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# Code Making in Early Oregon

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## CODE MAKING IN EARLY OREGON\*

ARTHUR S. BEARDSLEY†

MUCH has been written and more has been said concerning the early history of Oregon. Probably no section of the present United States has supplied more of the romance of early exploration and settlement. The story of her intrepid pioneers braving the dangers of forest and plain, of lurking animals and crafty Indians, of pestilence and starvation endured in order to establish new homes in that vast wilderness of the Far West, has been told and retold in fiction, drama, and history; but the story of Oregon is ever new, ever thrilling and inspiring. It brings to us in this present day a more intimate and forceful picture of the same factors which prompted the pioneers of the Atlantic shores to endure the hardships of a new world in order to build homes and fortunes in the new America.

The growth and development of a society in a new world must of necessity be closely linked with the development of a system of law. Without law society cannot endure. Law is the measure of its life, the key to its progress, and the hope of its endurance. Oregon in 1841 was no exception. This was the observation of Elwood Evans when he drew comparisons between the Puritans and the Oregon pioneers:

“Both were founders of commonwealths—both political agitators—both recognized the necessity of law and order to secure the well-being of the community. Before the Puritan fathers left the cabin of the Mayflower, they had signed their compact of government and selected their magistrates. Hardly had our pioneers selected a shelter from the inclemency of the season, when, true to their American instincts, they missed, and at once desired to supply the protection afforded by civil institutions. Spurned and neglected by their government, they turned to themselves, to each other, and at once agitated the question of establishing a temporary government . . . It is too well established to admit of cavil that some system of government is the very requirement of a new settlement. This essentially American axiom found no exception in the pioneer element of Oregon; to secure order and peace was the first duty foremost among the duties of citizens.”<sup>1</sup>

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<sup>1</sup> Address by Elwood Evans, quoted in part in 3 HORACE S. LYMAN, *HISTORY OF OREGON* (New York, 1903) 281.

The pioneers of Oregon were not lawyers. There was not a single lawyer among them in 1841. They knew little of legislative or parliamentary procedure and less of law. Their sense of right and justice, the urgency of their need, and their desire to build a structure of endurance were their greatest assets. The aphorism, "necessity is the mother of invention," was their motivating force; the provisional government and their codes of law were its fruition.

With the absence of organized government and a system of law in Oregon prior to 1841, the pioneers had been subjected to a conflict of jurisdictions in such controversies of legal nature as had arisen. Many matters had come before the Methodist missionaries. That they had assumed a formal jurisdiction is shown by the fact that in 1839 two missionaries had been designated to act as magistrates. Acting under this direction many matters were presented to them for adjudication.<sup>2</sup> It is not clear as to the source of the authority for such jurisdiction, and it is not clear what statutes, if any, were followed, nor whether, in the absence of such statutory law, the principles of the English common law were even applied.

The records also show that the Hudson's Bay Company had exercised jurisdiction over the legal problems in which, for the most part, some of their property or employees were involved. This authority had been extended even to include infliction of the death penalty.<sup>3</sup> The law which the Hudson's Bay Company applied, and the authority for its exercise of legal jurisdiction, lay in a statute of the British Parliament enacted in July 1821, which imposed the laws of Upper Canada upon the Oregon Territory.<sup>4</sup>

## I

The first efforts to draft a system of laws for the Oregon Territory were but a part of the plan to establish a provisional government.

An informal gathering of the residents of the Willamette Valley was held in the Champoege (variously spelled) district on February 7, 1841. According to Jesse Q. Thornton,

"The meeting was designed mainly for a preliminary consultation by a few persons connected with the Methodist Mission station, in the Wallamet Valley. The late Rev. Jason Lee was called to the chair, and he was requested to express his opinions as to what ought to be done in the premises. In a short speech . . . he advised the selection of a com-

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<sup>2</sup> 1 CHARLES H. CAREY, *GENERAL HISTORY OF OREGON PRIOR TO 1861* (Portland, 1935) 317.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

mittee for the purpose of drafting a constitution and code of laws for the government of the settlements south of the Columbia. Beyond this, little or nothing was done . . ."<sup>5</sup>

The meeting referred to above accomplished nothing of importance and had no effect upon the events which were to follow. A little over a week later, however, an event of extreme importance brought the inhabitants again together, and in a very marked manner called their attention to the importance and necessity of establishing some regular form of civil government.<sup>6</sup> On the 15th of February, 1841, a wealthy settler named Ewing Young died leaving no known heirs. His estate consisted of cattle and lands. The question immediately arose as to what disposition should be made of his property.

It had been the custom for the Hudson's Bay Company to administer the estates of deceased settlers and particularly of its employees, even to the extent of setting aside wills, and of taking possession of the property as its own, on the theory that the employees had no original right to acquire property. In a similar manner, the priests of the Catholic Mission took possession of property belonging to members of their faith.<sup>7</sup> No one seemed to think that such action would be tolerated in this case. What then would become of the property?

On the day of the funeral most of the inhabitants of the settlement were again present, and after the services were over, they held another informal meeting similar in character to that held on February 7. It was evident that there was a new reason for consultation concerning the steps necessary to be taken for the formation of laws. A committee was again appointed, but in the weeks which followed it failed entirely to perform the duty imposed upon it by this appointment.

On the day following the funeral of Ewing Young, the settlers again assembled for consultation, and at this meeting selected Dr. Ira L. Babcock of the Methodist Mission "to fill the office of supreme judge, with probate powers," and instructed him, until such time as a code

<sup>5</sup> THORNTON, *History of Provisional Government of Oregon*, in OREGON PIONEER ASSOCIATION TRANSACTIONS, 1874 (Salem, 1875) 50. See also Harvey W. Scott, *Provisional Government*, 2 OREGON HISTORICAL QUARTERLY 98, and CAREY, *op. cit. supra* note 2, at 318. While there are several references to a meeting on Feb. 7, 1841, it is not unlikely that these references are inaccurate. It might well be that the date given should be Feb. 17. The speech attributed to Jason Lee was not recorded until thirty years after the date spoken, and as the transactions of the Oregon Pioneer Association are frequently garbled, the date referred to (Feb. 7) might well be a typographical error.

<sup>6</sup> THORNTON, *supra* note 5, at 52; THE OREGON ARCHIVES, a collection of early "Journals, Governors' Messages and Public Papers of Oregon," by La Fayette Grover, Commissioner (Salem, 1853), refers to a previous meeting, but gives no details concerning it. Neither Hines nor Gray in their histories makes reference to it.

<sup>7</sup> WILLIAM H. GRAY, *HISTORY OF OREGON* (Portland, 1870) 199-200.

of laws could be adopted by the community, "to act according to the laws of the state of New York."<sup>8</sup> It thus became his duty to settle the estate of Young according to the laws of New York, which he proceeded to do. The fact that his action met with unanimous approval bespeaks well of his fairness and good judgment.

Thus at the very outset of government in Oregon, the laws of New York became impressed upon the Oregon Country through the express will of the people assembled together for the furtherance of matters pertaining to their individual welfare. This reference to the laws of New York has raised some interesting, but no less perplexing, questions. Why were the laws of New York selected over those of other states? Was the choice due to the pre-eminence of the Empire State? Was it because Dr. Babcock had lived in New York and presumably knew more of the laws of that state than of any other? Could not the same basis of selection have been used to adopt the laws of Massachusetts from which state other settlers had emigrated? Granting that perhaps Dr. Babcock had a broader education than most of the others, did this fit him better than they to serve as their "supreme judge"? Could it be reasonably assumed that even he, to say nothing of the others, actually knew anything of the laws of New York? Could it not be said that other members of the community had such a knowledge of the laws of their native or adopted states as would have qualified them to administer the laws of their home states?

The most rational answer would seem to be, that Dr. Babcock was selected to act as "supreme judge," not because of his knowledge of New York laws, nor because he once had been a resident of that great state, but because of his general fitness and education and ability to take up a set of laws and follow them *ad litteram*. This would presume the existence within the community of a copy of such laws of New York. But, could not the same argument be made for the selection of one or more of the other missionaries resident therein? Probably so, unless it should have been shown that the possessor of that code of laws was Dr. Babcock, himself.<sup>9</sup> If this copy of New York laws had belonged to Dr. Babcock, he would have been the logical person to apply them, all other factors being equal to those of the other members of the community. Would the members present have asked another to serve in this capacity, utilizing as his guide the property of another? So, while the

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<sup>8</sup> THE OREGON ARCHIVES, 6, cited *supra* note 6; GRAY, *op. cit. supra* note 7, at 201, states that Babcock was to act "just as he pleased," but his statement is not supported by the weight of authority.

<sup>9</sup> It is the opinion of Mr. J. Nielson Barry that Dr. Babcock, himself, owned a copy of a New York code, and for this reason was selected as "supreme judge."

evidence is lacking, logic and good reasoning would seem to point to the ownership of a copy of these laws by Dr. Babcock. It is a hypothesis only and, of course, lacks evidentiary substantiation.

It is a singular fact that, of those present at this meeting of February 18, 1841, none has ever recorded that he had seen such a volume of New York laws in their midst, nor that any particular person, resident among them, possessed such a copy. Several of these intrepid pioneers in later years when recording their recollections of this period have referred to the existence of such a copy of laws, and Gustavus Hines, who was present on this memorable occasion, has been quoted by the historian, Bancroft, as saying, "At this time there was but one copy of the laws of New York in the colony,"<sup>10</sup> but he did not further identify it, and the text of Hines does not seem to fully support this statement.

Some further support for the existence of a code of New York laws in the community can be found in THE OREGON ARCHIVES on page 24, where it is recorded that it was "moved and carried, . . . to adopt the laws of Iowa, as recorded, by amending them so far as to retain the fees of New York, for jurors and witnesses, instead of those of Oregon Territory." Furthermore, in the Preface to the STATUTES OF OREGON (1854), it states that, "That part of the Oregon Statutes relating to the manner of commencing actions at law, are taken, word for word, from the New York Code."

The first of these references was dated July 5, 1843, a little over two years from the date of the original reference to the laws of New York; and with the immigration which had followed the meeting at Champoege, numerous copies of such New York laws conceivably might have been brought to Oregon. Likewise, the quotation from the STATUTES OF OREGON (1854), although a codification of existing law, is far from being conclusive, as it speaks of a period twelve or thirteen years later. These references do not necessarily mitigate against the validity of the belief that a copy of a code of New York was in the colony in 1841, but neither do they prove it. At most, they establish the existence of an influence upon the Oregon laws by those from New York, which must have come from the presence in the territory of a copy of these laws.

One writer has raised doubts as to the existence in Oregon of a code of New York laws by his statement that,

"I query whether there was a single copy of the laws of that State [New York] in the country for ten years after the last resolution

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<sup>10</sup> 1 HUBERT H. BANCROFT, HISTORY OF OREGON (San Francisco, 1886) 294; GUSTAVUS HINES, HISTORY OF OREGON (Buffalo, 1850) 419.

was passed. I know there was none at the time, and only a single copy of the laws of Iowa two years after; hence Ira L. Babcock was law-maker, judge, and executive to the settlement, just as John McLaughlin was to the Hudson's Bay Company."<sup>11</sup>

While this writer was not immediately present at the time of the holding of the meeting at Champoeg (February 18, 1841), being temporarily absent, he should have been familiar with the existence of such a code, if such there was. He could hardly have been ignorant of such a fact, and his categorical statement, "I know there was none at the time," would normally carry considerable persuasiveness. However, as a historian, he so often has been found to be careless and inaccurate, if not actually and intentionally biased. His observations frequently are misleading and untrue, even in matters in which his personal knowledge should have dictated accuracy and truth. Thus, his observations fail to carry the probative force, which, under the usual circumstances, should be accorded a writer who is able to speak of a firsthand acquaintance with his subject matter.

The report on the code of laws scheduled to have been submitted by the code committee on June 1, 1841 was not forthcoming.<sup>12</sup> The personnel of this committee was originally composed of the following persons: Rev. F. N. Blanchet, Rev. Jason Lee, and Rev. Gustavus Hines, with David Dorpierre, Mr. Charlevon, Robert Moore, J. L. Parrish, Etienne Lucie, and William Johnson, but at the June meeting, Blanchet asked to be relieved of the duty, and his place was taken by Dr. W. J. Bailey. A resolution was then approved calling the committee to meet on the first Monday in August, in the hope that its report could be prepared and made ready for presentation to the people at a public meeting to be held early in October.

Bancroft has said<sup>13</sup> that the only member of the original committee who had had any practical knowledge of legislation was Moore, and that most of the others were probably ignorant of even the theories of law. It was the belief of the Mission party (Methodists) that, if Father Blanchet was made chairman of the committee, the support of the French Catholic party could be secured and sectarian difficulties thereby harmonized, while the settlers could be cajoled into supporting the program by the "liberal bestowal of small offices." The withdrawal of Blanchet from the chairmanship of the committee, according to Bancroft, was probably intended to signify that the Canadians would take no part in the organization of a government.

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<sup>11</sup> GRAY, *op. cit. supra* note 7, at 201.

<sup>12</sup> THE OREGON ARCHIVES, 6, 7, cited *supra* note 6.

<sup>13</sup> 1 BANCROFT, *loc. cit. supra* note 10.

No action was taken by this new code committee, and accordingly no meeting of the inhabitants was held in October. Hines states that some members of the code committee were honestly opposed to the idea of establishing a permanent organization, "so long as peace and harmony prevailed;"<sup>14</sup> furthermore, it had often been said that the Hudson's Bay Company disapproved of the action, and that Lieutenant Wilkes, then on a visit to Oregon, had cautioned against it.<sup>15</sup>

The view of Wilkes, according to Bancroft, was that

"Only a small minority of the inhabitants desired to establish a government, that laws were not necessary, that they would be a poor substitute for the moral code they all followed, that there would be great difficulty in enforcing them within any definite limits, and that an unfavorable impression would be produced in the United States concerning the influence of missions which were obliged to resort to a criminal code."

Another writer has asserted that the prime cause for anxiety in the formation of a government came from the employees of the Hudson's Bay Company, most of whom were of French or Canadian nationality and Catholic in religious faith, and all of whom were largely under the influence of the English company. While a few of them may have been favorable to the cause of government, the majority were not. In its place they would have preferred a council "to judge their difficulties, punish the crimes, and make regulations suitable for the people." While thus opposing one form of government, they were seeking another. Certain of the more reactionary members of the company's employees felt that the more laws there are, the more opportunities existed for roguery by those who make a practice of it.

In the months which followed, the settlers experienced much danger from attacks by wild animals, which continually preyed upon their livestock and horses, and several meetings were held to formulate plans to provide protection. These meetings were known as the "Wolf Meetings," and, at the first one held on February 2, 1843, a committee was appointed to devise means "for the protection of our herds" and to report back at a second meeting, to be held at the home of Joseph Gervais on the first Monday in March 1843 (March 6).<sup>16</sup>

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<sup>14</sup> GRAY, *op. cit. supra* note 7, at 203; 1 BANCROFT, *op. cit. supra* note 10, at 295, quotes from 4 CHARLES WILKES, NARRATIVE OF THE UNITED STATES EXPLORING EXPEDITION (Philadelphia, 1845), to the effect that Johnson, a member of the committee, had said that there was "no necessity for laws, lawyers, or magistrates."

<sup>15</sup> EDMUND S. MEANY, HISTORY OF THE STATE OF WASHINGTON (rev. ed., New York, 1924) 143, takes a different view.

<sup>16</sup> GRAY, *op. cit. supra* note 7, at 266-267.



At the second "Wolf Meeting" the committee was ready with a set of eight resolutions providing for the collection of money from the settlers for the purpose of paying bounties for the destruction of the predatory animals.<sup>17</sup> This second "Wolf Meeting" (March 6, 1843) was a success; and, as it was drawing to a close, W. H. Gray arose and in a stirring appeal for protection for their families turned the importance of the meeting from bounties to that of a plea for the organization of civil government. There was no question, he said, of the propriety of providing protection for our property in animals liable to be destroyed by wolves, bears, and panthers; but,

"How is it, fellow-citizens, with you and me, and our children and wives? Have we any organization upon which we can rely for mutual protection? Is there any power or influence in the country sufficient to protect us and all we hold dear on earth from the worse than wild beasts that threaten and occasionally destroy our cattle? Who in our midst is authorized at this moment to call us together to protect our own, and the lives of our families? True, the alarm may be given, as in a recent case, and we may run who feel alarmed, and shoot off our guns, while our enemy may be robbing our property, ravishing our wives, and burning the houses over our defenseless families. Common sense, prudence, and justice to ourselves demand that we act consistent with the principles we have commenced. We have mutually and unitedly agreed to defend and protect our *cattle and domestic animals*; now, fellow-citizens, I submit and move the adoption of the two following resolutions, that we may have protection for our persons and lives as well as our cattle and herds:—

"*Resolved*, That a committee be appointed to take into consideration the propriety of taking measures for the civil and military protection of this colony.

"*Resolved*, That said committee consist of twelve persons."

His sincerity and eloquence convinced those present that another effort should be made to form a government, and so they agreed to assemble on May 2, 1843, following, to perfect such an organization. At this meeting a new committee was chosen, the personnel of which was named to consist of the following: Dr. I. L. Babcock, Dr. Elijah White, James O'Neil, Robert Shortess, Robert Newell, Etienne Lucie, Joseph Gervais, Thomas J. Hubbard, C. McRoy (various spellings), W. H. Gray, Sidney Smith, and George Gay. They at once set to work on a plan of government, and had their report completed in time for a public meeting at Champoeg on July 5. From the moment of the adoption of these resolutions (March 6), "it could never again be said," as Meany has pointed out, "that Oregon was without a government."

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<sup>17</sup> THE OREGON ARCHIVES, 9, cited *supra* note 6.

At the public meeting at Champoege on May 2, 1843, the real test of the hope for a civil organization was before the settlers. The success of the plan was at once challenged by the presentation of a document prepared by the Canadians, and consisting of seventeen counts protesting the organization of a civil government. Confusion naturally resulted. It was here that Joseph L. Meek "stepped to a niche in history as he strode to his position, crying out, 'Who's for a divide! All in favor of the report and of an organization follow me!'" Joe saved the day; and when the vote was tallied, a majority favored the report,<sup>18</sup> and a civil government in Oregon had begun.

Thus, with the organization of a civil government, the time had come for the selection of a committee to draft a code of laws for the government of this community. Its report was set for hearing before a public meeting to be called on July 5, 1843, following, just two months hence; but the resolution allowed the committee but six days in which to complete its task, and fixed its compensation at the rate of one dollar and twenty-five cents per day each.

The legislative committee to which was entrusted the responsibility of drafting a code of laws was composed of David Hill, Robert Shortess, Robert Newell, Alanson Beers, Thomas J. Hubbard, W. H. Gray, James O'Neil, Robert Moore, and William M. Doty. No lawyer or member of the clergy was among them. Rev. J. S. Griffin had been suggested for membership on the committee, but some present opposed him "on the ground that clergymen should have nothing to do with making secular laws, as their calling disqualified them from fully comprehending the wants of the community."<sup>19</sup>

## II

It is recorded by Bancroft<sup>20</sup> that the legislative committee held its meetings on the 16th, 17th, 18th, and 19th of May, and on the 27th and 28th of June, Moore acting as chairman and L. E. Breton, the clerk of the court, as its secretary. Its deliberations were carried on openly in an unoccupied granary belonging to the Old Mission. And as few law books then existed in the country, they had limited precedents to guide them. Few of them had had any experience in legislation, which makes the product of their labors all the more surprising. When the people

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<sup>18</sup> THE OREGON ARCHIVES, page 14, cited *supra* note 6, reads a "great majority" favored the report; Gray says "two" and Newell "five" more for the same than against it. See 1 BANCROFT, *op. cit. supra* note 10, at 304; MEANY, *op. cit. supra* note 15, at 143.

<sup>19</sup> 1 BANCROFT, *op. cit. supra* note 10, at 305.

<sup>20</sup> *Ibid.*

gathered for the public meeting of July 5, the report of their code committee was submitted to them, and was read by the clerk, L. E. Breton. The articles were adopted one at a time.<sup>21</sup>

It has been pointed out by the above-mentioned historian that the scheme of government framed by the committee had a political significance imparted to it by Shortess, one of the settlers who had voted for it. By basing its provision partly upon the Ordinance of 1787, which provided for the government of the territories north of the Ohio River, the document provided, not only for a complete framework of government, but it also was "intended to settle the question of slavery west of the Rocky Mountains, as had been done in the Northwestern states." Also, by extending the jurisdiction of the provisional government over all of Oregon until such time as the United States should take possession of the country, the Organic Law ignored the claims of Great Britain, which was "a step in advance of the position publicly taken at this time by the government itself."

This report of the 1843 committee was constructed upon five legislative premises, viz., (1) rules of the house, (2) judiciary, (3) military, (4) land laws, (5) county division. The subject of an executive troubled the committee, and it finally left this power in a committee of three. In like manner the problem of taxation had to be passed by, since the people desired this. The military articles contained one provision of particular significance because it placed the militia under the control of the executive and subject to the call of the "authorized agents of the United States for putting down uprisings of the Indians." Thus the committee in another way seemed to be tying the new government to the United States rather than to England. The land-laws provisions were originally designed to take away lands claimed by Dr. John McLaughlin of the Hudson's Bay Company; but as the Mission had laid claim to part of the same holdings, the proposed laws were also appropriately modified before adoption. Bancroft has pointed out that the first object of the missions was to secure and hold large tracts of lands and water-power sites, and, since the United States Government had been slow to establish and define land titles and boundaries, it was their only recourse to support the organization of such a temporary government, or even of an independent government, as would, by virtue of its powers, confirm these land titles and claims. In taking this attitude in relation to land laws, the missions could not be unaware of their like application to the claims of the Hudson's Bay Company, and

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<sup>21</sup> For the text of the report of the committee and the organic law proposed, see 1 BANCROFT, *op. cit. supra* note 10, at 306-309.

that, in any settlement of overlapping claims, some compromise would surely be necessary.

The code of 1843 is truly a remarkable document. It has been referred to as Oregon's first Organic Law, and, while it was superseded by the Organic Law of 1843, it nevertheless deserves more appreciative contemplation than it usually has been afforded. The document partakes of the nature of the Ordinance of 1787. Some provisions of this Ordinance of 1787 were even incorporated verbatim into the organic act proposed by the code committee.<sup>22</sup> Commenting on this report, Dr. F. I. Herriott has said:

"The report of the committee is interesting and instructive. It exhibits the political thought and habits and wishes of the pioneers, uninfluenced by the immediate surroundings of civilization and the formal procedure and political ceremony so important in the operation of political institutions. We have there a practical illustration of the creation of a civil society somewhat after the fashion dreamed of by Rousseau; and what is more, we perceive some of the notions expounded by the French philosopher. The document presented, sets forth exalted principles of civil liberties and righteousness."<sup>23</sup>

The preamble of this document read:

"We, the people of Oregon Territory, for purposes of mutual protection, and to secure peace and prosperity among ourselves, agree to adopt the following laws and regulations until such time as the United States of America extend their jurisdiction over us."<sup>24</sup>

Included among the provisions of this Organic Law were the Thirty-seven Acts taken verbatim from the laws of Iowa Territory enacted at the first session of its territorial legislature in 1839. These Thirty-seven Acts were thereafter commonly referred to in Oregon as the "Little Blue Book" in order to distinguish it from the laws of the Iowa session itself, commonly referred to as the "Old Blue Book." As none of these laws were published in Oregon until the publication of the "Twenty Acts" of 1850 and the compilation of 1853, this "Little Blue Book" became in every sense a code of Oregon laws.

It is not known how many copies of the Iowa statutes of 1839 were actually in the Territory at this time. It is doubtful, however, if there were more than two such copies available; while Carey is authority for the statement that the copy of the Iowa statutes used by the committee was the individual property of James O'Neal,<sup>25</sup> the settler

<sup>22</sup> 1 CAREY, *op. cit. supra* note 2, at 333.

<sup>23</sup> F. I. Herriott, *Transplanting Iowa's Laws to Oregon*, in ANNALS OF IOWA (July 1904), reprinted in 5 OREGON HISTORICAL QUARTERLY 142-143.

<sup>24</sup> THE OREGON ARCHIVES, 28-32, cited *supra* note 6.

<sup>25</sup> Spelled also "O'Neil."

who had helped to drive the Ewing Young herd of cattle from California into Oregon. Bound with these Iowa statutes was the Ordinance of 1787, already referred to as having exercised an important influence upon the text of the Organic Law itself.<sup>26</sup>

Not all of the Iowa laws of 1839 were adopted at this legislative session. However, the Thirty-seven Acts embraced many of the most important subjects of legislation.<sup>27</sup> Among them were the laws of :

Attachment	Practice of Courts
Bonds	Promissory Notes
Constables	Public Administrators
Construction of Statutes	Public Lands
Costs and Fees	Recorder
Criminal Offenses	Replevin
Courts of Probate	Right
Depositions	Seals
Executions	Securities
Forcible Entry and Detainer	Sheriffs
Gaming	Territorial Treasurer
Sale of Liquor to Indians	Vagrants
Jurors	Change of Venue
Justices of Peace	Waste
Militia	Lost Goods, Estrays of Water Craft
Mills and Millers	Weights and Measures
Ne Exeat and Injunctions	Wills and Administrations
Petition	Worshipping Congregations

### III

This first code of laws for Oregon was further augmented by the action of the provisional government, which, on June 29, 1844, declared that, "All the statute laws of Iowa Territory, passed at the first session of the Legislative Assembly of said Territory, and not of a local character, and not incompatible with the conditions and circumstances of the [Oregon] country, shall be the law of this government, unless otherwise modified."<sup>28</sup> This act added many additional laws from the statutes passed by the first Iowa territorial legislative session, and may be regarded as a supplement to the first code of Oregon. These laws, likewise, remained unpublished until the publication of "Twenty Acts" of 1850 and the code of 1853.

This blanket adoption of the laws of the first session of the legislature of Iowa Territory made the remainder of the laws in the Iowa

<sup>26</sup> 1 CAREY, *op. cit. supra* note 2, at 333.

<sup>27</sup> THE OREGON ARCHIVES, 30-32, cited *supra* note 6.

<sup>28</sup> LAWS OF A GENERAL AND LOCAL NATURE, 1843-49 (1853) art. iii, 100.

statutes of 1839 also the law of Oregon. Such a general adoption of laws could but add to the confusion already existing as to the laws in effect in the territory. Who was to decide (aside from the courts) what laws were "incompatible with conditions and circumstances of the country?" Who was to determine which laws were of local character?

It was soon apparent that revision of the Organic Law of 1843 was desirable, and this was attempted by the legislative committee in its session of 1844. The recommendation of the executive committee in that year was that "provision be made by this body [legislative committee] for the framing and adoption of a constitution for Oregon, previous to the next annual election, . . .".<sup>29</sup> Some of the changes recommended were: (1) creation of a single executive in place of a committee of three, (2) increase in the number of representatives in the legislative department, and (3) change in the judicial system, together with changes in certain specific subjects more in the nature of statute than fundamental law. Many people felt that such amendments were unconstitutional, since they had not been authorized by the people nor submitted to them for approval. However, the changes proposed seemed worthy of further consideration and, in the message of the executive in 1845, as in the message of the preceding executive committee, recommendations were made with reference to the need of amending the Organic Law.

It was this attempt of the legislative committee of 1844 to carry out the executive's recommendations without submitting the proposals to the people, which prompted the legislative committee of 1845 to hold them unconstitutional. Hence, when George Abernathy, the newly chosen executive, renewed a request in 1845 for a revision of the Organic Law of 1843, the same was referred to a committee, composed of Messrs. H. A. G. Lee, Robert Newell, Jesse Applegate, J. W. Smith, and John McClure, which went to work on revision immediately (June 25), and was able to complete its report for consideration by the legislative committee on July 2; and by July 5, it was ready for submission to the people for their adoption.

Bancroft has said that

"The leading spirit in the legislature of 1845 was undoubtedly Mr. Applegate. The Spartan simplicity and fidelity to truth which distinguished him among his fellow-colonists is stamped upon their proceedings. His literary style, unequaled by that of any of his contemporaries, is easily recognized in the revised code. Concerning the work of the committee, he says that it was their object to introduce as few

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<sup>29</sup> THE OREGON ARCHIVES, 57, cited *supra* note 6.

changes as possible in the original Organic Laws, except the oath of office, and an amendment to the land law . . .

"While it is evident that Applegate endeavored to leave untouched the work of his friend Shortess as far as was consistent with expediency and propriety, and while avoiding any perversion of the intention of the Organic Laws, the amendments made to that instrument fulfilled practically all the purposes of the more elaborate legislation of 1844 . . ."<sup>80</sup>

Those changes which were made in the Organic Law of 1843 by the amendments of 1845 were of great significance. In reality, they did more than merely amend the Organic Law of 1843; they changed its form so radically as to practically supersede it by a new Organic Law. Hence, it is not improper to refer to this document as the Organic Law of 1845.<sup>81</sup> Certain of these changes should be referred to herein: To the first article was added a section concerning personal rights, and another concerning the general powers of the government, which was made tripartite in form. Other articles created a legislature of one house, and provided for a single elective executive, and judiciary, and defined in detail the respective powers of each. The land laws which were the "chief object of solicitude to all" were also changed "in letter, if not in spirit."

This fundamental document received the approval of the people at a special meeting on July 26, 1845, and from that time, according to Applegate, "both the Methodist Mission and the Hudson's Bay Company ceased to be political powers either to be courted or feared in the colony, and to the close of its existence the provisional government of Oregon attained all the ends of good government."<sup>82</sup>

It should be noted that the legislative committee of 1845, referred to the new Organic Law as a "compact" rather than a "constitution," which prompted Bancroft to characterize the reference as being "a distinction without a difference." Be this as it may, it was this document which constituted the basis of the Provisional Government in Oregon from 1845 to 1848.

The Organic Act passed by Congress in 1848<sup>83</sup> under which Oregon was organized as a territory, recognized the existence and validity of the laws of the Oregon Provisional Government and continued them in force until otherwise modified. Notwithstanding this provision in the Organic Act of 1848, the first Legislative Assembly under the territorial organization felt it necessary to again adopt the Iowa statutes.

<sup>80</sup> 1 BANCROFT, *op. cit. supra* note 10, at 474.

<sup>81</sup> For the complete text of this document, see STATUTES OF OREGON, fifth and sixth sessions (1855) pages 33-38.

<sup>82</sup> From a manuscript cited in 1 BANCROFT, *op. cit. supra* note 10, at 479-480.

<sup>83</sup> 9 STAT. 329, sec. 14 (Aug. 14, 1848).

## IV

The legislative session of the new territory on September 27, 1849 enacted, among other laws, an act to adopt certain chapters of the REVISED STATUTES OF IOWA, 1843.<sup>34</sup> This act became known as the "Chapman Code" because of the influence which its sponsor, W. W. Chapman, exercised in securing its passage. By this act it was intended to engraft some seventy-two laws of Iowa upon the statute law of Oregon, and thereby substitute a later code of Iowa for the first code adopted in that Territory in 1839. It designated the Iowa laws by their several titles, and the respective pages where located in the Iowa code.

The act in question was entitled, "An Act; to Enact and Cause to be Published a Code of Laws," and sections 1 and 2 in part are as follows:

Sec. 1. "... That the Revised Laws of Iowa, 1843, hereinafter entitled, and hereinafter amended, be and they are hereby adopted as the laws of this Territory."

Sec. 2. "The said laws, together with such acts as shall be passed at the present session of the Legislative Assembly, shall be indexed and published after the manner of the Iowa Laws of the date aforesaid to which shall prefixed the Declaration of Independence, Constitution of the United States, Ordinance of 1787, the Constitution of the late Provisional Government of Oregon, and the Organic Law of Oregon Territory."

It is a well-known fact that, although authorized to be published, the code was never printed. The reason for this was a controversy which arose between the printer authorized to perform the task and the secretary of the territory. The following letter presents the printer's explanation of the failure to publish the Oregon laws as he had contracted:

"LINN CITY, May 15, 1850

"To the Hon. Samuel Parker, President of the Council,

"Agreeable to a resolution of your Hon. Body passed this morning calling on me as contractor for the printing of the Laws and Journals of the last Legislative Assembly to state to the Hon. Council why the Laws and Journals were not printed in compliance with said resolution I beg leave to make the following report, viz: that

"I made all the necessary arrangements for complying with my contract as printer of said Laws and Journals, by procuring press, paper, workmen and other necessary materials, but owing to not being furnished with copies of the Laws I could not have them printed. It is due to the Secretary of the Territory of Oregon for me to state that at a late date or near the expiration of the time allowed by the Legislative Assembly for the completion of the contract that he proposed to let us have enrolled bills so far as there were any to print from, but

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<sup>34</sup> LAWS OF A GENERAL AND LOCAL NATURE, 1843-49 (1853) 103-108.



stating that a great portion of the bills were not enrolled, and if he could procure an office and suitable place to board he would be pleased to furnish copies. About this time he left, and went below. I then called on Mr. Porter whom I supposed was his deputy. He stated, that if I would pay him I think it was four or five hundred dollars, he would furnish copies. I did not think that I would be justified in doing so, not doubting, however, but that the Legislative Assembly would pay what was right for the copying them, but as it was uncertain whether the price demanded was not too much I declined. This, I believe gentlemen of the Council, is the only reason why the printing was not done according to contract. It has been rumoured that one reason was that the price fixed by the Legislative Assembly was not sufficient to pay. That is not exactly the case. I well knew when I took the contract that the price would not justify me, but I had full confidence that the Hon. Legislative Assembly, when assured of the fact, would fully compensate me. The question then might be asked, why did you not pay for copying said laws and trust the same body for a refund. The answer is simply this, that the first I was authorized to do, the latter I was not.

"I most respectfully subscribe myself,  
"Your Humble Servant,  
"JAMES M. MOORE."<sup>85</sup>

The construction placed upon this Act of September 27, 1849, by the Territorial Supreme Court resulted in a very bitter quarrel over its constitutionality. It was claimed that it contravened section 6 of the Organic Act of 1848 which provided that every act should embrace but one object which must be expressed in its title. Since a number of laws from the REVISED STATUTES OF IOWA, 1843 had been adopted in one act, the law contained more than one object and was therefore unconstitutional. The answer to this contention was that the act of the Legislative Assembly actually embraced but one object, to wit, the adoption of a code of laws for the Territory.

The enemies of Colonel Chapman derisively nicknamed his code the "Steamboat Code" since it carried a miscellaneous cargo. The chief opponent of this code was Amory Holbrook—the new United States district attorney—who had declared the act adopting the code void, and who had applied the imputation of multifariousness to it.<sup>86</sup>

The citizens of the Territory soon became divided in their views on this question and quite naturally those who supported the proponents of the "Chapman Code" favored the constitutionality of the

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<sup>85</sup> Through the courtesy of Nellie B. Pipes, Secretary of the Oregon Historical Society.

<sup>86</sup> 1 ELWOOD EVANS, HISTORY OF THE PACIFIC NORTHWEST: OREGON AND WASHINGTON (Portland, 1889) 330; 1 CHARLES H. CAREY, HISTORY OF OREGON (Portland, 1922) 502.

statute adopting the REVISED STATUTES OF IOWA, 1843—often called the “Big Blue Book” because of its blue board covers and portly size—while those who regarded the adoption of the “Chapman Code” as unconstitutional, in turn, favored the supremacy of the “Little Blue Book” of 1839.

The Supreme Court of Oregon at this time was composed of three justices, Nelson, Strong, and Pratt, who, in addition to their appellate-court duties, also traveled in circuits hearing judicial controversies in the areas composing their respective circuits. The majority of the court, Judges Nelson and Strong, construed this Act of September 27, 1849, as a contravention of the Organic Act and therefore unconstitutional. Judge Pratt, however, took a different view, holding that by adopting several distinct statutes of Iowa in one act the people were adopting an act embracing but a single object, to wit, the adoption of a code of laws for the Territory.

The story of this controversy has been stated in an interesting manner by one of the lawyers of that time:

“The result of these conflicting views of the Judges was that in Judge Nelson’s judicial district, composed of Clackamas, Marion, and Linn counties, and in Judge Strong’s district composed of Clatsop county and the counties north of the Columbia River, the Code of Iowa 1839, adopted by the Provisional Government, was held to be in force. Judge Pratt’s district, composed of all the territory west of the Willamette River, included the counties of Washington, Yamhill, Polk, and Benton, and in this district the ‘Chapman Code’ of the Revised Code of Iowa Statutes of 1843 was recognized as the law in force. In the district of Judges Nelson and Strong, the lawyers would cite the law from the ‘Little Blue Book,’ as the volume of the Statutes of Iowa, 1839 was called. In Judge Pratt’s district the same lawyers would quote from the ‘Big Blue Book’ as the Iowa Code of 1843 was called.”<sup>37</sup>

Referring to this controversy in later years Judge M. P. Deady characterized it as follows:

“From 1850-53 the politics and personalities of the country turned largely on this controversy. The judges were divided over it, editors wrangled about it, orators grew eloquent over it, until the condition of the Big-Bookers and Little-Bookers grew almost as fierce as between the Big-Endians and the Little-Endians of Lilliput, over the momentous question, at which end should an egg be broken.”<sup>38</sup>

<sup>37</sup> James K. Kelly, *History of the Preparation of the First Code of Oregon*, 4 OREGON HISTORICAL QUARTERLY 185, 188.

<sup>38</sup> 1 EVANS, *op. cit. supra* note 36, at 331, quoting from an address by Judge M. P. Deady in 1885 at Portland before a delegation of Iowa editors. See also PORTLAND MORNING OREGONIAN, June 28, 1885.

It has been estimated that, at this time, there were but three or four copies of the Iowa statutes of 1839 in the Territory, and only two copies of the REVISED STATUTES OF IOWA, 1843; and so far as the "Chapman Code" is concerned, it was not published until the latter part of 1853. So much uncertainty and doubt existed concerning the validity of this "Chapman Code" that it became of little value.

The lawyers of Judge Pratt's district having no copies of the "Chapman Code" available had to "get along with little learning and less law"; while in the districts of Judges Strong and Nelson, the "difficulty was scarcely less" serious.<sup>39</sup>

A very interesting study of Oregon's laws was made some years ago by Dr. F. I. Herriott and printed in the ANNALS OF IOWA for 1904. Since it presents a theory as to why these pioneer lawmakers selected the laws of Iowa for the regulation of their private and governmental affairs, instead of selecting the laws of Illinois, Michigan, Ohio, Pennsylvania, New York, Massachusetts, or any other of the states of the American Union, it is herein included in part. Some of the questions asked by him are: Why did they choose the laws of Iowa? Why did the committee first choose the laws of New York (February 18, 1843) only to later put them aside and to choose the laws of a newly organized territory? What prompted the choice of a body of untried laws when they could have selected, from a number of the older states, codes and laws of recognized and accepted standing? "Did the members of that Committee," he asks, ". . . have before them the statutes of those several states and after due examination and deliberation decide that the laws of Iowa were most fit for their circumstance? What suggested and what induced the adoption of the committee's report that the laws of Iowa should be adopted?" The writer then points out that in 1843 Iowa was but a frontier with sparsely settled communities, and that it was unlikely that many, if any, of her settlers had emigrated to Oregon; and the name Iowa was known only to a few persons in the East, let alone to the pioneers of the far Northwest. Dr. Herriott asserts, as his opinion, that it was not an improbable fact that some hardy pioneer had come into possession of a copy of the laws of Iowa of 1839 and had brought the volume with him across the plains to Oregon, and that, since this was the only documentary expression of the printed law within the Territory, the pioneers had no other choice. If this be a correct conclusion, how unfortunate it is that, among the factual details which comprise the history of this early period, no record has been made stating that such a code had been used by the committee. Details

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<sup>39</sup> 1 CAREY, *loc. cit. supra* note 36.

of the early meetings are comparatively replete, and in view of this, it would seem to be even more strange that the minutes of their proceedings make no mention of the existence among the settlers of a book which was to play such an important part in the legal history of the Oregon Territory, as did these Iowa laws of 1839.

Another explanation is ventured by Dr. Herriott as worthy of consideration. It concerns the interest in Oregon displayed by Senator Lewis F. Linn of Missouri, the colleague of Senator Thomas H. Benton, who was likewise a champion of the establishment of American claims to the Oregon country. Senator Linn at various times had introduced in the United States Senate bills to extend the American influence over the disputed territory. One particular bill,<sup>40</sup> introduced by him on December 16, 1841, provided, among other things, for the extension of the civil and criminal laws of Iowa over all the territory included within the Oregon domain. Part of this proposed bill is as follows:

*"Sec. 2. And be it further enacted, That the civil and criminal jurisdiction of the supreme court and district courts of the Territory of Iowa, be, and the same is hereby, extended over the part of the Indian territories lying west of the present limits of the said Territory of Iowa, and south of the forty-ninth degree of north latitude, and west of the Rocky Mountains, and north of the boundary line between the United States and the Republic of Texas, not included within the limits of any State; and also, over the Indian territories comprising the Rocky Mountains and the country between them and the Pacific Ocean, south of Fifty-four degrees and forty minutes of north latitude, and north of the forty-second degree of north latitude; and justices of the peace may be appointed for the said territory, in the same manner and with the same powers as now provided by law in relation to the Territory of Iowa: Provided, etc."*

While this proposed bill was not destined to become law, it did, however, pass the Senate on February 3, 1843, shortly before the second "Wolf Meeting" at which the memorable plea was made for the protection of the women and children of Oregon as well as of cattle, and which plea had been the spark that ignited the dormant hope for a provisional government. Obviously, there was no connection between the two events, but since over a year had elapsed since the introduction of Senator Linn's bill, the settlers of Oregon might very easily have heard of his proposed plan. It might likewise explain the choice of the Iowa laws of 1839 as the official code of Oregon as made

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<sup>40</sup> 2 THOMAS H. BENTON, THIRTY YEARS' VIEW (New York, 1854-1856) 470.

by the vote of the inhabitants at their meeting at Champoeg on July 5, 1843.

This was the opinion of Dr. Herriott, who said :

"Now, it is more than probable that the nature of Linn's bill had by 1843 become known to the pioneers in Oregon. Learning that the laws of Iowa were those urged for their government by their staunchest friends in the halls of Congress, it would have been the natural and diplomatic thing, . . . for the committee . . . to have of set purpose adopted the laws of Iowa because their action would then commend itself to the friends of the Territory in the East."<sup>41</sup>

## V

When the special legislative session of May 2, 1850 met in Oregon City, the Territory of Oregon was still without a published code of its own making. At this session, a committee composed of W. W. Buck and George L. Curry was appointed, pursuant to a resolution duly passed,

"to select and prepare for the press, such Acts of the Assembly as may be of immediate and pressing importance to the people of the Territory, . . . commencing with the Acts on 'Justices of the Peace,' 'Probate Courts,' 'Revenue,' 'Crimes and Punishments,' until twenty acts shall have been printed."

This publication was designed to serve as a code of laws for the Territory, although it obviously covered only a selection of laws. In view of the fact that the committee was directed to select but twenty acts, including the four enumerated above, the compilation became known as the "Twenty Acts."<sup>42</sup> By actual count, however, there are twenty-one acts, instead of twenty, as follows :

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|--------------------------------------|--|
| (1) Probate Courts                   | (11) Bonds and Securities                        |
| (2) Probate Courts Supplement        | (12) Crimes and Punishment                       |
| (3) Probate Clerks                   | (13) Gaming                                      |
| (4) Probate Clerks Supplement        | (14) Jurors                                      |
| (5) Sheriffs Supplement              | (15) Practice                                    |
| (6) Accessory and Collective Revenue | (16) Jurisdiction of Supreme and District Courts |
| (7) Justice of Peace                 | (17) Wills                                       |
| (8) County Treasurer                 | (18) Executive Administration                    |
| (9) Coroners                         | (19) Territorial Roads                           |
| (10) Attachment                      | (20) Supervision                                 |
|                                      | (21) Roads and Highways                          |

<sup>41</sup> Herriott, *supra* note 23, at 147-148; 3 LYMAN, *op. cit. supra* note 1, at 350.

<sup>42</sup> ACTS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF OREGON, 1849 and 1850 (1850). The quotation from the resolution given above is found on p. 180.

Of these important acts, five, viz., attachment, bonds and securities, jurors, practice, and territorial roads, remained at this date (1850) identical in form, or with only a very slight modification, with the laws adopted from the Iowa code of 1839. The remainder had undergone extensive change and revision.

It is now impossible to know just what other acts were contemplated by the action of the Legislative Assembly. Why did not the Assembly enumerate the entire twenty acts desired? Why did it not leave the selection of the entire twenty acts to the committee? Why did it choose to compile but twenty acts and no others? These, and other such questions, might well be asked. Unfortunately, however, the answers will never be known. It may be that the most important acts totaled about twenty in number. Certainly those which were selected to comprise the twenty are justly deserving of a place within the scope of the proposed compilation, although a very important one relating to common schools consisting of thirty-seven sections was for some reason omitted.

In a note appended to the compilation, the committee (the resolution did not designate them a code commission) states that

“. . . They have endeavored to discharge their duty in the publication of the preceding transcript of such laws of the Territory, as they deemed of the most immediate and pressing importance. It is perhaps, necessary to speak of the difficulties they have encountered in the endeavor to discharge their duty. . . .”

The title page of this publication purports to indicate that the “Twenty Acts” contains certain acts passed at the sessions of July 1849 and May 1850. Only one of the acts passed at the May session of 1850—“the Probate Clerk Supplemental”—appears therein, the remainder of the laws for this session being in the laws of 1851. Several of the acts of 1849 included in this volume may have been re-enacted at the May session; most of them, however, were the laws originally borrowed from the Iowa codes of 1839 and 1843, and were re-enacted for this purpose at the September 1849 session. The question might well be asked at this point, whether, by re-enacting certain laws at these sessions for purposes of compilation, the legislature had intended to impliedly repeal all others not so re-enacted. If not, then what was the need of the re-enacting process?

From the laws contained in the “Twenty Acts” it is apparent that those selected were chosen because of the practical character of their content. They were to serve somewhat as a handbook of the important statutes then in force, and were not intended to constitute a code. In fact the “Twenty Acts” does not possess the requisite form of a code.

By popular consent the compilation is, however, frequently spoken of as a code of laws.

## VI

One of the matters of pressing importance which was destined to come before the Legislative Assembly of December 8, 1850, was the revision of the territorial laws. In his message to the legislature, Governor John P. Gaines had referred to the confused condition of the statute law of the Territory, which caused it to be almost inoperative for the public good, and had recommended in part:

"I would most earnestly invite your immediate attention to the condition of the laws of the Territory. It has been said of an ancient tyrant, 'that he posted his laws so high that none of his subjects could read them.' No man's life, liberty, or property, should be subjected to the operation of laws of which he is wholly ignorant, or of which he might not easily obtain information, and yet, such is essentially the condition of the people of this Territory.

"One of the highest compliments due to the people of Oregon, is their love of good order and their strict regard to the rights of each other. But, as the country populates, new interests will arise, and the necessity of well known rules, by which these interests can be regulated and protected, must be obvious to all. Some of the laws now on the Statute Book, are believed by many to have been placed there in violation of their chartered rights, whilst others openly refuse obedience to them for the same reason. These difficulties should at once be gotten rid of, and a code instituted that would command the respect of all our constituents."

Public sentiment supported the recommendations of Governor Gaines. This was reflected by an editorial in the Roseburg WESTERN STAR of December 12, 1850, where, commenting on this message, the editor somewhat satirically said:

". . . He also invited attention to the Laws of Oregon, and intimates, though he had not the impoliteness to say it, that the Legislature would do well to provide some means by which the people might learn of their enactments. Had he recommended the printing of the Laws in pamphlet form for the lawyers, judges and other officers of the government, and publishing them in one or more of the 'people's textbooks' or newspapers for the benefit of the masses of mankind he would have done a thing creditable to his political sagacity, and honorable to him."

That portion of the governor's message relating to laws was submitted by both branches of the legislature to their proper committees. In the Council this was the Judiciary Committee which reported back on December 4, "That in the opinion of the committee on judiciary they should be instructed to write out and report such laws, as in their opinion the wants of the Territory require, without regard to

those laws heretofore passed." Similar action was taken in the House of Representatives.

With both branches of the legislature in agreement that codification and revision of the laws of the Territory should be made, the following joint resolution was introduced by Mr. Fred Waymire:

"Resolved by the Council, the House of Representatives concurring therein, That the Secretary of the Territory be requested to make a list of all the laws passed at the last session of the Legislative Assembly, that have not been repealed at the present session. Also, all the laws passed at the present session of the Legislature, and cause them to be published in the newspapers in this Territory."<sup>43</sup>

At the close of the legislative session the territorial secretary, General Edward Hamilton, requested Judge Mathew P. Deady, a member of the Judiciary Committee of the House of Representatives, to prepare and compile for publication the laws which had been passed, including also the laws of the sessions of September 1849 and May 1850. To these, and certain other laws, which he included on his own responsibility, he added pertinent headnotes, and arranged the materials according to their respective subject matter, thereby producing a code which then was published under the direction of the secretary. This volume took the name of the secretary and was known as the "Hamilton Code." It was the first code to be published in Oregon,<sup>44</sup> but like several later codes was printed in New York City.

The "Hamilton Code" was for the main part based upon the compilation of the "Twenty Acts." Of those laws which comprised the "Twenty Acts," about twelve were incorporated into the "Hamilton Code" with little or no change. Five completely new acts were substituted for similar titles in the "Twenty Acts," while three titles contained in the "Twenty Acts" were omitted entirely from the "Hamilton Code." The remainder of the code consisted of new acts drafted and passed during the session of December 1850.

It is interesting to observe in connection with most of these early laws that very few specific repealing clauses were included. Most acts were repealed by implication. Hence the "Hamilton Code" impliedly repealed all other laws which were inconsistent with the provisions of

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<sup>43</sup> Council Resolution No. 6, Journal of Council, 1850-51, 119.

<sup>44</sup> 7 WILLIAM DRAPER LEWIS, *GREAT AMERICAN LAWYERS* (Philadelphia, 1907) 360, covers biography of Mathew P. Deady, probably copied from Bancroft. See also the following: 2 H. H. BANCROFT, *CHRONICLES OF THE BUILDERS OF THE COMMONWEALTH* (San Francisco, 1891-1892) 475, covering biography of Mathew P. Deady. Miss Pipes states that, since Deady furnished the data and actually wrote part of the biography, he, himself, is authority for his statement as to his authorship of the code.



that code. Other acts omitted from the "Hamilton Code," and not specifically repealed by it, were left in a state of uncertain validity. Such a practice could not result in other than confusion.

## VII

The uncertainty as to what laws were in force due to the controversy over the "Blue Books" ("Little Blue Book," or the "Thirty-seven Acts," versus the "Big Blue Book," or the "Chapman Code") induced the legislature to pass the Act of January 12, 1853,<sup>45</sup> which provided for a code commission of three members to be selected by the legislature to draft a code of laws which should be submitted to the next session of the legislature, scheduled to convene in December 1853. The legislature then proceeded to elect the following commissioners: James K. Kelly of Clackamas County, Reuben P. Boise of Polk County, and Daniel B. Bigelow of Thurston County, now a county in the state of Washington.

The scope of the duties of the commission were set forth in section 4 of the act creating the commission:

"The said commissioners shall report the code of laws prepared by them, with such suggestions and recommendations, as they may deem advisable, to the next Legislative Assembly on or before the second Monday of the Regular session of the same, which report shall be reprinted in some convenient form."

The story of the proceedings and work of the commission can best be told in the exact language of one of those commissioners, Mr. Kelly, who has said:<sup>46</sup>

"Being first elected, I acted as chairman of the board, and notified the other commissioners of the time of our first meeting, which took place sometime in March, 1853. We met in the council chamber of the legislative building, where all our subsequent meetings were held.

"The first two or three days were occupied in discussing the general outline of our duties and the kind of code to be prepared. By common consent we agreed to accept the New York code of practice as the basis of our own, but with the notable exception in regard to proceedings in Equity. Mr. Bigelow strongly insisted upon having no separate court of equity or of equity proceedings, but urged that we follow the example of California in this respect. Mr. Boise and I differed from Mr. Bigelow. We contended that in the Organic Act of August 14, 1848, a separate system of equity proceedings was con-

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<sup>45</sup> General Laws Oregon Territory 1852, 57-58.

<sup>46</sup> Kelly, *supra* note 37, at 190-191.

templated, wherein it provided that 'each district court,' or judge thereof shall appoint its clerk, who shall be the register in chancery.' . . .<sup>47</sup>

"The system of equity jurisprudence and proceedings in equity adopted by the first code commission has now prevailed in Oregon for forty years, and during all that time, I think has met with the approbation of both bench and bar."<sup>48</sup>

"Another thing agreed upon by the commissioners was that the code should be prepared so that it might be adopted by the Legislative Assembly in several acts instead of one, as was done in the Chapman Code in 1850. This was done in order to comply with the provisions of the Organic Law, which required that every act should embrace but one object.

"These preliminaries being settled, it was agreed that each commissioner should take one subject and prepare the draft for an act upon that particular branch of the law. During the preparation of these drafts the commissioners held frequent consultations, as often as once or twice a week, to discuss and agree upon the proper phraseology to be adopted, or arrangement of subject matter in the proposed act.

"It was agreed among us that Mr. Boise should prepare the act relating to executors and administrators, and also proceedings in the probate courts.

"To Mr. Bigelow was assigned the duty of preparing the act relating to crimes and misdemeanors, and to regulate criminal proceedings.

"I undertook to prepare the code of civil procedure in actions at law and suits in equity.

"These three subjects embraced the greater part of the laws which we undertook to prepare, and after their completion, the remaining portion of our work was comparatively easy and brief. According to my recollection, it was completed in the latter part of the summer or early fall of 1853. We prepared the draft for an entirely new code of statutory laws, with the single exception of the law relating to wills. This had been enacted by the Legislative Assembly in 1849, at its first session, the main feature of it being a transcript from the Missouri statutes on the same subject. As this was one of the first acts passed by our legislature, we adopted it in our draft, with only a few verbal changes."

Mr. Kelly then proceeds to state that about two hundred copies of their report containing the proposed code were printed by the state printer, Asahel Bush, and assembled into octavo volume of 396 pages<sup>49</sup> without binding, since no facilities then existed in Oregon for the binding of books. This form was chosen because the different parts

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<sup>47</sup> 9 STAT. 329, sec. 14 (1848).

<sup>48</sup> Sec. 9-102 O. C. L. A. 1940.

<sup>49</sup> According to the McMurtrie survey, only three complete copies of this REPORT OF THE COMMISSIONERS ELECTED TO PREPARE A CODE OF LAWS OF THE TERRITORY OF OREGON OF 1853 have been located. They are in the law libraries of Harvard, Library of Congress, and the University of Washington.

could be easily separated, which, when titles and emergency clauses had been added, could then be introduced into the legislature as separate bills. This would avoid the difficulty which the "Chapman Code" had experienced at the hands of the Supreme Court several years before.

In order to facilitate the passage of these bills (there was, however, apparently no possibility that any of them would be defeated), Mr. Kelly and Mr. Boise stood for election to the Council and House of Representatives respectively, and were duly elected. Each was appointed chairman of the judiciary committee of his respective house and personally sponsored the introduction of certain of the bills.

In such a manner was the code of 1854, largely influenced by and based in part upon the laws of New York,<sup>50</sup> prepared and enacted into law. Mr. Bigelow had taken no part in the enactment of the final chapter of the story of this code because in December 1853 Congress had provided for the organization of the counties north of the Columbia River as the Territory of Washington.

The facilities of the territorial printer, as pointed out above, did not permit the proper printing or binding of such a volume as this code would be, so Mr. Bush arranged to have the work done for him in New York City. When the codes were completed all but two hundred copies<sup>51</sup> were shipped to Oregon by sailing ship via Cape Horn. They never reached their destination. "They were either shipwrecked or so badly damaged that they were worthless."<sup>52</sup> The remainder of the consignment was shipped by way of the Isthmus of Panama, and in due time arrived safely. The Salem OREGON STATESMAN of September 5, 1854 ran an advertisement for the sale of the book, and called attention to it in a news item as follows:

"The Code, embodying all laws in force in Oregon, is ready for distribution. Persons entitled, and County Auditors, can obtain them by calling upon, or sending to the Secretary of the Territory. Mr. Terry has them for sale as will be seen by advertisement. It is a volume of 592 pages, bound in law style, comprising a perfect index, with full

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<sup>50</sup> STATUTES OF OREGON, fifth and sixth sessions (1855) preface.

<sup>51</sup> All historians state that two hundred copies were sent via Panama. Mr. Bush states that he sent five hundred copies by each of the routes; but in an article in the Salem OREGON STATESMAN, Jan. 30, 1855, he says, "We had 750 copies of Oregon Statutes on board the *Southerner* besides a miscellaneous library." He seems to have misstated the facts in one of the statements, but, since his letter to the Legislature is in the nature of an official document, it is probably a more accurate statement thereof.

<sup>52</sup> No one seems to know which was the case, but they probably never arrived, since the *Southerner* was shipwrecked ten miles south of Cape Flattery, and according to the OREGON STATESMAN of Jan. 30, 1855, was a total loss. Only the passengers and crew were saved.

marginal notes and references to all the New York Reports. These references to cases decided by the first jurists of the land cannot but add much to the value of the Statutes."<sup>53</sup>

Mr. Bush told the story of the loss of this code in an interesting manner when he memorialized the Legislative Assembly of 1855 to authorize the publication of a new edition of the statutes:

"The 'Act to provide for the public printing, and the distribution of the laws and journals,' requires the Territorial Printer to cause to be printed one thousand copies of the laws. . . . In pursuance of the requirements of that act, the undersigned caused to be printed and bound one thousand copies of the laws of a general nature enacted at the last session, in the City of New York. Five hundred copies of the same were forwarded via the Isthmus, by Express, for immediate distribution. In view of the heavy expense of that mode of transportation, the Secretary of the Territory concurred in the propriety of shipping the remaining five hundred copies via Cape Horn, by which equally safe route they would be received as early as desired. With his sanction, I therefore shipped five hundred copies on the clipper to San Francisco, with instructions to Messrs. Abernathy, Clark & Co., of that city, to forward on steamer to Oregon. They were received at San Francisco, and placed upon the steamship Southerner, and in consequence of the casualty which has happened to that vessel, I fear the books are lost or so damaged as to be unfit for use. If so, the matter must all be re-set, as the work was not stereotyped."<sup>54</sup>

The loss of all but a few copies of the code of 1854 necessitated the publication of a new edition. This edition was also printed and bound in New York City under the legislative authority<sup>55</sup> provided by the Legislative Assembly of December 1854, and was identical with the STATUTES OF OREGON (1854) except that the laws enacted at the December session were also incorporated into it. Thus the STATUTES OF OREGON (1855) is in reality a revised edition of the STATUTES OF OREGON (1854). Like THE ARCHIVES, the "Twenty Acts," and the STATUTES OF OREGON (1854), the STATUTES OF OREGON (1855) has become much sought for, but it is in no way as scarce and costly as those codes which preceded it.

The code adopted in 1854, and again in 1855, was frequently called the "Oregon Code." It has been revised several times in order to adapt it to the changed conditions of statehood, but in its main features it has remained substantially the same as when prepared by the first code commissioners in 1853.

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<sup>53</sup> Supplied through the courtesy of Miss Nellie B. Pipes.

<sup>54</sup> Letter to the Legislative Assembly, Jan. 15, 1855.

<sup>55</sup> House Joint Resolution No. 24, Jan. 1855, in STATUTES OF OREGON, fifth and sixth sessions (1855).

## VIII

The STATUTES OF OREGON (1855) remained in force as the "Oregon Code" for eight years, and until the "Deady Code" of 1862 was enacted into law.

The Deady codes—of Civil Procedure (1862) and Criminal Procedure (1864)—were in reality the work of a code commission authorized by joint resolution of the Legislative Assembly of 1860. That resolution in part provided:

"That a committee of three be raised . . . whose duty it shall be to revise the statutes of the State and report a complete system of laws, such as in their opinion may be suited to the wants of the people, taking our existing statutes as a basis for their report, and dividing the same into appropriate subdivisions and chapters. . . ."<sup>56</sup>

The resolution likewise provided that the committee file its report with the governor who was requested to immediately convene the legislature in special session to consider the report.

This code commission was the second such commission to have been created in Oregon for the purpose of code revision.<sup>57</sup> The personnel consisted of Mathew P. Deady, Addison C. Gibbs, and James K. Kelly, and the code which they drafted for legislative approval was adopted on September 8, 1862.

As in the case of the statutes of 1853, the commission was given almost unlimited power to modify and change the existing laws of the state, and to write into the code such amendments, substitutions, and additions, as in their judgment, or by the decisions of the Supreme Court, may have seemed desirable. The latitude of their authority was very broad, but as in all such cases the public was protected from unwise or unjustified exercise of such authority in the review of their report, which had to receive legislative approval. It does not appear that any unwarranted liberties were taken with the existing laws of Oregon by the commission, nor as many innovations made as were made by the code commissioner in the revision of 1853.

The codes of 1862-64 were not free from objection and criticism. Some fear existed that the Legislative Assembly of 1864 might not approve the remaining portions thereof, but whether such fear was or was not well grounded, the governor's plea for acceptance of the report prevailed. He, himself, had been a member of the commission as it was first composed in 1860 and had aided in the drafting of the CODE OF CIVIL PROCEDURE. No one was more able to defend it from

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<sup>56</sup> Joint Resolution, in Laws of Oregon 1860.

<sup>57</sup> The first one was in 1853.

the criticism of its enemies, because no one, aside from the other members of the commission, understood better than did he the great improvement in legal procedure which the code would produce. This portion of the legislative message of Governor Gibbs is as interesting as it is instructive. He said in part:

"At the regular session of the Legislative Assembly in the year 1860, a code commission was appointed to prepare a code, to submit to the succeeding assembly. One of the gentlemen named on the commission, being desirous of going East soon after, declined the labor, and the remaining members of the commission, induced Judge Deady to take his place.

"At the regular session of the assembly for the year 1862, the commission reported a complete code of civil procedure, entitled 'An act to provide a code of civil procedure,' together with the following general laws:

"An Act providing for private incorporation and the appropriation of private property therefor.

"An Act to provide for limited partnerships.

"An Act to regulate marriages.

"An Act providing for the workers of public roads and highways.

"These acts, including the one to provide a code of civil procedure, were passed at that session of the assembly, after careful consideration, substantially as reported.

"At the same session, the assembly passed an act authorizing Judge Deady to complete the code, and report to the next session of the assembly.

"From an informal report to the executive office, I am authorized to state to you, that the commissioner is prepared to report to you, at this session, 'An act to establish a code of criminal procedure and to define crimes and their punishments,' consisting of forty-eight chapters, and seven hundred and thirty sections. Also, an act of twelve chapters, regulating the civil and criminal procedure in Justice's courts, in cases where the procedure in the courts of record is inadequate or unsuited to the subject. These two acts complete the code of the state in all matters relating to proceedings in courts, and everything connected therewith. From examination of the work as it has progressed, I feel warranted in commending it to you, and hope it will receive your careful and favorable consideration. It is much needed in the state.

"Since the passage of the code of civil procedure, its merits and demerits have been very freely canvassed at the bar and among the people. The principal cause of complaint has been the insufficiency of the index. This complaint may be admitted to be true in a good measure, but the publication was a temporary one, in pamphlet form, and the time limited in which to prepare the index. However this may be, the index does not affect the merits of the code."<sup>58</sup>

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<sup>58</sup> Oregon House Journal, 1864, appendix.

## IX

The "Deady Code" of 1862 with the Oregon laws which supplemented it was used continuously until Judge Deady published in one volume his *ORGANIC AND OTHER GENERAL LAWS OF OREGON* covering the legislative enactments of Oregon from 1845-1864, which was published in Portland in 1866. This volume contained his codes of Criminal Procedure and the Justice Code which he had prepared and reported to the Legislative Assembly that convened on September 12, 1864. This codification was made pursuant to the Act of October 16, 1862, which authorized a completely new code. It was passed by this Legislative Assembly in the same manner as submitted to them by the commissioner.

The volume is in reality the complete report of the code commission of Oregon authorized by the joint resolution of the Legislative Assembly in 1860 and continued by section three of the Act of October 16, 1862. It will be recalled that part of this report was published as a Code of Civil Procedure in 1862; while the Code of Criminal Procedure, the Penal Code, the Justice Code, and certain other acts were not finished until just before the Legislative Assembly convened in 1864. In its published form the *ORGANIC AND OTHER GENERAL LAWS OF OREGON, 1845-1864* is, however, in all respects a complete code. It was authorized by the Legislative Assembly at its session of 1864,<sup>59</sup> and was compiled by Judge Deady under an appointment from the governor.

Few persons can fully understand the difficulties under which Judge Deady labored to complete this task. Few persons, however, could have been better qualified than he to perform it. His own feeling about the undertaking is expressed in his preface to the *ORGANIC AND OTHER GENERAL LAWS OF OREGON, 1845-1864*, as follows:

"After a long and unavoidable delay, this work is brought to a close. No labor has been spared to make it what the Assembly intended—a complete compilation of 'all the general laws of Oregon' arranged 'in the order and method of a Code.' The reader may never fully appreciate the trouble and difficulty involved in the compilation, in a codified form of the scattered and oft amended statutes of the State and Territory, covering a period of ten years of almost annual legislation. The change in the nomenclature of offices and officers, and the new distribution of their powers and duties, caused by the transition from a Territorial to a State government, made the labor of compiling

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<sup>59</sup> Act of October 21, 1864, in the *ORGANIC AND OTHER GENERAL LAWS OF OREGON, 1845-1864*, compiled by Mathew P. Deady (Portland, 1866) 134-138.

the statutes of the former period, almost equivalent to re-drafting them."

The act of the Legislative Assembly which provided for the complete compilation and codification of all the laws of Oregon from 1843 to date (1864) was entitled, "An Act for collecting, compiling and printing the laws of Oregon." In order to better understand the scope of the compilation intended by the Legislative Assembly, a portion of the act is set forth, as follows:

"Sec. 1. That the governor be and he is authorized and required to appoint a suitable commissioner, whose duty it shall be, immediately after the adjournment of this session of the Legislative Assembly, to collect, in the order and method of a code, all the general laws of Oregon in force, under their appropriate heads and titles, with marginal notes and references, and also a syllabus of each section at the beginning of each chapter or title, as the case may be, and well digested alphabetical index of the whole. And in the compilation of such laws, such commissioner shall omit all phrases, terms, names, and expressions inconsistent with the Constitution of this State, and shall substitute therefor, such phrases, terms, names, and expressions, as are authorized and provided by such Constitution."

In the preparation of the two Deady codes, Judge Deady was nominally assisted by others, but their efforts were addressed to the legislature, while he did the actual work of preparation, much of it without even the assistance of an amanuensis.<sup>60</sup>

How very satisfactorily his work was done may be seen from the fact that in substance and form the various Deady codes have been the foundation of all subsequent codifications, and no complete legislative revision has ever been deemed necessary since 1872. His work has been greatly increased in usefulness by legal and historical notes and annotations, prepared and included therein by him.

In 1872 the Legislative Assembly again provided "for collecting, compiling and printing" the laws of Oregon under the supervision of a new code commission specifically named by the act itself.<sup>61</sup> This compilation, it may be noted, was authorized by a special act of the legislature in the same manner as the authorization of the "Deady Code" of 1866 instead of by joint resolution as was done in the case of the revision authorized in 1860. The methods selected represent different ways of attaining the same end, and do not affect the validity or probative force of the compilation prepared in pursuance of such authority.

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<sup>60</sup> 7 LEWIS, *op. cit. supra* note 44, at 375.

<sup>61</sup> Act of October 22, 1872, Laws of Oregon 1872, 71.



Section 1 of the act authorizing the revision of 1872 was couched in almost the identical language as the Act of October 21, 1864, and particularly directed the attention of the compilers to the wish of the legislature to omit unnecessary language, and phrases and terms inconsistent with the Constitution of the state. It reads:

"There is hereby constituted and appointed a commission, consisting of Mathew P. Deady and Sylvester C. Simpson, who shall be known and designated as the Code Commissioners, whose duty it shall be, immediately after the adjournment of this session of the Legislative Assembly, to collect, in the order and method of a code, all of the general laws of Oregon in force, under their appropriate heads and titles, with marginal notes and references, and also a syllabus of each section at the beginning of each chapter or title, as the case may be, and a well-digested, alphabetical index of the whole. In the compilation of such laws, the commissioners shall omit all phrases, terms, names and expressions inconsistent with the Constitution of this state, and shall substitute therefor such phrases, terms, names and expressions, as are authorized and provided by such Constitution."

Soon after the compilation was commenced, Mr. Simpson resigned from the commission and the governor appointed Lafayette Lane to take his place. The code which resulted from their collaboration has been known as the "Deady and Lane Code" of Oregon and was published in San Francisco in 1874.

Oregon has had several later and no less important codifications; but they have been based upon the prior codifications and revisions and present no unusual nor unique characteristics.

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