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COMPILING THE TERRITORIAL CODES OF WASHINGTON

The story of the codes of laws which have been used in the Territory of Washington is little known. Little has been said of their influence on the legal history of the territory and state, and less has been recorded concerning those whose legal skill has produced these codifications. Some phases of the historical influences which form the background of the codes of Washington Territory, and the important parts played by their makers, have become either lost or shrouded in oblivion. In the not far distant future the stories of other phases of this legal history may pass from the memory of man and become likewise forgotten.

I.

The Oregon Territory, at the time when its area was greatest, included within its boundaries, in addition to the present state of Oregon, the vast expanse of lands now included in the states of Washington, Idaho, and part of Montana. Since this entire area constituted the Oregon Territory, the laws of Oregon prior to the partition of 1854 were the laws of those states and portions of states since carved from it. It follows then that the laws in force in Oregon at the time Washington was made a separate territory likewise had been the laws enforced in the area north of the Columbia River for the thirteen years preceding.

It does not follow, because of the existence of a certain body of laws within a given area at the time it is made into a territory, that these laws shall become *ipso facto* the laws of the new territory. The newly created territorial legislature may, if it so desires, adopt any or all of them as the law of the new territory, or may reject them *in toto* and then proceed to enact a completely different body of statute law. However this may be, it is reasonable to presume that familiarity with the laws previously existent will influence in a positive manner the legislation subsequently enacted by the legislature of the newly creat-

ed territory. Such influence was manifested in the selection of laws for the new territory of Washington in two definite ways. In the first place, the Congress of the United States included in the Organic Act creating the new territory a provision,¹ continuing in force in Washington Territory all laws of Oregon Territory, whether of federal or territorial origin, which were applicable to the new territory.

This influence of the Oregon law was, in the second place, expressed by the first territorial legislature in its adoption of certain of the laws of Oregon which had been in force in the counties north of the Columbia. The laws of Oregon which were made a part of the statute law of Washington Territory in this manner were mostly from the political code of Oregon, and included the election law, and other laws with which the people were quite familiar.

II.

The first session of the territorial legislature of Washington convened in Olympia, on February 28, 1854. It is interesting to note that the first bill introduced into the House of Representatives was "An act to provide for the appointment of a board of commissioners to prepare a code of laws for the territory of Washington." The importance given to the need for drafting a code of laws for the territory was partly a reflection of that public sentiment which sought the enactment of a complete system of laws especially applicable to the new territory. Such a sentiment was crystallized in an editorial comment² by one of the leading newspapers in which the editor expressed a feeling that the laws "should be few and well ordered," and "that none should be enacted without suitable deliberation, and with an object to their being favorably received, enforced, and applicable to this portion of the Pacific Coast." The editorial advised the repeal of the "Oregon Steamboat Code," and "Blue Books," which had been the subject of so much confusion and objection south of the Columbia River,³ and urged the appointment of a code commission to complete a code of laws. What

¹ Act. of March 2, 1853, Ch. 90, Sec. 12, 10 Stat. 177.

² Olympia (Wash.) *The Pioneer and Democrat*, February 11, 1854.

may appear to the reader as somewhat amusing was his argument that the new territory was now "of age" and that the "people did not wish to be tributary to Oregon for our laws."

Governor Stevens likewise sensed the importance of the matter of such legislation, and in his message to his first legislature urged that certain of the laws of Oregon be re-enacted:

"In the matter of legislation," he said, "I would suggest that, as there seems to be some ambiguity as to the state of statute law at present in force in this Territory, some course be adopted which, while it frees us from the present uncertainty, shall not render the community entirely destitute of law. Such a result might be effected, by enacting such of the laws of Oregon as still remain applicable to this Territory, and by having at the same time suitable persons occupied in preparing such acts as the present exigencies may need."⁴

The act which provided for the code commission was passed on March 3,⁵ and by its terms appointed as members thereof Edward Lander, then United States District Attorney, Victor Monroe and William Strong, both of whom were distinguished judges of the territory. It was to be their duty to prepare such laws as in their judgment would be applicable to, and necessary for preserving the public peace and well being of the inhabitants of the territory.

The personnel of the commission represented some of the most brilliant legal minds within the new territory. In his *History of Washington*, Snowden has said that:

"Wiser selections could not have been made. The commissioners were already trained in the law, familiar with its forms, and experienced in its administration. They knew better than anybody else then in the territory could know, what would be required to set up a government, maintain public order, provide for public improvements, establish courts and regulate the practice in them; to define crimes and various offenses, and prescribe their punishment, as well as to provide for levying, collecting and disbursing revenue. They knew also how to avail themselves of the experience; and they knew how to put all these things in form, so that they would conform to the organic law, and stand the test of administration."⁶

³ Arthur S. Beardsley, "Code Making in Early Oregon," in *The Pacific Northwest Quarterly* (Seattle, 1936), xxvii, 10.

⁴ *Journal of the House of Representatives*, 1854, 20.

⁵ *Laws of Washington*, 1854, 451.

⁶ C. A. Snowden, *History of Washington* (New York, 1909), iii, 237.

The act creating the code commission required the commissioners to submit to the standing committees of the legislature from day to day such laws as they had drafted. This was done to avoid any difficulty over the interpretation of section six of the *Organic Act* which required that each act should embrace but one object to be expressed in its title. Doubtless, the memory of the quarrel over the validity of the "Steamboat Code" of Oregon was still fresh in their minds.⁷ The presence upon the code commission of Judge Strong was another check against any attempt that might be made to adopt a code in one single act. Judge Strong, while sitting as a judge of the Supreme Court of Oregon Territory, had already declared that such a procedure was in conflict with a provision in the *Organic Act* of Oregon Territory identical to that of section six of the *Organic Act* of Washington. The powers of the commission were very broad and were limited only by the need of preserving the public peace and well-being of the inhabitants.

Included in the sixty-five acts of a general nature enacted at this session were the various practice and procedural codes, such as the *Civil Practice Act*, the *Criminal Code*, the *Criminal Practice Act*, the *Probate Code*, and the *Justice Practice Code*. It was in connection with the drafting of these codes that the work of the code commission was best performed. The *Civil Practice Act* was in the main based upon the law of New York with occasional interpretations from Indiana and Ohio. These were the states in which the commissioners had resided before coming to the Oregon country, and naturally represented the laws with which they were most familiar. The other acts show unmistakably the influence of the Oregon laws which had been borrowed from the laws of Iowa.

After a session lasting sixty-four days, the legislature adjourned on May 1, 1854. Shortly before adjournment the code commission submitted its final report, and in a letter to the legislature expressed its feeling of the honor of having been able to assist in framing a body of laws. It commented upon the difficulties under which its work had been done, the limited time allowed in which to do it, and the "want of the statutes of

⁷ Beardsley, "Code Making in Early Oregon," 10.

most of the older states." The commissioners recognized the probable presence of many errors which would require correction at some future time, but expressed the hope that they were not such as would create serious embarrassments in the administration of justice.

Such historians as have discussed the work of this first legislature have given it high praise. They have referred to the fact that the laws passed at this session remained the law of the territory for many years, and that subsequent amendments in no way improved the "system [of law] which had emanated from those two vigorous legal minds and learned jurists, Edward Lander and William Strong."⁸

III.

In commenting upon the unwise legislative attempts to improve the quality of the provisions of the *Code of 1854*, Judge Elwood Evans spoke with a first-hand acquaintance, although his comments were written many years after these attempts at codification had been made. He had been closely associated with these subsequent revisions of statutory law. In fact, he had served as code commissioner during several of the legislative sessions which had provided the *Codes of 1859, 1863, 1871, and 1873* respectively. His reference to the "creditable system" of laws adopted in 1854 and the innovations made by these later revisions must not be construed as reflecting a quality of impotence in the later codes, nor a criticism of his own contributions to the statute law of Washington. The thought which he endeavored to express was that of the enduring quality of the *Code of 1854*. He regarded it in much the same manner as it was referred to by Judge Lander, who characterized it as constituting a "body of laws which are to become the foundation of jurisprudence in our young Territory."

The revisions of the *Code of 1854* which were made in 1859, 1863, 1869, 1871, and 1873 respectively, had as their object the perfection of the acts of civil procedure and practice,

⁸ Elwood Evans, "Political and local history of Washington as a separate Territorial Government . . ." in *History of The Pacific Northwest: Oregon and Washington* (Portland, Ore., 1889), I, 466. Evans for some reason omits all reference to Victor Monroe.

criminal procedure, probate procedure, and justice court procedure. They were complete codes of these statutory practices in much the same form as similar laws are now codified in several states—California being a typical example. With the exception of the *Code of 1869*, they are not to be regarded as general codes or compilations; nor should they be compared with the expertly developed codes of the present day, except in so far as they were then, as now, the measure of the extent of social and economic relations.

The first agitation for a revision of the *Code of 1854* began in 1857. The *Code of 1854* had been in operation less than three years when the territorial legislature considered a joint resolution to appoint a committee of five members to “inquire into the expediency of appointing a commission to revise the laws of this Territory.” This committee on December 24, 1857, recommended that a committee from both branches of the legislature be appointed as a commission to compile and codify the laws of the territory prior to the opening of the next session of the legislative assembly.⁹

This resolution had originated in the House of Representatives, and although it was accepted by the Council on December 24, it was displaced by Council Joint Resolution No. 2¹⁰ which was agreed to by the House of Representatives and became effective on January 6, 1858. The latter resolution was designed to relieve the legislature from the arduous task of code revision and to appoint a commission of experts to perform this duty. By its terms it provided for the appointment of William Strong, Selucius Garfield, and Butler P. Anderson to act as code commissioners to revise and compile the laws of Washington Territory¹¹ and to report their labor to the next legislative session (1858).

Probably the report of this code commission was for the most part the work of Mr. Anderson, who was then living in Olympia. There is nothing to show that the other commissioners contributed anything toward it. In fact, the joint resolution passed by the next succeeding legislature on December 16,

⁹ *Journal of the Council*, 1857-58, 49.

¹⁰ *Ibid.*, 62.

¹¹ *Laws of Washington*, 1857-58, 69.

1859, hinted as much. It referred to the report as "made by B. P. Anderson, Esq., one member of the commission appointed at the last session . . . to revise and compile the laws. . . ." ¹² The purpose of this resolution of December 16, 1859, was to "take into consideration and recommend some course to be pursued relative to the report." ¹³

When the legislature convened in December 1858, Mr. Anderson addressed a letter to the Speaker ¹⁴ of the House of Representatives advising him that, as one of the code commissioners, he had devoted his spare time to the task of compiling the statutes, and that he had covered about one-third of the laws. He stated that a complete "revision" had not been attempted; and that more time would be required if the legislature desired the compilation to be completed at that time.

The code, which Mr. Anderson presented, was made the subject of a joint resolution ¹⁵ passed December 14, 1858, creating a special joint committee of members from both houses "to take into consideration and recommend some course to be pursued . . . relative to the report" The special joint committee, speaking through its chairman, reported to the legislature December 16 ¹⁶ "that about two-thirds of said laws have been compiled, and that twenty-five days will be required to finish the compilation. Therefore, the committee have instructed me to recommend that B. P. Anderson, Esq., be requested to complete the compilation, and report the same to this Legislative Assembly on or before the 20th day of January, 1859."

On the 19th day of January, Mr. Anderson addressed another letter to the Speaker of the House of Representatives, advising him that the work of compiling the laws had been completed, and had been turned over to the legislative committee.

¹² *Laws of Washington*, 1858-59, 67-68.

¹³ Judge Strong had previously served on the Code Commission of 1854 and was at this time an associate justice of the Supreme Court; Butler P. Anderson and Selucius Garfield were both prominent members of the territorial bar. Mr. Anderson had been prosecuting attorney of the territory. Mr. Garfield, a resident of Seattle, later served as Surveyor-General, Delegate to Congress, and Collector of Customs. He was famed as an orator of unusual ability.

¹⁴ *Journal of the House of Representatives*, 1858-59, 7-8.

¹⁵ *Laws of Washington*, 1858-59, 67; *Journal of the Council* 1858-59, 25.

¹⁶ *Journal of the House of Representatives*, 1858-59, 34; *Journal of the Council*, 1858-59, 30.

He called particular attention to the fact that only the general laws had been codified, and that private and local laws had been purposely omitted, as well as those which were either obsolete or had been expressly repealed.

After considering the proposed *Code of 1859* (1860) this select committee, again speaking through its chairman, J. D. Biles, on January 20th reported to the legislature¹⁷ that they had examined the report of Butler P. Anderson, and that it was what it purported to be, an all-sufficient revision and compilation of the laws of Washington Territory. The committee concluded its report by recommending that the proposed code be "laid upon the table of the House," which was done. There it remained until it was revived by the legislative session of 1859-60.

Political squabbles and personal animosities kept the report of Mr. Anderson from favorable consideration for some time after the legislative session of 1859-60 had begun. The controversy concerned in no way the qualifications of Mr. Anderson as a codifier nor the quality of his labors. It was rather a question of whether the territory or the United States should provide the compensation for the work of preparing the compilation and the funds for printing it. The Congress had provided most of the costs of previous printings of the laws and the codes, although the expenses incident to the preparation of the same had been recognized as a proper territorial expense.

The policy of opposition to the adoption of this *Code of 1859* (1860) was largely reflected in the activities of H. J. G. Maxon, of Clark county. On the 24th of January, 1859, Mr. Maxon introduced a resolution into the Council which stated in its preamble that¹⁸

"Whereas, it is the opinion of this council that the joint resolution passed by the last legislature, authorizing a board of commissioners to revise and compile the laws of Washington Territory, was not complied with, and that the compilation made by B. P. Anderson, Esq., was not authorized; and

"Whereas, we are of opinion that this legislature and the people of the territory are responsible for, and that the territorial treasury is liable to be drawn upon for said compilation; therefore

¹⁷ *Ibid.*, 166.

¹⁸ *Journal of the Council*, 1858-59, 176.

“Resolved, that the President of the Council be, and he is hereby, instructed to address a note to B. P. Anderson, Esq., asking him to communicate in writing to this body that he will, in no event, claim of this territory, whether as a part of the commission, or as an individual acting upon his own responsibility, (until authorized by the present legislature,) any compensation whatever from the treasury of said territory, to the end that the whole subject under consideration may be spread upon the journals, and thus be made a matter of record.”

Apparently two reasons were in Mr. Maxon's mind for introducing the above resolution. Both were extremely technical in their character and probably reflected a personal antipathy toward a revision of the Code. The joint resolution which had been adopted on January 6, 1858, providing for the code commission, had stated that “. . . it shall be their [commissioners'] duty to report the result of their labors to the next legislative assembly; Provided, however, that in no event shall the territorial treasury be drawn upon for said revision. And provided further, that in case any of the above named commissioners refuse to act as such, the Governor of this Territory may appoint some suitable person to fill the vacancy occasioned by such refusal.”¹⁹ Two members of the said commission had refused to act; and it was evident, notwithstanding the language of the resolution of January 6, 1858, that the territory would be called upon to reimburse Mr. Anderson for his labors. So, if the resolution of January 6, 1858 was to be given a strict interpretation, it had not, as Mr. Maxon contended, been complied with. Mr. Maxon apparently was willing to waive the first objection if Mr. Anderson was willing to look to the United States rather than to the territory for his remuneration. In the meantime, the House had received House Bill No. 57 providing for the publication of the compiled laws of Washington Territory. The Council was notified of the introduction of this bill on January 27, 1859.

Anticipating a negative reply from Mr. Anderson to this resolution of January 24, 1859, Mr. Maxon introduced into the Council on January 27th a resolution addressed to the public printer, Mr. Furste,²⁰

¹⁹ *Laws of Washington*, 1857-58, 69.

²⁰ *Journal of the Council*, 1858-59, 192.

“asking him to communicate in writing, distinctly stating whether or not he is willing to print the revision and compilation of laws of Washington Territory, made by B. P. Anderson, Esq.; and should such willingness be expressed, that he be asked to state, unequivocally, that in no event will he look to Washington Territory, (or the treasury thereof), for any portion of the cost of the printing of said revision and compilation.”

Written replies were received by the Council on January 28, 1859, from both Mr. Anderson and Mr. Furste. Their contents are not stated in the Council proceedings but the inference is clear that in both cases the answer was in the negative. On motion of Mr. Maxon, the reply was, in each case, referred to the Ways and Means Committee—an appropriate place in which to bury them.²¹

The day following the receipt of the replies from Mr. Anderson and Mr. Furste, (January 29, 1859) the chairman of the Judiciary committee, Mr. Maxon, introduced Council Bill No. 31, entitled, “An act to provide for the appointment of a board of commissioners to prepare, revise and compile a code of laws for Washington Territory.”

While these proceedings were going on in the Council, the House had passed²² a bill to pay for the cost of Mr. Anderson’s compilation, which in the Council reached two readings, and was then referred to the committee on Ways and Means. The committee reported the bill back to the Council without recommendation, and this on being ordered to a third reading, was on the motion of Mr. Maxon laid on the table and made a special order for the fourth of February ensuing. This was a death blow to the bill for the payment of Mr. Anderson’s services, since February 4 was to be the day after the constitutional limit of

²¹ At this point it would seem appropriate to discuss the significance of the constantly recurring reference to the implied obligation of the United States to pay for the printing of the laws of the territory. This was an obligation which the federal government had assumed from the beginning of the territory. This responsibility of the federal government explains the annual attempts made to revise the laws. The United States paid the bill. While the records show a persistent demand from the Governor, the public, and the press for a complete codification of the laws, the legislative assembly had just as persistently refused to grant their request, and had endeavored to placate the public by reenactments of the practice codes as part of the session laws, knowing that these costs would be assumed by the federal government, whereas the cost of a complete codification might not be assumed. Hence the controversy over the Anderson code was in reality a fight to impose the cost of the *Code of 1859* (1860) upon the federal government, thereby saving the expenditure of territorial funds.

²² Evans, “Political and local history of Washington . . .,” in *History of The Pacific Northwest*, I, 523.

the legislature had expired and the day following the adjournment thereof.

When House Bill No. 57, entitled "An act to provide for the publication of the compiled laws of Washington Territory," came before the Council, it was referred to the committee on Ways and Means which reported it out for further action of the Council. It came before the Council for the first test on Tuesday, February 1, 1859. There Mr. Maxon, attacked it by a motion to lay it on the table and to make it a "special order of the day for the 4th of July next."²³ Apparently he wished it to die amid the glamour of a patriotic celebration. Thus ended the attempt to provide for the publication of the compiled laws of Washington Territory as a separate publication independent of the session laws of 1859-60.

The Council Bill No. 31, entitled "An act to provide for the appointment of a board of commissioners to prepare, revise and compile a code of laws for Washington Territory," which had been introduced by Mr. Maxon had successfully passed the Council, but was amended in some manner (the proceedings do not indicate in what way) when it came before the House. The Council refused to concur in the House amendments and the bill failed of passage on February 2, 1859,²⁴ the day before the last of the legislative session.

The *Code of 1859* (1860) was the result of the work of the code commission of 1858. While it is referred to as the *Code of 1859*, it was not enacted into law until early in January of 1860.²⁵ A valid doubt existed as to the need for this code; and an opinion generally expressed was that it added nothing of importance to the *Code of 1854*. The popular esteem accorded the *Code of 1854* may explain the lack of any evidence that Judge Strong had contributed his services to its preparation.

IV

It was the duty of the governor of the territory to refer in his legislative messages to such changes in the law as he deemed desirable. The fulfillment of this duty could be carried

²³ *Journal of the Council*, 1858-59, 221.

²⁴ *Ibid.*, 226.

²⁵ *Laws of Washington*, 1859-60.

out by advising the legislature that "a revision of our laws is badly needed." Sometimes he specifically referred to the shortage of copies of the session laws and made that condition the basis of his recommendation. Often-times the messages would use the word "compilation" jointly with the word "revision." It can hardly be supposed that such a recommendation by Governor Turney, on December 19, 1861, contemplated other than the amendment of such statutes as needed modification and their re-passage as complete acts. The legislative practice during this territorial period called for amending a statute by re-enacting it *in toto* with the changes desired; whereas the practice, today, is to pass an act amending only the sections concerned, leaving the remainder of the statute untouched. Certainly the technical meaning of the words "revision" and "compilation," as they are used today, was not observed in the preparation of the territorial codes during the two decades following the organization of Washington Territory.

The legislative session of 1861-62 made no effort to enact legislation for revising the territorial laws. Accordingly, when the session of 1862-63 convened, Governor Pickering devoted a considerable portion of his legislative message to a plea for a "codification and republication of our Territorial Law," in the belief that "convenience, necessity, and justice to the people require legislative action at this time, . . ." ²⁶ This advice of the executive was followed and the *Code of 1863* was the result.

The *Code of 1863* was the work of a special legislative code committee consisting of Judge Obadiah B. McFadden, former chief justice of the Supreme Court, Paul K. Hubbs, representing the Council, and J. D. Potter, S. D. Smith, and Paul K. Hubbs, Jr., representing the House of Representatives. ²⁷

The authorization for the revision came through a joint resolution passed on December 22, 1862. ²⁸ The commissioners were to "re-codify the laws so far as practicable and to report the same to their respective houses for action during the present session of the legislature." The compilation resulting from

²⁶ *Journal* of the House of Representatives, 1862-63, 30.

²⁷ It is interesting to note that father and son served together on this committee, the senior representing the upper house and the junior the lower.

²⁸ *Journal* of the Council, 1862-63, appendix x.

their efforts was adopted by the legislature, and thereby became the *Code of 1863*. It was regarded as an improvement over the preceding one.²⁹

V

Less than four years elapsed before an agitation was begun for the revision of the *Code of 1863*. The principal reason assigned at this time for the need of a new code was the well-worn argument that but few copies of the laws were available for the use of lawyers and the public officials. "The efficiency of public servants, as well as the proper administration of justice, require that they be put, as early as may be, in a shape that will place them within the reach of all," wrote Governor Moore in his legislative message of December 9, 1867.³⁰ "I would recommend, therefore, that commissioners, 'learned in the law,' be appointed to revise and codify all the statutes of the Territory now in force and that they be instructed to report the result of their labors to the Legislative Assembly, either at this or the next session."

This legislative session approved the recommendation of Governor Moore for a revision of the laws and provided for the undertaking by means of a statute enacted January 29, 1868.³¹ In making this provision for the *Code of 1869* the Territorial legislature used the "statute" form of authorization instead of the more common "resolution" form.

The statute in question provided that the governor was to appoint three "discreet" persons (the governor had recommended instead three persons "learned in the law") to act as code commissioners. They were to report their work to the following legislative session, (1869). In the light of their injunction, "to thoroughly revise the statute laws . . . in force . . . , classifying and arranging the various subjects under appropriate titles, bringing together and incorporating the various amendments into the original acts, and rejecting all repealed, inoperative and obsolete statutes," one may wonder why the

²⁹ *Laws of Washington*, 1862-63.

³⁰ *Journal of the House of Representatives*, 1867-68, 31.

³¹ *Laws of Washington*, 1867-68, 64.

sole requisite of "discreetness" was made the basis of their qualifications as codifiers.

That the commissioners failed to "thoroughly revise" the laws is evident from the changes which were subsequently imposed. That the *Code of 1869* went too far in "classifying and arranging the various subjects under appropriate titles" was the opinion of certain critics, who believed that it "was a decided success in the way of making the most out of the least material, being merely a labyrinth of reciprocating indexes, with headings so honey-combed into each other, that the explorer invariably comes out the same hole that he went in at. As a statute it is generally conceded to be a lamentable failure."³²

It is doubtful whether the above criticism of the *Code of 1869* by the editor of the *Washington Standard* was altogether fair and justifiable. Certainly the gentlemen appointed were both "discreet" and "learned in the law." In fact, the governor could hardly have chosen more capable commissioners than they. All three were able lawyers.³³

It does not appear that either Mr. Lasater or Judge Dennison did any work on the revision of the laws. Judge Evans submitted an individual report. In the meantime he had been elected chief clerk of the House of Representatives, and on account of his work on the code report was also made clerk of a joint legislative committee on code revision. The result of his work was the enactment of the *Code of 1869*,³⁴ which engrafted at least one new feature upon the law of the territory, the *Community Property Law*. It has been said that, because of the enactment and inclusion of the *Community Property Law*, the

³² *Olympia Washington Standard*, September 13, 1873.

³³ James H. Lasater of Walla Walla represented the first judicial district, Elwood Evans of Olympia, later of Tacoma, the second district, and B. F. Dennison of Port Townsend represented the third district. Judge Evans (although referred to as judge by all historians, the title was an honorary one only) was one of the most promising lawyers of the territory. He had been admitted to practice law in 1852 at the first regular term of court held in Washington Territory, and already had been clerk of the Council, secretary of the territory, acting Governor, and later was to hold numerous other important public positions. Judge Dennison was at this time an associate justice of the Supreme Court. He had settled in Whatcom in 1850 and at one time or another was a resident of nearly every important town in the territory. He was later to become the first president of the Washington State Bar Association when it was organized in 1889.

³⁴ *Laws of Washington*, 1868-69.

Code of 1869 was the most valuable code which had been adopted during the life of the territory.³⁵

The legislative session of 1868-69, filled with enthusiasm for code reform, proved to be a very busy one. The select joint committee on code revision accepted the report of Judge Evans as the basis of its work. He recommended a revision of the practice acts. To this, they prepared to add a revision of the general laws, to the end that a complete general codification of the laws of the territory might be obtained. To do this required that the laws of a general character be re-enacted. To re-enact these laws was a big task. Each had to be re-enacted *in toto*. The time had not come when the legislature was to feel free to embody the laws into a general compilation with consecutive section numbers and with titles and enacting clauses omitted. The ghost of 1854 and the interpretation of section six of the *Organic Act* were still before them.

The plan of the select joint committee was to re-enact all existing statutes so that they might be incorporated into the *Code of 1869*. They assumed, and probably correctly, that Congress would appropriate money with which to pay the bill. Had not this been the intent of the act of January 29, 1868? Was this not the objective which Governor Moore had recommended in his message of December 9, 1867? But Governor Moore had been succeeded by Governor Alvan Flanders, and Governor Flanders entertained a different view.

On November 24, 1869, Governor Flanders addressed a message to both houses of the legislature in part as follows:³⁶

"I have received from your honorable body a large number of bills (not less than fifty) which have been sent in for my approval. All or nearly all of these bills are general laws which have been re-enacted as they now stand upon the statute books. These and many more of the same character, which have been passed by one or both Houses, or which are in the hands of the Select Joint Committee of your honorable body, and which have not yet been reported for your consideration, are of equal and perhaps greater importance than those that have been passed. The

³⁵ James Wickersham, "Life, Character, and Public Service of Elwood Evans. Pioneer, Lawyer, Governor and Historian," in *Washington Historian* (Tacoma, January, 1900), I, no. 2, 63.

³⁶ *Journal of the House of Representatives*, 1868-69, 406.

object to be attained in the re-enactment of these laws is to embody them into a code properly arranged and printed as such.

“That this is desirable and perhaps necessary no one can doubt. But it is of far greater importance that, in the compilation and re-enactment of these laws, they be thoroughly examined, and that they receive the most critical revision and careful consideration at your hands. I think you will readily admit that the time bestowed upon those you have passed and that the time which now remains for the consideration of those hereafter to come before you is entirely too limited for the exercise of that care which their importance demand.

“This would create expense without attaining the purpose at which the codification of the laws aims. Among those which remain to be passed, are :

An act in relation to practice and proceedings in civil actions.

An act in relation to practice in the probate courts of W. T.

An act in relation to crimes and punishments, and proceedings in criminal cases, and an act relating to Justices of the Peace and their practice and jurisdiction. A proper consideration of these laws alone, will require much more time than remains of the present session.

“In view of these facts I would respectfully submit if it would not be wise and judicious to refer all these bills to a commission to ‘revise, digest and codify the laws of the Territory’ and report to the next legislature. . . .

“It is much better that our laws should remain as they now are, than that their revision and re-enactment should be so hastily and imperfectly done as to create the necessity of repeating the labor and expense of republication by a future Legislature.”

Again on the 27th of November, the governor sent another veto message to the legislature and at the same time returned twenty-nine additional bills without his approval. In further explanation of his action, he wrote:³⁷

“Nearly all these bills are simply re-enactments of laws as they now stand upon the statute books. A few of them have been altered and amended in some unimportant particulars, they are now in force in our Territory and are undoubtedly good laws. The object to be attained by their re-enactment is to have them printed as the laws of the present session of the legislature as a portion of what was to form the ‘code.’ Their publication would cost the government a large sum of money without any corresponding benefit. It is very probable that in the end the Terri-

³⁷ *Ibid.*, 430.

tory would be obliged to pay the bill. But whether paid by the Territory or the general government, it would be an expenditure of money which is not warranted at this time, and especially in view of the hasty and imperfect manner in which the 'code,' of which the bills are a part, have been acted upon. It is doubtful if one of all the bills reported by the Select Joint Code Committee, and which have been passed, has been read in either House. In view of these facts I return these bills to the House from which I received them without my approval."

Corroborating this interpretation of the legislative extravagance, Mr. Snowden has written in his *History of Washington* that³⁸ ". . . The changes which it [legislature] suggested were, for the most part, merely verbal, but to make them in legal form the acts in which they occurred were re-enacted. This made it necessary, or at least permissible, to have them reprinted for the use of the legislature, and thus greatly to increase the work and profits of the public printer. To this the governor objected, and vetoed the amended measures in batches."

While the attempt to prepare a codification of the laws, which would embrace a revision of all existing law, was for the most part a failure, the *Code of 1869*, when it finally was adopted, was a very substantial improvement over the previous attempts at codification. In the form in which it was enacted (the later *Code of 1873* was almost identical with it) this *Code* was to remain in force until the codification of 1881.

VI

Common to each of the territorial codes of Washington from 1854 to 1869 inclusive, was a provision which abolished all distinctions between "actions at law" and "suits in chancery" and provided one form of action to be known as a "civil action." Such a statute had been incorporated into the laws of several of the territories created by Congress in the years between 1845 and 1865, and represented a liberal interpretation of that section of their organic acts which provided that "The supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common law jurisdiction."³⁹ These territorial legislatures construed this grant of

³⁸ Snowden, iv, 183-84.

³⁹*Revised Statutes of The United States* (Washington, 1878), second edition, section 1868.

power to mean that chancery and common law jurisdiction could be exercised jointly rather than severally.

It will be recalled that under a similar section in the *Organic Act* of Oregon Territory the code commissioners of 1853 refused to make such an interpretation, notwithstanding the urgent plea of Commissioner Daniel R. Bigelow of Olympia, who wished then to combine equitable and legal relief in one proceeding.⁴⁰

When this legislative power came before the United States Supreme Court for review in a case arising in Montana, the court held that the territorial legislature had no power to pass an act depriving the territorial courts "of chancery as well as common law jurisdiction."⁴¹ This decision was rendered on May 1, 1871. Its effect was to render void the statutes of those territories which had abolished the distinction between proceedings in law and equity.

As a result of this decision, the next session of the legislative assembly of Washington Territory, which convened on October 2, 1871, was forced to amend the code of civil procedure by enacting that, "All common law forms of action are hereby abolished, but the distinction between actions at law and suits in chancery shall be preserved; . . ." ⁴² To effect such a change in the theory of civil practice without creating opposition from some members of the bar was probably an impossible task. At least, this was the effect of the amendments to the *Code of 1869*. While the *Amendments* had a few advocates, the majority of the bar felt that they were unreasonable and ought to be repealed. With a dissatisfied bar opposed to the *Amendments of 1871*, the possibility that further change and repeal would be made by the legislative session of 1873 was not unlikely. One of the leading newspapers of the territory editorially referred to the need for a new Code in clear and precise language.⁴³

⁴⁰ Beardsley, "Code Making in Early Oregon," 20.

⁴¹ *Dumphy v. Kleinschmidt*, 78 U. S. 610, (20 Lawyer's edition, 223).

⁴² *Laws of Washington*, 1871, 3.

⁴³ *Olympia Washington Standard*, September 13, 1873.

“The Civil Practice Act, or Code of Practice as it is sometimes called, it is agreed by the lawyers, demands amendment, repeal, codification or something else. The whole bar appears to be united in pronouncing our system of practice very defective and unsatisfactory. Without venturing any suggestions as to which system should receive the preference, we hope that our representatives will set themselves at work in earnest at the very commencement of the session upon this important matter, and at least lay the foundation of some system of practice upon solid principles. Since the compilation of 1854, it can hardly be denied that every new one has in some particular been inferior to that which preceded it. The Statute of 1859 was only a partial reprint of 1854. The Statute of 1863 was an improvement upon that of 1859, but in many respects inferior to that of 1854. The Statute of 1869 was a decided success in the way of making the most out of the least material, being merely a labyrinth of reciprocating indexes, with headings so honey-combed into each other, that the explorer invariably comes out the same hole that he went in at. As a statute it is generally conceded to be a lamentable failure. The practice act of 1871 is founded upon another system, which has many advocates, and there are others who would prefer to see the old one restored. All its friends as well as its opponents, however, agree that as it now stands it is very defective, and if continued should undergo many changes.”

The sequence of events which followed the passage of the *Amendments of 1871* presents an interesting but entangled relationship and one which does not lend itself easily to explanation.

One of the first matters to be considered by the Legislative Assembly of 1873 which convened on October 6, was the question of revision of the laws of the territory and particularly the *Amendments of 1871*. As no code commission had been previously authorized to prepare a proposed code, the legislature appointed a select code committee, consisting of the judiciary committees of both houses, to prepare a general compilation of the laws. This procedure was preferred to that of a revision of only the codes of civil and criminal procedure, probate, and justice court as had been proposed by John P. Judson of Tacoma.⁴⁴ By October 25, the new practice bills together with about eighty smaller bills, which were to be embodied in the compilation of the laws, had been introduced into either branch of the legisla-

⁴⁴ *Journal of the House of Representatives, 1873, newspaper report.*

ture. On that date the *Washington Standard* hopefully commented upon the possibility of a new code: "From what we have seen and know of the matter, we feel happy in assuring the people of the territory of our belief that their representatives at this session will give them a compilation of the laws with needed amendments, that will be satisfactory and beneficial to the public at large."

And further: "Our legislature will merit and receive the thanks of the public, if they succeed in presenting them with laws in one volume as the result of their labors at this session."

When the legislative session was over⁴⁵ the people found that the practice codes as embodied in the *Code of 1873*⁴⁶ were almost verbatim re-enactments of the similar codes in the *Code of 1869*. This restored to the code of civil procedure the provision which had abolished the distinction between actions at law and suits in chancery, and which had substituted in place of these two forms of action—a civil action. Neither the legislative records nor the newspaper accounts of the proceedings of this session supply any explanation of why, in the light of the holding in the decision of *Dunphy v. Kleinschmidt, supra*, the legislative assembly should conclude that it had the power to adopt a statute providing for a single form of action. In repealing the *Amendments of 1871*, apparently the legislature had some knowledge of the principles involved in the case of *Hornbuckle v. Toombs*—a second attempt made by the Montana Territorial Legislature to establish its power to provide for a "single form of action"—which was then pending before the United States Supreme Court. This appeal had been presented to the court on December 9, 1873, less than one month after the Washington Territorial Legislature had re-enacted a code of civil procedure embodying this principle.

Some idea of the feeling which had existed in the territory against these *Amendments of 1871* may be found in the following short paragraph taken from a decision by Mr. Justice Greene in the case of *Gallenton Hartsock v. C. G. Tyler* which was tried in the second judicial district of the territory at

⁴⁵ November 13, 1873.

⁴⁶ *Laws of Washington*, 1873.

Olympia in April, 1877. Judge Greene expressed his personal feelings very fully in this long opinion from which these words are typical,⁴⁷

“These Amendments of 1871 were passed, as it were, under duress, in order that our territorial civil practice as part of a system finding its most authoritative exposition in its court of last resort, the Supreme Court of the United States, might be accommodated to the clearly announced views of that ultimate tribunal. But hardly had the amendments been made before such counter opinions were rendered in the Supreme Court and such counter ruling action was held in Congress, as have made them entirely unnecessary [that] the very next legislature, therefore, repealed them.”

Five months were to elapse before the decision of the court in the appeal of *Hornbuckle v. Toombs* was to be handed down. During this interval a bill had been introduced into Congress, on February 4, 1874, with the purpose of authorizing territorial legislative sanction of the principle of the “single form of action.” The bill was duly approved by Congress on April 7, 1874; and in its form provided:

“That it shall not be necessary in any of the courts of the several territories of the United States to exercise separately the common-law and chancery jurisdiction vested in said courts; and that the several codes and rules of practice adopted in said Territories . . . , in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had . . . , be, and the same are hereby validated and confirmed: . . . ”⁴⁸

The decision in the case of *Hornbuckle v. Toombs* followed less than a month later.⁴⁹ Unequivocally overruling *Dumphy v. Kleinschmidt*, and two other similar decisions, the Supreme Court confirmed the power of the territorial legislature, subject to the conditions of their respective organic acts, to merge the claims at law and in equity in one action.⁵⁰ It is

⁴⁷ Elwood Evans' Scrapbook, 52. This scrapbook contains unreported decisions of the district court.

⁴⁸ *The Statutes at Large of The United States, 1873-1875* (Washington, 1875), xviii, part 3, 27.

⁴⁹ May 4, 1874.

⁵⁰ 85 U. S. 648 (21 Lawyer's edition, 996).

a strange fact that the holding of the court was not based upon the Act of Congress of April 7, 1874, and does not seem in any way to contemplate it.

While the records do not show that the justices of the Territorial Supreme Courts exercised any influence upon the passage of the Act of Congress of April 7, 1874, it is not without possibility that such was the case. The records do show that at this time Mr. Justice Greene of the Supreme Court of Washington Territory was carrying on a correspondence with the Judiciary Committee of the Senate concerning the passage of another act affecting the jurisdiction of Territorial Supreme Courts;⁵¹ and reasoning by analogy, it is not improper to conclude that a similar correspondence might have had some bearing upon the passage of the Act of April 7, 1874.⁵² Thus were settled the anomalous problems arising out of the *Codes of 1871 and 1873* respectively.

VII

As a climax to a quarter century of experimental code study, the *Code of Washington*, referred to from this point on as the *Code of 1881*, emerged as the *ne plus ultra* of territorial code making. The agitation for an amendment to the *Code of 1873* conformed to what seemed to have been the normal routine of code making, *viz.*, the adoption of a new code after the lapse of about two legislative sessions. In this respect, the *Code of 1881* was no exception.

Legislative revision of the *Code of 1873* was proposed first in the session of 1877. The advocates of the code reform on this occasion sought not only the amendment of the *Code of 1873*, but also that which had been sought continuously since 1854, namely, the adoption of a completely classified and sys-

⁵¹ *Congressional Record* (Washington, 1874), II, part 4, 3585.

⁵² Questions of exceedingly great interest are raised by the speculation as to what attitude the Territorial Supreme Court would have taken toward appeals which might have come before it based upon the provision of the *Code of 1873* during the interim between November 13, 1873, when the legislature restored the *Civil Practice Act of 1869* and the passage of the Act of Congress on April 7, 1874. Could the Court have found some basis for upholding the validity of the *Civil Practice Act of 1873*? It would be interesting to know to what extent private rights and remedies were affected by this practice act before the retroactive provisions of the Act of Congress became effective.

tematic code of laws of the present-day type. This concept of the type of the code desired is apparent from the title of the Act approved on November 9, 1877, being "An act to provide for the codification of the laws of Washington Territory."⁵³

Under the provisions of this act the codification was not to be limited to that of the practice act, as had been the case in the prior territorial codifications. The scope was to be much broader. The governor was "authorized and requested to nominate, and by and with the advice and consent of the Legislative Council of said Territory, to appoint a code commissioner who shall be a resident practicing attorney or judge of the Supreme Court of the Territory." Doubtless the writer of this section had familiarized himself with the phraseology of the provisions of the Constitution of the United States which relate to presidential appointments (Art. II Sec. 2), and desired through analogy to embody those principles into this section of the act. It was exceedingly unusual language and had never been used in any of the enabling acts which had provided for codifying the laws of either Oregon or Washington territories.

The language of this enabling statute is pertinent to a satisfactory study of the type of code which the legislature proposed to enact. Several of the sections are as follows:

Section 2. The said code commissioner so appointed, is hereby authorized and required to collate and thoroughly revise and codify all the statute laws of the Territory of Washington which are, or may be, in force at the close of the present session of the legislature. For this purpose, it is hereby made the duty of said code commissioner to group together all correlative and similar statutes, classifying and arranging the various subjects under appropriate amendments into the original acts, rejecting all repealed, redundant, inoperative and obsolete sections, laws, or parts of laws; and furthermore, to make such alterations and amendments as shall reconcile all contradictions, correct and supply omissions in figures, letters, words and sentences; and, to do and perform all other needful acts as shall enable the said code commissioner effectually to reduce and bring into a written, intelligible and systematic form, the statute laws of this Territory.

Section 3. That it shall be the duty of the said code commissioner in codifying and arranging the laws under proper parts, titles, divisions

⁵³ *Laws of Washington*, 1877, 235.

and subdivisions, under the provisions of this act, to complete and perfect the same, that such code of laws shall be made to cover and embrace the whole body of substantive law of the Territory of Washington. The said code shall be arranged and presented by the code commissioner under four general parts, or divisions, substantially, as follows :

- I. The Political Code of Washington
- II. The Civil Code of Washington
- III. The Code of Civil Practice
- IV. The Penal Code Embracing the Code of Criminal Procedure.

Section 4. The said code commissioner is hereby further authorized and empowered to prepare a brief syllabus to each of the several laws, and subdivisions and titles of law, in said codification, together with such concise and appropriate marginal notes for, and to, the various sections, as shall afford easy and ready reference to all distinctive points and subjects embraced therein; and furthermore, to prepare such annotations, or "foot notes," furnishing references to decisions, and correcting seeming contradictions in the laws, as shall be deemed useful and expedient.

Section 5. The laws so revised, codified and arranged by the code commissioner appointed in pursuance of the provisions of this act, shall, when published, be embraced in one or more volumes of convenient size, and shall be known as the Washington Code and no other title by legal reference shall be necessary for their designation.

Other sections made provision for the code commissioner's compensation in such an amount as the legislative assembly should fix, and required that he take an oath of office, an act which had never been required of any preceding code commissioner.

Only five days elapsed after the passage of this act until the legislature adjourned *sine die*. Apparently this was an insufficient period of time in which to allow the governor to select the code commissioner, and to get his appointment confirmed by the council. Nothing was done about the appointment, and the proposed codification did not materialize.

The bill was reintroduced into the legislative session of 1879 and was passed with but few changes.⁵⁴ The first section was changed so as to provide for the appointment of Governor Elisha P. Ferry as code commissioner, and he was directed to "make such additions as may be thought necessary for a com-

⁵⁴ *Laws of Washington, 1879, 90-92.*

plete and perfect code for the Territory of Washington”⁵⁵ and to submit the same in printed form.⁵⁶ He was to receive a fixed salary of seventy-five dollars per month instead of the uncertain amount provided in the Act of 1877. Before the work was completed, this provision was to become the basis of a bitter controversy.

Governor Ferry was regarded as an admirable choice for the duties of code commissioner. He was an able lawyer and was just completing his second four-year term as governor. It was believed that he would compile an acceptable code and for that reason was given the unusual power to “make such additions as may be thought necessary.” Such a grant of power was tantamount to authority to alter or change any existing laws and to interpolate them indiscriminately, making him almost a modern Solon or Lycurgus.

One code writer has said that the inclusion of such language is mere verbal extravagance. No codifiers would attempt to make such changes, well knowing that some legislator would, before final passage by the legislature, enter objections designed to render futile the plan of the codifier to interpolate the statute.

Whether Governor Ferry felt constrained to exercise the full measure of the authority granted to him by the legislature is doubtful. There is reason to believe that he did nothing more than lend his name to the proposed compilation, and that such work as was done was performed by his clerks, John P. Judson, Patrick P. Carroll, and U. M. Rasin respectively. Certain critics of the governor openly charged that, although the code would not be completed, he would nevertheless make a claim for the “clerk hire.” The criticism of the governor went further and suggested that “the legislature . . . put the codification in the hands of a competent and willing man and pay him for his services.”

This attack upon the governor was answered by the *Puget Sound Courier*, quoting in part articles in other papers,⁵⁷ with

⁵⁵ Section 2.

⁵⁶ Section 6.

⁵⁷ Palouse (Wash.) *Washington Gazette*, reprinted in the *Olympia Washington Transcript*, and answered by the *Olympia Puget Sound Courier*, September 16, 1881.

a bitter denial that Governor Ferry would ask payment for clerk hire in codifying the laws. "It comes," says the editor, "with poor grace from the Hopkins family, father or son, to attempt to cast slurs upon ex-Governor Ferry. Besides being an act of base ingratitude, it is unsafe for them to do so."⁵⁸

The newspapers which were unfriendly to the former governor were not alone in their conviction that no code would be forthcoming. The legislative message of Governor Newell hints that the governor himself entertained such a feeling. In addressing the legislative session of 1881, he said: "My distinguished, immediate predecessor in the executive chair, was appointed to codify the laws of the territory. I am not informed that he contemplates presenting a report at this session, or at any future time."⁵⁹

Governor Newell seemed to feel that the codification of the laws had not gone forward in the way that the legislative session of 1879 had intended. He referred to the matter in his message of October 3, 1881, and stated that he believed, "Suitable arrangement and classification of the laws would simplify the administration of justice, and conduce to a large reduction of the cost of litigation to the citizens," and concluded with the remark, that the "codification should not be abandoned."⁶⁰

The legislature, in turn, was skeptical as to what, if anything, had been done by the code commissioner in preparing a code for their consideration. On the fourth day of the session a resolution was passed appointing a committee of five members—three from the house and two from the council—to "ascertain and report as soon as possible, the best method of revision and codification of the Washington Territory Statutes, and also whether it would be advisable to undertake either, or both, during this session."⁶¹ No record now exists as to what report this committee made, but as the revision was actually accomplished, it is obvious that their report must have recommended that favorable action should be taken.

⁵⁸ *Laws of Washington*, 1881, 201, 210. The records do not show that Governor Ferry ever received any compensation for his services but the clerks were each allowed three hundred and sixty dollars.

⁵⁹ *Olympia Puget Sound Courier*, October 3, 1881.

⁶⁰ *Ibid.*

⁶¹ *Laws of Washington*, 1881, 248.

It is now impossible to know what, if any, work had been done on the codification by former Governor Ferry or his clerical assistants prior to the opening of the session of 1881. By the opening of the fourth day of the session no code had been submitted to the legislature, and apparently no word had been received as to the possible submission of such a code. It is probable, however, that some work had actually been done, because the clerks selected by Commissioner Ferry continued to serve the legislature throughout the entire session.

The work of code revision was placed in the hands of a special legislative committee consisting of the House and Council committees on the Judiciary, Counties, and Printing—seventeen gentlemen in all.⁶² Of these, five were attorneys;⁶³ while the other members represented the various interests of the territory.⁶⁴

After the legislature had been in session for nearly one month and the character of its program had become known, a letter was printed in the *Seattle Post-Intelligencer* of November 5, 1881. Its object was to advise the legislature as to the feeling of the people in regard to the prospects of a new code, and to urge that their civil and political rights should be protected. The writer of the letter, G. M. Haller, a prominent attorney of Seattle and associate of the late Judge Thomas Burke, was doubtless sincere in his suggestions, but he could hardly have hoped that the legislature would consider his comments, notwithstanding the logic which the arguments presented. In the end, however, much of what Mr. Haller had suggested was actually accomplished.

“We are advised,” said he, “that the legislature now in session is about to give us not only a new civil and criminal code, but a compilation and codification of all the existing laws of Washington Territory, now scattered through the diverse statutes from 1854 to 1879, and to that end have formed an able Judiciary Committee, which committee has called to its aid a corps of lawyers in the capacity of clerks, and we, the people,

⁶² House: J. A. Kuhn, Stephen Judson, W. W. Holcomb, W. S. Smith, James A. Karr, G. F. Raymond, R. R. Reese, Albert Van Eaton, W. G. Preston, Thomas Warman, Orin Kincaid, R. P. Steen; Council: Elwood Evans, B. L. Sharpstein, Jacob Hoover, J. W. Graden, J. H. Long.

⁶³ Kuhn, Sharpstein, Evans, Hoover, Holcomb.

⁶⁴ Message of Governor Newell to the legislature, December 7, 1881, as reported in the *Seattle Post-Intelligencer*, December 13, 1881.

are promised not only a complete compilation but also many improvements in both the civil and criminal codes of our territory. The vast and important consequences following such a step and the actual relation which any interference or unsettlement of existing and known law has to the advancement and prosperity of our country is my apology for the following remarks, and if any suggestions herein contained can assist the learned gentlemen having the matter in charge I shall feel fully repaid, or if these matters have been thought of and provided for, this will at least do no harm, and the people may more easily see the dangers in which their rights of personal liberty, personal security, and private property necessarily are involved in a hasty attempt to change or remodel long existing laws whose meaning has become partially known and settled by a long course of judicial decisions, following a cost of thousands of dollars to the people in expensive and vexatious litigation.

“I use the word hasty, not in the sense of reflecting upon the work of the commission or its clerks, which will be done with all the care and skill that the time will allow, and the character and high legal ability of its members will insure, but the legislative session can only last 60 days. The work was not begun until some days after the convening of the assembly. It must necessarily be completed some weeks before the close of the session to give the executive time to consider its provisions. So that, one may safely say that 30 or 40 days is all the time that can be spared for its completion. When we think what eminent judges and lawyers have shrunk from the like attempt to be completed in two years, we must marvel at the sublime courage of the committee now in charge of this work. But supposing the work is done and ready for final action of the assembly, there will have to be a repealing clause or else it will be no codification. How is that to be made? A complete repeal of all previous laws will wipe out all not contained in the new book. Is it within the power of man to incorporate, adjust, reconcile and present all the laws on perhaps vital questions of property, or the conduct of our affairs, or the protection of our persons or lives? If the repeal is only a repeal of all laws inconsistent or conflicting with the new ones, then we are where the committee began, for we must search through all the old laws and compare them to discover which are inconsistent.⁶⁵

“Further, a repeal of the criminal practice act without a saving of all pending prosecutions will be a general jail delivery; the law against which the criminal offended being no longer in force, he cannot be held for an offense against an *ex post facto* law. So an unguarded repeal of the civil code may oblige every poor suitor either to begin action over again, no matter at what stage it is before judgment, or if on appeal, may quash the appeal.⁶⁶

⁶⁵ Covered by the *Code of Washington*, 1881, sections 3319 and 3320.

⁶⁶ *Ibid.*, sections 1296 and 761.

"Yet all these latter matters may be, and no doubt will be regarded by the learned gentlemen who have the work in charge. But there is another matter equally important which may be overlooked. It has been the custom of the assembly of Washington Territory, that their laws,⁶⁷ and especially the codes passed heretofore, (I believe with few exceptions) shall go into effect from and after their passage. This act will probably pass about the end of the month of November, and it will not be possible for the territorial printer to furnish the people with the copies until May or June of next year, so that until that time the whole bar and especially the people will be in almost complete ignorance of what the existing law really is.⁶⁸

" . . . Until then the whole judiciary and bar will be working in the dark, perhaps their whole work wrong, and destined to be blasted under the first light of the new law. In the meantime rights without number may be sacrificed and wrongs unwittingly done. Why then would it not be well to provide that this new revision shall not go into effect in any of its provisions until August 1, 1882? That will give time for the printing, circulation, and reading of the law, and enable the several courts to try their cases, and the Supreme Court to correct errors under the existing order of things. . . . "

The work of the regular session moved slowly, and, when the sixty days were almost passed, it became certain that the code could not be finished. Considerable talk of an extra session was heard around the legislative halls, but many legislators were of the opinion that an extra session would lack lawful sanction. The governor himself was in doubt of his power to convene the legislature, notwithstanding the provisions of the *Organic Act* (section 11)⁶⁹ which stated that "the governor shall have power to call the legislative assembly together by proclamation, on an extraordinary occasion, at any time." He felt that he was between two fires because an earlier statute had provided that "no session of the legislature of a Territory shall be held until federal appropriation for its expenses had been made."⁷⁰ Another section of the law⁷¹ obligated the Congress to appropriate four thousand dollars for the expenses of

⁶⁷ Mr. Haller was in error in this regard. See *Laws of Washington*, 1868, 53, which fixed the time as sixty days from the adjournment of the legislature.

⁶⁸ The Secretary of Territory's certificate appended to the *Code of 1881* is dated May 24, 1882.

⁶⁹ *Revised Statutes of The United States* (Washington, 1878), second edition, section 1923.

⁷⁰ *Ibid.*, section 1886.

⁷¹ *Ibid.*, section 1887.

the territorial legislature, but until these expenses had been voted the governor felt that the legislature would have no valid status.

At this point the governor transmitted to the legislature a message⁷² in which he advised the legislature, that with the special permission of the President⁷³, he would reconvene the legislature in special session at the close of their present session, in order that they should have more time to consider the revision and codification of the territorial laws, which obviously would not be completed before adjournment of the regular session. At that time but six days remained for the legislative consideration of bills, and the revision had progressed too far to permit its failing for want of sufficient time for its full consideration. The governor expressed the opinion that much disadvantage and disappointment would ensue if the codification were not completed.

A few days later (November 30) the governor received an unsolicited letter from Chief Justice Roger Greene, of the Territorial Supreme Court, which he in turn communicated to the legislature.⁷⁴ Judge Greene's advice, much in the nature of an advisory opinion by the court, was for the purpose of assuring the governor, as he said, "that there is no occasion to doubt your authority to call the extra session, or the plenary power of the legislature to make laws when met." The chief justice supported his opinion by referring to a section of the *Organic Act*, which authorized this procedure even in the face of a conflicting statute, and pointed out that the prior statute had been qualified by the *Organic Act* which had been subsequently enacted into law.

Supported by the letters from the Secretary of the Interior and Judge Roger Greene, Governor Newell addressed a lengthy message to the legislature on December 2, convening them in extra session, at the expiration of the regular session. In his message to the legislature the governor again explained his reasons for calling the extra session, and enumerated the

⁷² *Journal of the House of Representatives*, 1881, 235.

⁷³ No authority for this procedure for the presidential power has been located.

⁷⁴ *Journal of the House of Representatives*, 1881, 333.

important laws passed by the legislature which were to be embodied into the new codification, and concluded his message by stating that "Several important measures remain to be considered in connection with the revision which in addition to those here designated, when adopted, will necessitate and justify the publication in one volume of the revised statutes of Washington Territory. . . ."

Among the first bills introduced into the Extra Session of 1881 was one providing for the publication of the *Code* in the territory. Although considerable opposition to this bill developed, the bill finally was passed, and the *Code* was printed by C. B. Bagley, the public printer of the territory. An interesting comment on this legislative squabble is taken from one of the newspapers of that day.⁷⁵

"Governor Newell has issued his proclamation calling for a special session of the legislature for the purposes of completing the codes, to remain in session not more than 20 days. Congress appropriated \$3,000 for printing the codes. Hon. Elwood Evans introduced in the council, a bill directing the Secretary of the Territory to have the code printed in the Territory. This bill does not suit Bancroft & Co., of San Francisco, who, wishing the \$3,000, have sent an agent to Olympia to lobby against it. Mr. C. B. Bagley, of the Olympia Courier, also wants to print the codes, and in the shape of a circular, offers to do the work on very reasonable terms and in a short time. 'We fully and heartily agree with Mr. Bagley that Mr. Evans' bill is correct in principle, as it provides that the people's money shall be spent among the people from whom it was collected. If Mr. Evans' bill passes, the greater part of the \$3,000 will go to pay printers in the territory for the type-setting, presswork, and mechanical labor of the book.' The idea that a few dollars can be saved to the Government by allowing any printers out of the territory to print the codes should not weigh an atom against the bill. We know there are printing offices in the territory able to do the work in as good a style as it can be done elsewhere. We hope that Mr. Evans' bill passes both houses unanimously."

The extra session concluded its labors on Wednesday, December 7, 1881. Shortly before adjournment the governor dispatched to the legislature a message of good will in which he summarized and praised their work. He called attention to the fact that many incongruous, obsolete and inoperative statutes

⁷⁵ *Walla Walla Union*, December 3, 1881.

had been repealed and that the entire task was necessary to an intelligent, proper and economical administration of justice. In conclusion, he said, "I commend the result to the candid, temperate and unbiased judgment of the people as a work of skilled and intellectual labor, embodying the principles of sound law, drawn largely from the most moderate jurisprudence, and unprecedented in that the burden of its preparation was self-imposed and performed without pay. . . ." ⁷⁶

VIII

The manner in which the *Code of 1881* was built, and the form which it finally received are stories none too well known. The many questions which might be asked concerning it cannot now be answered. Only the House Journal was printed for this legislative session and it is not particularly helpful to a study of this *Code*. The histories of the state throw no light upon this codification; and the newspapers are sadly lacking in editorial comments thereon. What was the character of the *Code of 1881* and how was it planned? How did it differ from the *Codes* which preceded it?

With the aid of the revising clerks—John P. Judson, Patrick P. Carroll, and U. M. Rasin—the select code committee of the legislature began the work of revision and codification, utilizing such work, if any, as had been done by Commissioner Ferry and his assistants before the opening of the legislative session. The enrolled laws on file in the office of the Secretary of State, at Olympia, indicate that the legislature, itself, began the work of revising the laws then in force and of working them into a tentative compilation. That this was the case is also shown by the consecutive section numbers for the *Civil Practice Act* and the *Criminal Practice Act*, which are the first two acts in the *Code of 1881*. The sections of each of these acts were numbered from one to the end of the act. In addition to these numbers for the sections of these two acts, the legislature had also affixed consecutive code section numbers beginning with the first section of the *Civil Practice Act* and ending with

⁷⁶ Seattle *Post-Intelligencer*, December 13, 1881.

the last section of the *Criminal Procedure Act*. This is illustrated by the first section of the *Criminal Procedure Act* which is No. 1 of the act in question and No. 764 of the *Code*.

At this point, because of the shortage of time, the legislature decided to devote its efforts to revision, and to leave the work of compilation to John P. Judson. In one of the final sections (3322) of the *Code* the legislature provided that John P. Judson should be appointed to index the *Code* and prepare it for publication.

In preparing the *Code* for publication the compiler was directed to use all possible haste. He was directed to strip the acts of their titles, enacting clauses, and clauses indicating time of taking effect; and to give to the sections consecutive code section numbers (section 3323). He was empowered to arrange the subject matter into chapters, and to give headnotes and catchwords to the chapters and sections. While he was authorized to correct errors and omissions in the texts of the laws, he was prohibited from altering or changing the law in any way (section 3322).

In the light of the direction contained in section 3323, requiring the compiler to strip the acts of their respective titles, much confusion has resulted from his failure so to do with the first act in the *Code*. For some unknown reason he included the title to the *Civil Practice Act*, being "An act to regulate the practice and proceedings in civil actions." This title has the appearance of being the title to the entire *Code*, whereas it is the title to the first act only. If it were to be construed as the title to the *Code*, treating the *Code* as one single act, the whole codification would have been invalidated by the provisions of section 6 of the *Organic Act*. It was probably included in the compilation through inadvertence, and must not be regarded as having any legislative significance.

It is not generally understood that the *Code of 1881* is an official legislative code. Each and every law contained in it was re-enacted in its entirety at either the regular or extra session of 1881. The *Code* provided that, in so far as its provisions were identical with the prior acts, the code provisions were to be construed as continuations of such laws and not as new en-

actments (section 3319). In an early decision⁷⁷ the Supreme Court of Washington construed this section in the exact words of the statute, holding that its language clearly expressed the meaning intended and that in effect the *Code of 1881* was not a compilation of laws, but the old laws in a new form. Wherever the provisions of the *Code of 1881* differ from prior acts of a general nature relating to the same matter, the code provisions are made to prevail, and the prior acts are thereby repealed (section 3319). In those cases where the *Code* has omitted acts of a general nature in force at the beginning of the session of 1881 and not otherwise repealed, such laws are continued in full force and effect (section 3320), unless they are repugnant to other acts upon the same subject passed or revised at the regular or extra sessions of 1881.

The *Code* designated the classes of acts which were to be excluded from, as well as those which were to be included in, the published volume. Some were not to be codified, but were to be printed only in the *Session Laws of 1881*. These were to be the laws which related to appropriations, cities, towns, counties, and acts of a private, local, and temporary character. Ordinarily the bound volume of the session laws for a particular session includes all laws passed at that session; but the *Session Laws of 1881* omitted all laws included in the *Code* for the reason that they had been embodied into the codification.

If the bound volume of the *Session Laws of 1881* be examined, several interesting features will be observed. Some of the acts included in it relate to matters which were to have been included only in the *Code of 1881* as provided in section 3321. They were, however, placed in both places. These acts are amendatory of prior acts relating to practice in civil actions, probate, and the justice of the peace, and were passed and approved early in the regular session. In view of their general nature, it is not clear why they were placed in the session laws. If the provisions of these acts be compared with the corresponding provisions of the *Code*, many variations will be noted, the explanation of which rests in the fact that these acts did not

⁷⁷ *Littell and Smythe Manufacturing Company v. Miller*, (1892), 3 Wash. 480, 28 Pac. 1035.

represent the last word of the legislature upon the matters included therein. The prior acts (*Code of 1873*) were amended by these same laws, but, before the *Code of 1881* was completed, the separate acts comprising it were again amended before final passage so that the acts, which went into the *Code of 1881* varied from the acts which were put into the session laws for that year. Such changes were doubtlessly made from the floor of the legislature and were in effect amendments to the acts previously passed during the same session. This explanation can be established by the dates on the enrolled bills on file in the office of the Secretary of State at Olympia. It is evident that, for at least two reasons, these acts should not have been included in the session laws. First, the acts fell within that group of subjects which were to be codified, and secondly, the session laws as printed did not represent the final expression of the legislative will upon the subject matter in question. In at least one instance the original law, as found in the *Session Laws of 1881*, was placed in the *Code* as a footnote section,⁷⁸ although this original act had been later amended before the final passage. In this instance the footnote section was inaccurate and misleading.

Reference has been made to footnote sections in the *Code of 1881*. These footnote sections indicate laws which were inadvertently omitted by the compiler from the *Code*,⁷⁹ and which by the compiler's instructions, and the joint certificate of the Secretary of the Territory and himself, were required to be included. Since the *Code* at this time had been printed, these addenda could not be embodied within the *Code* and given consecutive section numbers. If the comparison of the proof sheets with the enrolled bills had been made in accordance with the intent of section 3323, these footnote sections could have been properly inserted and consecutively numbered accordingly. Not many of these footnote sections are to be noted; however, nine sections follow the provisions of the *Civil Practice Act*, and two sections follow the *Criminal Practice Act*. No others have been located. They are equivalent to lost sections because

⁷⁸ *Code of Washington*, 1881, section 1196. See footnote reference on page 230 of the *Code*; also *Session Laws of 1881*, 29.

⁷⁹ See pages 156 and 230 respectively.

they were not indexed in the *Code*; nor were they placed in *Bagley's Supplement to the Code of 1881*, which was published a short time thereafter.

Statutory direction provided the plan of arrangement and content of the subject-matter of the *Code*.⁸⁰ The compilation was to include:

First, the Constitution of the United States, and the amendments thereto.

Second, The *Organic Act* and other acts of Congress applicable to Washington Territory.

Third, The Naturalization Laws.

Fourth, All acts of a general nature revised and amended, or enacted at the eighth regular and extra sessions of the legislature.

No directions were made in this section concerning the arrangement of the statutes within division four, but section 3322 required the compiler to arrange and classify them in such manner as he thought desirable.

In his arrangement of the contents of the *Code*, the compiler followed the order of the statute (section 3322); but the classification of the statutes within division four was borrowed from the prior codes. The first subdivision of the statutes is that of Civil Procedure, followed by Criminal Procedure, the Probate Practice Act⁸¹ and the Justice Practice Act respectively. The final subdivision of the statutes bears the caption "Miscellaneous" and contains all the statutes not of a procedural nature. The entire *Code* (aside from the first three divisions) is again divided into two hundred and fifty-six chapters numbered in Roman, each with its own individual caption. The caption relating to school law (chapter 245) being a very long one is further divided into titles.

Under the authority of the Acts of 1877 and 1879 providing for the compilation of the statutes the compiler was to present the *Code* under four divisions substantially as follows:

⁸⁰ *Code of Washington*, 1881, section 3325.

⁸¹ Some copies of the *Code of 1881* have, through error, repeated the caption Justice Practice Act for the caption Probate Practice Act.

1. The political code.
2. The civil code.
3. The code of civil procedure.
4. The penal code including the code of criminal procedure.

The *Code of 1881*, itself, specified four divisions, one of which was to include all four of those listed in the Act of 1879. This fourth division of the *Code of 1881* was in turn so subdivided as to take care of the Codes of Civil Procedure and Criminal Procedure (including the penal code, which left the divisions of civil code and political code to be incorporated under the caption of "Miscellaneous." It is, therefore, apparent that the plan of arrangement suggested to the code commissioner in 1879 was more logical than the plan finally adopted, and, had Commissioner Ferry been more active in performing the duty for which he was chosen, a more systematic compilation of the law might have been forthcoming. It is not clear as to where he would have placed the Probate Practice Act, but possibly it could have been included in the division of Civil Procedure.

Most of the acts passed by the legislative sessions of 1881 carried emergency clauses which provided that, "This act shall take effect and be in force from and after its passage and approval." Some acts added the words "by the Governor" after the words relating to approval, but in every such instance where not so added, the words were obviously implied. The practice of indicating emergencies so as to make the statutes immediately effective is a common one; but it is also one which is badly abused. In the absence of any reference as to when statutes shall become effective the presumption is that they shall take effect immediately,⁸² unless there be a constitutional or statutory provision to the contrary. The policy of providing that all acts, not otherwise declared to be emergent, shall take effect sixty or more days after adjournment of the legislature is also a common one. In fact, such a policy is controlled by a constitutional provision in most states.⁸³ No such provision was

⁸² Some acts passed in 1854 and subsequent sessions of the territorial legislature contained emergency clauses which made them immediately effective. Those which did not have such clauses became immediately effective under the rule of the presumption. Of what value then was the emergency clause?

⁸³ Washington Constitution, article II, section 31.

incorporated into the *Organic Act* of Washington Territory, although it might properly have been so included. In the absence of any such restriction, the territorial legislature was free to enact a law fixing the time when general laws should become effective. This they did in 1868, in the following language:

Section 1. "From and after the date of the passage of this act, all laws made and passed of a general nature shall not be deemed to have or take effect until sixty days after the sitting of the legislative session has expired, unless otherwise directed."⁸⁴

This statutory provision being in effect at the time of the adoption of the *Code of 1881* governed the date when the *Code* became effective. The laws enacted at the session of 1881 and comprising the *Code* became effective on February 7, 1882, about three and one-half months before the printed *Code* was distributed, unless they carried emergency clauses, and during that time the people of the territory had no means of knowing what laws were in force. No pamphlet laws were published and few newspapers printed more than bare references to the enacted laws. This was one of the matters about which G. M. Haller had written to the *Seattle Post-Intelligencer* on November 5, 1881.

IX

Few codes have been subjected to such a rigid judicial examination and construction as that which the *Code of 1881* received. Being an unique expression of the legislative will, it has raised many interesting, and no less complex, questions of statutory interpretation. The result has been two distinct theories of judicial construction and much *dicta*.

It will be recalled that each of the *Acts of 1877* and *1879* provided that when the codification was completed and published, it should be known as the "*Washington Code*." The Legislature of 1881 reversed the words designating the title of the *Code* making it to read "*Code of Washington Territory*." (Section 3325). The word territory was dropped when the title page of the *Code* was prepared, leaving the title of the *Code* as

⁸⁴ *Laws of Washington*, 1868, 53; *Bagley's Supplement*, 16.

"*Code of Washington.*" Reference has been made to the popular designation of this *Code* as the "*Code of 1881,*" and as such it was subjected from time to time to judicial construction. The first two or three sessions of the territorial legislature subsequent to 1881 commonly referred to this *Code* by various designations. It was not uncommon in the same session to introduce bills to amend the "Code of Washington," "Code of Washington Territory," "Washington Code," "Code of 1881," and simply the "Code." The titles to many bills were in language similar to the following, "An act to amend section 3050, chapter 238, of the *Code of Washington Territory,*" and prior to the decision of the court in *Harland v. Territory*⁸⁵ decided in February, 1887 such titles were considered sufficient.

In a lengthy opinion written by Mr. Justice Turner, the court held in the *Harland* case that a mere reference in the title of an act to the section of a code, which is to be amended by the act is insufficient and that such an amendatory act is void. The basis for this interpretation was that the *Organic Act* of Washington Territory, which stated that "every law shall embrace but one object, and that shall be expressed in the title,"⁸⁶ did not permit such form of amendment.

Judge Turner in his decision of *Harland v. Territory* set forth at some length his theory of the *Organic Act*, in support of his view, and quoted from many authorities. Among the arguments, he said that some statement of the purpose of a law must be included within the title of an amendatory act in order that the title may indicate the object of the proposed law. Such a statement might be very general or even meagre. To use the word "amend" is, he says, sufficient. Law-makers do not read the bills in full before they vote on them in session, although theoretically they are supposed to do so. Bills are passed with reference to title only. The words of purpose in the bill are there for their information and guidance. Referring specifically to the act, which proposed to amend the *Code of 1881*, being "An act to amend section 3050, chapter 238, of the *Code of Washington Territory,*" Judge Turner said:

⁸⁵ 3 Washington Territorial Reports, 131.

⁸⁶ Section 6; *Revised Statutes of The United States* (Washington, 1878), section 1924.

“It seems to me that it is paltering with the Act of Congress to say that the object of a particular law is to amend a section of the Code, and that the title is sufficient if it express that much. It would be equally accurate to say that the object of all penal laws is to secure the peace and good order of society, and that laws denouncing robbery, burglary, or larceny would have their object adequately expressed by the title, ‘An Act to secure the peace and good order of society.’ The latter title goes as far beyond, as the former stops short of, expressing the true object. The object of an amendatory act is not to amend. Such a construction is too narrow; it sticks in the bark. Legislatures do not amend simply with the object of amending; the object in every case is to introduce some new substantive rule of action by the new law, or to abrogate some such rule in the old law. It is attached to the old law because its provisions are supposed to be germane to that law. It might be enacted without reference to it; in which case its title would be required to give intimation of the new rule. What magic is there in the name ‘amendment’ which exempts a law to which it is tacked from the salutary provisions applicable to every other law?”

The decision of *Harland v. Territory* grew out of several acts, one of which was designed to grant women the right of suffrage. It is generally conceded that Judge Turner was personally opposed to the principle of permitting women to vote. That this had an effect upon his decision cannot be truthfully said, but the decision did, however, “disclose his natural bent in opposition to the policy of granting women the right of suffrage.”⁸⁷ In the principles which it enunciated, it must be said to have held, that the *Code of 1881* could not be amended by a mere reference, in the title of the amendatory act, to a section of the *Code of 1881*, but that some words pertaining to the subject of the section of the act to be amended must also be included.

The decision was broad enough to effect the validity of all acts of the territorial legislature which attempted to amend the *Code of 1881* in this manner.

In a decision which arose after statehood,⁸⁸ the Supreme Court applied the principles of *Harland v. Territory* and refused to hold a territorial statute valid which was, in effect, de-

⁸⁷ C. S. Reinhart, *History of the Supreme Court of the Territory and State of Washington*, 21.

⁸⁸ *State v. Halbert* (1896), 14 Wash. 306, 44 Pac. 538, 64 A. S. R. 80.

clared invalid by the holding of *Harland v. Territory*, on the theory that if the said statute was invalid, it could not be revived by that provision of the Constitution⁸⁹ which holds that, "all laws now in force in the Territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature. . . ."

The great antithesis of *Harland v. Territory*, and the decision which has been said with doubtful validity to specifically overrule it,⁹⁰ was *Marston v. Humes*, decided in December, 1891.⁹¹

This decision involved the validity of an act passed by the legislature of 1891 entitled, "An act relating to pleadings in civil actions, and amending sections 76, 77, and 109 of the *Code of Washington of 1881*." In presenting the opinion of the Court, Mr. Justice Hoyt took issue with the philosophy of his colleague, Mr. Justice Turner. The question before the court at this time was, in simple language, whether the title of the act was broad enough to indicate the content of this act, as required by the provisions of the *Constitution*, which states that, "no bill shall embrace more than one subject, and that shall be expressed in the title."⁹²

After subjecting the title of the act in question to the test of whether the object of the act was clearly expressed therein, the court decided that it was, inasmuch as the matter of vacation of judgments was a part of the subject of pleadings, and the title stated that the act related to pleadings in civil actions. On the basis of this conclusion the court upheld the validity of the act in question. Having decided the question before it, the remainder of the opinion of the court must be regarded as *dicta*. In its holding in the case of *State ex. rel. Seattle Electric Co. v. Superior Court* (1902), the court, referring to Judge Hoyt's opinion, said: "It is true, the learned writer of the opinion went further, and stated that . . . a section of such Code may be amended by an act under a title which simply provides

⁸⁹ Washington Constitution, article xxviii, 2.

⁹⁰ *Erickson v. Hodges* (1910), 179 Fed. 177.

⁹¹ 3 Wash. 267.

⁹² Washington Constitution, article II, section 19.

for the amendment of such section by its number, without any designation of the subject matter of the section to be amended."⁹³ This opinion was reaffirmed in a decision rendered by the court in the year following. In *State v. Scott* (1903) the court said: "True the court went further, and held in that case [Marston v. Humes] that the Code of 1881 could be constitutionally amended by a mere reference to its section numbers . . ."⁹⁴ Both of these decisions seemingly are in accord with *Marston v. Humes*, but in reality they are only in accord with the *dicta* of this case.

In the course of his opinion in *Marston v. Humes*, Judge Hoyt very apologetically referred to the necessity of a re-examination of the reasoning in *Harland v. Territory*. His reasons may be summarized in the following manner:

(a) The court was at that time divided equally upon the question,

(b) One of the judges was incapacitated from sitting,⁹⁵

(c) Had the same case arisen in a different district of the territory, a contrary conclusion would have been arrived at,⁹⁶

(d) This court would not be justified in "blindly following and accepting as law" the decision of half of said court which constituted a majority of those sitting in that particular case.

(e) That court was less favorably situated for a full investigation of the question in the light of the authorities, than is this court.

(f) Very few books were accessible to the court in 1887.

(g) That a large number of the cases cited are said to have been so cited from digests rather than from the cases themselves.

(h) This court has had the opportunity to fully examine all the cases therein cited, and many more upon the same subject.⁹⁷

⁹³ 28 Wash. 332, 68 Pac., 957.

⁹⁴ 32 Wash. 279, 73 Pac., 365.

⁹⁵ Judge Hoyt.

⁹⁶ The reason was that the case had arisen in the judicial district over which Judge Hoyt presided.

⁹⁷ During the three years since *Harland v. Territory* was decided the Supreme Court Library must have been materially increased in size.

(i) The first decision was based upon the limitations of the *Organic Act* of the Territory; the *Constitution* of the State now controls, and the Court is free to interpret it without the limitations of the territorial decisions.

The last reason which Judge Hoyt offers is in reality a begging of the question. Few people can distinguish the issues in these two cases; the content of the provisions of the *Organic Act* and the *Constitution* is the same, although the wording differs. Most courts would have felt that the arguments in *Harland v. Territory* would have provided sufficient precedent for subsequent problems of similar scope. One cannot refrain from wondering whether the attitude of the court in the second case was not largely motivated by personal bias rather than the sincerity of judicial reasoning.

One writer, untrained in legal science but supported by almost forty-three years of service as clerk of the court, has said, and because of his intimate association with the history of the court, his comment is deserving of considerable respect, that in his opinion "Judge Turner's decision is much the more logical of the two, and, fortified as it is with subsequent decisions of this court, is without doubt the law at present."⁹⁸

Most students of the law regard the positions of the court in these two decisions as unsatisfactory. They are frequently heard to lament that the decisions are confusing. Some believe that *Harland v. Territory* has been "specifically overruled," while others regard *Harland v. Territory* as still the law. They, who contend for the latter view, must inferentially regard both decisions as consistent, if not complementary. This conclusion becomes the more convincing when the actual holdings of the two decisions are compared.

⁹⁸ Reinhart, 22.

*Harland v. Territory**Question*

An act to amend section 3050 of the *Code of Washington Territory (Code of 1881)*.

Decision

Act void.

Reasoning

The title of the amending act did not contain any reference to the subject matter of act to be amended.

Conclusion

Inferentially this act, amending a section of the *Code of 1881*, would have been valid had the title contained some statement, however general or meagre, which would have given some idea of the purposes of the act and the changes desired.

*Marston v. Humes**Question*

An act relating to pleadings in civil actions, and amending sections 76, 77, and 109 of the *Code of Washington of 1881*.

Decision

Act valid.

Reasoning

The title of the amending act did contain a statement of the subject of the act to be amended.

Conclusion

An act may amend a section of the *Code of 1881* if the title contains a statement of the subject matter of the act to be amended sufficient to give some idea of the purposes of the act, and the changes desired. In this case the act in question did contain such descriptive language.

Thus, in effect, both decisions hold that a section of the *Code of 1881* may be amended, providing the title of the amending act contains sufficient statement of the purpose of the amendment or gives a clear expression of the change in the law which the amendment will effect.

Too frequently, the reader of judicial opinions, and the digester also, fails to distinguish between the actual holdings of a legal opinion and the learned dissertations or *dicta*, which such opinions frequently contain. The syllabi of the decisions contain frequent statements of *dicta* much too often accepted as statements of the law laid down in the decision. Such was the difficulty with the decision of *Marston v. Humes*. As an example of this confusion the reader will frequently note that *Marston v. Humes* is cited as authority for the rule (see syllabus) that "A section of the *Code of 1881* may be amended by

an act under a title which simply provides for the amendment of such section by its number, without any designation of the subject matter of the section amended." Such a statement is pure *dicta*. The decision itself did not hold this.

Undoubtedly Judge Hoyt intended to so hold, but the courts have not willingly accepted this broad statement of statutory construction,⁹⁹ although frequent reference has been made to the language above quoted. To the casual reader the deductions of Judge Hoyt are convincing. Certainly the development of his thesis is a masterpiece of inductive reasoning, which must be read to be appreciated. The substance of his argument upon the construction of the constitutional provision that "No bill shall embrace more than one subject, and that shall be expressed in the title" is worthy of further study. "How," he said, "Shall this provision be interpreted?" And in answer thereto, he said,

"I am of the opinion that the legislature must be the judge of the scope which they will give to the word "subject," and that so long as the title embraces but one subject, it is not inimical to such constitutional provision, even although the subject as thus used contains any number of subjects."

Furthermore, he said,

(a) That it cannot be contended, that a title would be void which provided that the enactment was to be upon the subject of "pleading." And,

(b) If the term "pleading" is sufficient, then it must be competent for the legislature to enact as a single law a "code of civil procedure." And,

(c) If the legislature can thus by a name sufficiently comprehensive embrace all subjects properly relating to civil procedure, it must follow, that, by adopting a subject sufficiently general, it can embrace in one act all the "statute law of the State."¹⁰⁰ Furthermore,

(d) If it is competent for the legislature to enact this entire body of laws under a single title, it must follow that an act to "revise or re-enact" the same would, upon familiar principles, be likewise valid. And finally,

(e) If the whole act can be revised or re-enacted under one title, the same can be revised or re-enacted in part by way of amendments, provided the parts to be amended are specified in the title.

⁹⁹ State ex. rel. *Seattle Electric Company v. Superior Court*, supra 96.

¹⁰⁰ The legislature of Oregon Territory attempted this procedure in 1849. See Beardsley, "Code Making in Early Oregon," 10.

X

Closely allied to that judicial interpretation which has made the *Code of 1881*, is the judicial definition and characterization which has accompanied its interpretation.

In the *dicta* of his concurring opinion in *Harland v. Territory*, Mr. Justice Langford subjected the *Code of 1881* to severe condemnation and ridicule. With extraordinary contempt he said,

“We have a book which is marked on the fly-leaf, ‘The Code of Washington,’ I have examined it, and find that it does not purport to contain any authenticated act of the legislature assembly of the Territory of Washington. It purports to have been edited and compiled by a private party. It contains no titles to acts, no enacting clause, no signature of president of the council, speaker of the house, or governor. It is not certified by the secretary to be or contain a true copy of any legislative act. The chapters, divisions, and sections all purport to be the act of a private party. His sections run up to 3327, and in the book is an unauthenticated provision that a certain private party shall publish parts of a certain class of laws which he shall deem to be general, and leave out certain parts of all acts, and leave out entirely others. He certifies that he has examined all the laws embraced in the volume (the Code), etc., and put redundant matter in parentheses, and matters omitted from enrolled laws but supplied by him are enclosed in brackets.

“Now it is clear that this book contains no act passed by the legislative assembly, and it cannot be known officially what it does or does not contain. We suppose that this is the private book which the Act of 1883 purports to amend.”

It is obvious that this characterization by Judge Langford is unfair and unjust. Certain comments are wholly inaccurate, while the whole tirade breathes of bias and prejudice. Needless to say, his view of the character of the *Code of 1881* was not entertained by the bar of the territory, nor by his associate, Mr. Justice Greene, who in his dissenting opinion, says, “From all that is decisive and much that is not decisive, . . . I totally dissent, . . .” The answer to this tirade of Judge Langford was made by Judge Hoyt in the course of his opinion in *Marston v. Humes*. By way of quest, he asked (at page 272), “Is there such a thing known to the law of this state as the *Code of 1881*?” By way of answer, he said, “the proposition is too clear

for extended argument. . . . The legislature which revised and re-enacted the laws which now constitute such *Code* provided that the laws thus revised and re-enacted should be arranged and consecutively sectionized from the first to the last, and that such laws when so placed and numbered in a single body should constitute the *Code*, and I can see no reason why their will thus expressed should not have force. Besides from that time to this, the legislature by constant reference to said body of laws as the "*Code of 1881*," have clearly shown their adoption of the same as such *Code*; and for the courts to hold that there was no such thing as the *Code of 1881* would, in my opinion, do violence to every rule of judicial interpretation of legislative acts."

The above holding in language somewhat differently phrased is to be found as one of the points of the syllabus of the above case, and, in its syllabic form, this language has been cited with approval by the court in a number of later decisions.

XI

The legislature specifically provided that the laws of a general nature not repealed by the *Code of 1881*, were to continue in full force and effect. It was their intention that all such laws should be incorporated into the *Code*. The legislators did not intend that any laws of a general nature should be overlooked by the sessions of 1881. The purpose of the saving clause (section 3320) was to save any such laws which had been inadvertently omitted from the procedure of repassage in either the regular or extra session. It was the belief of the legislative committee that all such laws had been repassed; and the members of the code committee did not realize that any had been overlooked; but, in fact, some seventy-seven general laws had been forgotten.

After several months had elapsed, John P. Judson and Elwood Evans, both former members of the code committee of 1881, prepared a compilation of these laws consisting of fifty pages including an index. The compilation was in the nature of a supplement to the *Code of 1881*, and follows somewhat the plan of the latter in omitting the titles of the acts. It was not arranged into sections as in the *Code of 1881*, but it listed the

dates of the laws which was a feature that the *Code* did not include. The authority of these laws does not rest upon this supplement for their sanction, but upon the strength of the saving clause of the *Code of 1881* (section 3320), which preserved them. It is not an official compilation like the *Code* and has never received legislative approval.

The supplement has come to be known as *Bagley's Supplement* because it was printed by Clarence B. Bagley, then the state printer. In referring to the supplement by way of a preface to the volume Mr. Bagley has said:¹⁰¹

"The Legislative Assembly of 1881, in the enactment of the '*Code of Washington*,' and the session laws of 1883, did not include many laws of a general nature, which, by the terms of the repealing clause of the *Code*, are still in force. These are scattered through the session laws, from 1855 down to date, and the following compilation is thought to include all such laws of a general nature, not appearing in said *Code of 1881* and laws of 1883, but still in force in Washington Territory. The question may arise whether some of these laws have not been repealed, but as at present advised, they are thought not to be, and hence are included."

There seem to be two distinct editions of the *Supplement to the Code of 1881*. The second edition, while not so marked, bears the imprint date of 1884. Since the contents of this edition present some interesting variations, particular reference must be given to them.

The 1884 edition contains two laws more than the 1881 edition, but five laws are included in the 1881 edition which do not appear in the 1884 edition, and six laws are to be found in the 1884 edition which are not contained in the 1881 edition. These six laws of the 1884 edition are laws relating to county boundaries and were not passed until the legislative session of 1883, which explains their absence from the 1881 supplement. Of the five laws contained in the 1881 supplement and missing from the 1884 edition, two were repealed by the 1883 legislative session, one was a temporary law which expired by its own terms in 1883, another was a statute which had been repealed prior to 1881 and was picked up and included through mistake.

¹⁰¹ John P. Judson and Elwood Evans, *Laws of Washington Territory* (Olympia, 1881), 2.

The last statute in question was probably omitted from the supplement of 1884, through inadvertence.

XII

As was true of all the territorial codes, the *Code of 1881* was not without its critics. The extent of the agitation for a new revision of the laws prior to the session of 1887 is not known, but that such a demand had strong political support is certain. In his message to the legislature of 1887, Governor Semple said:¹⁰²

“The laws of this territory, owing to careless legislation and decisions of the courts, are in such a state of confusion that it is very difficult even for experienced members of the bar to arrive at any definite conclusion in regard to them, much less can a citizen exactly determine the rules that govern his conduct, or the laws that guarantee his rights and privileges. Consultation of our laws by our citizens is rendered still more difficult by the absence of anything that can properly be called an index to the volumes. To remedy these faults there seems to be a general desire for the codification of our statutes. I suggest that instead of a codification of our present law, a commission be created and instructed to prepare for submission to the next legislature a civil, a criminal, and a probate code, being guided in their labors by an adherence to the spirit of our laws as heretofore instituted. It should also compile all general laws under a separate head, and provide a competent index for the whole system.”

The legislature regarded with approval the recommendation of the governor relative to a code commission. House Bill No. 118, being “An act to provide for the appointment of a code commission,” was introduced into the house on Monday, January 9, 1888, by T. J. V. Clark of Yakima County. The bill was referred to the Judiciary Committee which reported it out favorably on January 27. The proposal was approved by the House on that day, and by the Council on January 31, and was signed by the governor on February 2.¹⁰³

In the code commission act of 1877, the governor was to appoint as a commissioner either an attorney, or a judge of the

¹⁰²*Walla Walla Union*, December 17, 1887.

¹⁰³*Laws of Washington*, 1887-88, 44.

Supreme Court. By the act of 1879, the selection was limited to former Governor Ferry, an attorney of considerable prominence. Notwithstanding the failure that Governor Ferry made of codification in 1881, the legislature still had confidence in the legal profession. Perhaps this was due to the excellent service rendered by the select code committee in the legislative session of 1881, on which, there were nine attorneys.¹⁰⁴ The fact remains, however, that in the Act of 1888 the governor was to appoint, not one attorney but four attorneys, residents¹⁰⁵ of the territory who were then practicing law. Two of these appointees were to belong to each of the "Great political parties." One may well wonder what importance party affiliation could have upon this task.

The commissioners were to meet within thirty days after their appointment and enter upon the discharge of their duties (section 2). No oath was to be required. The duties as outlined by the legislature were "to revise, codify and fully prepare a code of the laws of said Territory, having reference and adhering as closely as practicable to our present system" (section 1). In section 3 it was also provided that:

"It shall be the duty of said commission to prepare in the best form, a code of laws for general use in said Territory, adhering as closely as may be proper and practicable to the present system and laws, and to arrange the same logically and systematically under the proper headings and chapters supplying any omissions and imperfections that may now exist, at the same time adopting practical necessary forms of laws, and keeping in view the laws and forms, and arrangement of the same now in use, in the states and territories under the code system. Said code shall be fully prepared and shall be submitted in written or printed form to the next regular session of the legislature on the first day thereof."

In consideration of their services, the commissioners were to receive seven dollars per day. They had the power to appoint a clerk at the rate of five dollars per day, (section 2) and for all expenses of service the legislature appropriated seven thousand dollars (section 4).

¹⁰⁴ Kuhn, Evans, Hoover, Sharpstein, Judson, Rasin, Carroll, Comegys, Holcomb.

¹⁰⁵ It is not clear why this word was inserted. Perhaps it was intended to refer to William Lair Hill who had published a code for Oregon in 1887. He was at this time a resident of California but was then preparing to move to Seattle.

As members of this code commission Governor Semple appointed W. H. Doolittle of Tacoma, J. H. Snively of Yakima, T. H. Came of Seattle, and A. E. Isham of Walla Walla. Bancroft has said,¹⁰⁶ that as the "passage of the enabling act"¹⁰⁷ rendered it undoubted that the state constitution would differ materially from the organic law of the territory, the commission suspended its labors until the state constitution has assumed definite form, when it revived its work."

What, if anything, was accomplished by this commission is problematical. No record is left of their "labors" and, if a report was filed with the governor, it was buried in the administrative archives and was never recorded. Doubtless the question of code revision was permitted to lag because of approaching statehood and the current belief that thereafter a new state code would be needed. Certain it is, that one of the first acts of the first legislative session, after statehood had been granted, was to provide for a complete and thoroughly revised system of laws.¹⁰⁸

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BIBLIOGRAPHY OF WASHINGTON TERRITORIAL CODES

(Throughout the preceding article the term "code" has been used in its popular rather than its technical sense. The codes do not have individual paginations separate from that of the other general acts but usually will be found at the front part of the volume.)

Code of 1854, in *Statutes of the Territory of Washington, 1854*. (Olympia, 1855. LXVII 488 pp.)

Code of 1859 [1860], in *Acts of the Legislative Assembly of the Territory of Washington, 1859-60*. (Olympia, 1860. III 523 pp.)

Code of 1863, in *Statutes of Washington Territory, 1862-63*. (Olympia, 1863. xc 144 v 572 pp.)

Code of 1869, in *Statutes of the Territory of Washington, 1869*. (Olympia, 1869. 832 pp.)

¹⁰⁶ H. H. Bancroft, *History of The Pacific States of North America: Washington, Idaho, and Montana, 1845-1889* (San Francisco, 1890), xxvi, 299.

¹⁰⁷ *The Statutes at Large and Treaties of The United States of America, 1851-1855* (Boston, 1866), x, 172.

¹⁰⁸ For certain help in the preparation of this article the author is indebted to Mr. Arthur Remington of Tacoma and Mr. Frank Pierce of Seattle.

Code of 1871, Amendments, in *Statutes of the Territory of Washington, 1871*. (Olympia, 1871. 262 pp.)

Code of 1873, in *Laws of the Territory of Washington, 1873*. (Olympia, 1873. 776 pp.)

Code of 1881, in *Code of Washington*. (Olympia, 1881. XLVIII 580 pp.)

Bagley's Supplement to Code of 1881, in *Laws of Washington Territory*, compiled by John P. Judson and Elwood Evans. (Olympia, 1881. 50 pp.)

Bagley's Supplement to Code of 1881, compiled by John P. Judson and Elwood Evans. [second edition.] (Olympia, 1884. 50 pp.)