate as connecting links. As an example of what is meant by connecting-link statutes, reference is made to the laws regarding the state library as they existed prior to 1943. The administrative code (Chap. 7, Laws of 1921), although it did not repeal the laws creating them or fixing their powers and duties, abolished approximately 70 governmental agencies. Among these abolished agencies were the "state library commission" and the "state library advisory board." This administrative code created, however, a "state library committee" and invested it with the powers which the state library commission and the state library advisory board had. In 1929, the superintendent of public instruction was given the powers of the state library committee and, in 1941, the state library commission was created and given the powers which the superintendent of public instruction had over the state library. To ascertain then, the powers of the newly created state library commission, it became necessary to find what the powers of the superintendent of public instruction were, and, going to that statute, we find it necessary to ascertain what the powers of the state library commission and the state library advisory board were. But, lest you be misled, it should be said that the last legislature corrected this confusion as to the state library by definitely detailing the powers and duties of the existing state library commission and abolishing the library agencies which preceded it.

Another reason for revision of the present statutes is that there has never been a complete legislative revision since Washington became a territory nearly 90 years ago. Even the Code of 1881 does not contain all the statute law as of that time. In fact, it is therein expressly provided that any laws of a general nature not revised, amended or

re-enacted shall continue in force; and effect was given to this provision in *State ex rel. Christie v. Meek*, 26 Wash. 405, wherein a general law of 1860 was held to be in force, notwithstanding the Code of 1881, inasmuch as that code did not revise, amend or re-enact it. More than this, there are some 725 sections of that code which differ in some respect from the original laws from which they were taken. Some of these differences are important, others are unimportant.

There are long and complex sections which should be divided into shorter sections for greater clarity and for ease in amending, inasmuch as in this state the amended section must be set forth as amended.

Then, too, certain of our present laws should be restated for purposes of clarity and conciseness, and there should be a rearrangement for orderliness and uniformity, which, in many instances, cannot be done without revising, and existing laws should be made to conform to our Supreme Court decisions.

There should also be enacted some general interpretative provisions and definitions in order to cut down the volume of our laws and to shorten and simplify the drafting of bills. To illustrate the need for this, it may be pointed out that in the laws of 1939 there are eleven sections defining "person". The necessity for repeating definitions and interpretative provisions would be greatly reduced if covered by a single chapter dealing with such things.

It would serve no useful purpose here to point out the numerous inconsistencies and irregularities in our statute law, but suffice it to say that they are many, and this is especially true regarding the laws of governmental agencies, which constitute a large and important part of our statute law.

For the foregoing reasons, and perhaps others, the committee felt that there should be a revision of our statutes and it therefore recommended to the 1943 legislature that such a revision be provided for. The legislative committee of the bar association not only approved the idea but was instrumental in getting such a bill through the legislature and signed by the governor. This new law (Chap. 252, Laws of 1943) provides for a revision as well as recompilation and makes an appropriation for carrying on the work. Through the cooperation of Honorable George B. Simpson, Chief Justice, the committee has been provided with two large offices in the basement of the Temple of Justice in Olympia. One of these rooms is occupied by the legal staff, and the other by the clerical staff.

As a result of preliminary studies the difficulties, complications and magnitude of the task became apparent to the committee, since revision, according to Sutherland on STATUTORY CONSTRUCTION, "implies a re-statement of the law in a corrected and improved form."

In analyzing the work to be done the committee has developed some five distinct phases or steps for accomplishing it:

First, discovering and collecting of all live laws;

Second, adopting a classification plan;

Third, placing of all of these laws into their proper classification;

Fourth, revising such laws as need requires, and

Fifth, securing the legislative enactment of the final revision.

The first step, that of discovering and collecting all live laws, required that we go back to the very first territorial session laws, for not one

of our codes could be relied upon as containing all the law, or even correctly stating the law, so that it might be used as a starting point. As the late Judge Fullerton said in *Spokane, Portland & Seattle Railway Co. v. Franklin County*, 106 Wash. 21, "But the compilation (referring to a Washington code) has no official sanction in the sense that it controls the construction the court must put upon the several acts. If it includes matter superseded, the matter must be rejected and, if there are matters not superseded and not contained therein, they must be searched out and given effect".

It was therefore decided by the committee to develop a system which would account for and specifically dispose of every section, beginning with the first territorial law. Thus, the first step was to record all sections and from these pick out those of a general and permanent nature which remained unrepealed and unamended. In order to accomplish this the Bancroft-Whitney Company graciously supplied the committee with three unbound sets of Remington's Revised Statutes, including the pocket and the 1941 supplements. Each live section has already been placed on a separate card in accordance with a chart which had been prepared and which showed whether the live section appeared in the bound volumes, the pocket supplement, the 1941 supplement, or the 1943 laws, so that only the current Remington sections were placed on cards. This work was done by a well-instructed and competent clerical force.

The legal staff has been working with the session laws, beginning with the very first. A standard form sheet has been adopted, upon which is recorded every section. Each section is identified by its number, page, chapter and year. Those that specifically amend or repeal are placed on the sheet with the section amended or repealed, while the others are recorded in chronological order on separate lines. To verify that every section of every session law has been accounted for, a so-called master list of every section of every session law has been prepared and on this is recorded the disposition made of each section. From these listings the live sections will be discovered, placed according to subjects under our classification system, and be ready for revision.

In order that there may be no question as to the source of any new code section, whether revised or not, it is planned that each will carry its own source notes, which will contain the legislative history back to the very beginning. Each section will also be followed by the revisor's notes, which will call attention to all changes made and the reasons therefor. The source notes and revisor's notes will not, of course, become a part of the revision, but they will be mimeographed and retained, as they will be of great value in analyzing the work and determining its accuracy as well as in doing research work.

In revising, the committee will not undertake to change substantive law but rather to make it conform to the legislative will as it is found expressed in the numerous statutes. Attempt will be made, however, to reconcile inconsistencies, to eliminate duplication and to clarify ambiguities. Both judicial and administrative interpretation will be studied to resolve existing confusion and uncertainties. It hardly seems necessary to say that the very common practice of using the general repealing clause has added immeasurably to the difficulty and magnitude of this work.

Not only will the work of the committee be available at all times for the examination of members of the bench and the bar, but as it progresses, it is hoped that interest and concern in it will develop to such an extent that those whose practice or knowledge is in special fields of statute law will give the committee the benefit of their special knowledge and, to this end, our preliminary revisions will be available for that purpose. More than this, the committee solicits and will greatly appreciate the advice of every lawyer as to any defect in our present statutory law which is within the committee's province to remedy, whether it relates to revision or recompilation.

While the committee has not definitely decided upon the type of codification it will adopt—that is, the subject classification and arrangement and grouping of the sections—it may be said that it is tentatively undertaking a classification which will make up some fifty-five codes. To allocate the material to these codes the committee listed alphabetically nearly three hundred subjects and opposite each subject-title is being noted under which code and which chapter of the code each is to be found. This list should be placed in the publication of the code for it will be of great value to the lawyer.

And now a word about cross-references. The law does not provide that the committee should make any annotations whatever but, upon the urgent suggestion of Mr. H. B. Clark, former managing editor of Bancroft-Whitney Company, the committee is preparing the cross-references as the work progresses, which should mean that a better and more thorough job can be done than to leave it to the publishers.

The final step will be the enactment by the legislature of the revised code in its entirety. It is hoped that sufficient publicity and understanding of the revision and recompilation will assure the adoption and passage of the code without any amendments being proposed in the legislature, for one such proposal might well mean the failure of passage. Some may feel that as long as a new code is to be adopted, it would be a good opportunity to change some laws by amending the code before adoption. Such action would lose sight of what the committee is trying to accomplish, which is to get the entire body of our statute law into useful shape. If amendments or new laws are desired they should be proposed in the regular legislative way after adoption of the code and this may be done by amending sections of the code itself or by adding new ones. The adoption of the code as submitted does not mean that it necessarily would be published as adopted without the changes and additions resulting from subsequent action of the legislature which passes it. It is almost a certainty that whoever publishes an edition of the code will do so following the legislative session, so it will contain the laws as they exist on the date the new laws become operative.

The ultimate ends hoped to be attained by this revision and recompilation are a clear, concise statement of the laws into reasonably sized sections and these arranged into a classification plan deemed best adapted to the laws of this state. Like the United States laws, every publisher will give the same number to each section and the legislature will be able to amend by designating the code numbers.

The committee solicits criticisms and suggestions. This is a big job which carries a great deal of responsibility, and the committee hopes for the enthusiastic cooperation and ultimate approval of the entire

bar. The bar association's special committee and representatives of the supreme and superior courts will be asked to meet from time to time with the committee in order to study and work for the accomplishment of this task which is so important to the bench and bar as well as to the people of the entire state.

The committee realizes that from the very nature of the subject matter and the legal minds that must deal with it, it would be impossible to turn out a code that would be acclaimed perfect by a single lawyer or even by the committee itself. The committee has been unable to find any two codes which are alike, and it is not likely that any two lawyers would revise and recompile alike or even similarly and, yet, each could probably make a logical argument in support of his work. This reasoning takes us back to our statement that one proposed amendment might well mean the failure of passage of the code or result in numerous amendments which would destroy its uniformity and plan of organization. That is why we so strenuously urge the united endorsement of the code, leaving the amendments to be made afterward. While the making of our laws is the function of the legislature, it is, or should be, the responsibility of the bench and bar to exercise their influence and give their aid to the end that the body of our statute law be well organized and maintained.

In anticipation of a new and modern code, the committee fears that unless some definite timely action is taken our laws will again become confused as each legislature adds new ones. It is regrettable and, to some extent, unavoidable that a general revision does not stay revised. Changes, with at least some growing confusion, commence with the next legislative session. To minimize this confusion and protect the work done, the code committee takes this opportunity to make certain suggestions and recommendations relating to the future of our statute law.

Our legislatures meet for sixty days, during which time a large part of some 1,000 or more bills are prepared and introduced. There never has been a continuing agency set up for the purpose of drafting or supervising the style, form and contents of bills. The drafting personnel has been changed almost from session to session and even during sessions. Because the staff has been so small and has operated only during the turmoil of legislative sessions, it could not possibly handle all the work, so that bills are not only prepared by numerous persons without regard to uniformity as to form, contents and arrangement of material, but more than half of the bills never reach the bill-drafting room. For instance, in the Session Laws of 1939, there are thirteen chapters each containing a section which repeals all acts or parts of acts in conflict. It is doubtful that such a provision has any force whatever. Sutherland on STATUTORY CONSTRUCTION, 3rd Ed., Section 2013, says that in legal contemplation it is a nullity; that repeals must either be expressed or result by implication; and that a general repealing clause cannot be deemed an express repeal because it fails to identify or designate any act to be repealed. The late Judge Fullerton, in *Batchelor v. Palmer*, 129 Wash. 150, in adhering to this theory, said, "It is true the later act concluded with the sentence 'all acts or parts of acts inconsistent with this act are hereby repealed.' It is but declaratory of what would be the legal effect of the act without this provision."

Supervision over the form and contents of legislative bills should be placed in a non-partisan agency consisting of at least one attorney who is well-grounded in the art and science of bill drafting. Heretofore no particular importance has been given in this state to the qualifications for bill-drafting, and yet it is a very specialized work and involves many phases. A bill-drafter must decide many questions of constitutionality, many phases of statutory construction, whether an idea should be expressed in negative or affirmative language, in mandatory or directory phrases, in general or particular terms. He should know grammatical construction. He should know all phases of this subject so he could prepare and carry out instructions and suggestions dealing with the style, arrangement and sectioning of bills. He should know when to amend and when to repeal. He should know when and how to abbreviate and when and what to capitalize; how to accomplish proper legislative action by bill, resolution or memorial. He should know when to paragraph, make subsections, and how and when to use a proviso. He should develop definite rules from that knowledge for the guidance of others to insure accuracy and uniformity. Brevity, with care in the use of plain and definite language with appropriate words, makes for clarity and stronger law. The use of ineffectual or redundant words and phrases weakens a law. In later years the subject matter of our laws has become more complex and hence unnecessary words should be omitted. It was once said by an old bill-drafter of England, "More words should not be used than are necessary to make the meaning clear. Every superfluous word may raise a debate in Parliament, and a discussion in Court".

Preambles, like prologues to a play, merely advise the circumstances which call forth the act. They are not law. In New England and New York they appear very rarely. In most instances, a proper drafting of a bill makes a preamble unnecessary.

The head of this state agency should not be a position of patronage, but should be non-partisan and permanent. Between sessions this agency could work on revision, develop legislative reference material and draw bills for the next legislature. Twenty years ago the American Bar Association passed a resolution containing the following:

"Resolved, that in the opinion of the Association, an official drafting and reference service, when properly organized and directed, forms an efficient agency tending to prevent the enactment of unconstitutional, obscure and otherwise defective statutes and to secure the utmost brevity and simplicity consistent with accuracy in the language of statutes, and we hereby recommend the establishment and generous support of such service at Washington and in those states not now having such service".

Many states have such an agency, and this state is big enough and has a sufficient body of law to make such an agency very much needed. It could carry on where this committee leaves off.

In concluding this report, the committee desires to impress upon the bench and bar that, while this undertaking is not just for the benefit of lawyers but rather for all the people of the state as well, nevertheless it is of particular importance to lawyers, for they will get more direct benefit. But, aside from this, as before pointed out, the responsibility for the condition of our code is upon us lawyers,



from the very nature of our profession and daily participation in legal matters.

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In connection with the foregoing report, the Association adopted the following resolution:

"WHEREAS, due in a large measure to the absence of a permanent, independent, non-partisan agency of state government charged with specific responsibility for maintaining our statute laws and drafting legislative bills, there are now and almost certainly will be many unconstitutional, obsolete, superseded and duplicative laws, as well as laws made up of uncertain, inappropriate and excessive words; and

WHEREAS, this situation will greatly impair the value of the revised and recompiled code when adopted unless such a state agency is created;

Now Therefore, Be It Resolved by the Washington Bar Association assembled that this association endorse and recommend to the Legislature the establishment of a legislative reference and bill drafting agency with the duties and responsibilities of maintaining our statute law in conformity with the plan of the revised code as the same may be changed or modified from time to time by each successive legislature."

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## The American Law Institute's Model Code of Evidence

By JUDSON F. FALKNER, *Dean of the Law School of the  
University of Washington.*

In planning this necessarily brief statement concerning the Code of Evidence which has been approved by the American Law Institute, I found that I was confronted with a considerable problem of condensation. In the first place, what we have here is a Code, and necessarily the draftsmen have undertaken to cover the entire area of the law of evidence. In the second place, the treatment of many existing rules has been radical in character. And finally, it should be mentioned that a controversy arose between the reporter and his advisers on the one hand, and Mr. Wigmore, chief consultant, on the other, as to the method or technique which should be employed in the drafting of an Evidence Code, Mr. Wigmore expressing his disapproval of the Code in an article in the January, 1942, issue of the *American Bar Association Journal*.

The result is that I can do no more today than refer to some of the salient features of the project. Specifically, I shall attempt only the following:

- 1—A brief reference to the background and history of the undertaking.
- 2—A word about the dispute as to method which I just mentioned.
- 3—Reference to some of the more significant changes which would be worked by adoption of the Code and