

THE
REVISED CODES

OF THE
STATE OF NORTH DAKOTA

1895

TOGETHER WITH

THE CONSTITUTION OF THE UNITED STATES AND OF THE
STATE OF NORTH DAKOTA

WITH THE AMENDMENTS THERETO

BY AUTHORITY OF THE LEGISLATIVE ASSEMBLY

BISMARCK, NORTH DAKOTA
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PREFACE.

The year 1776 marks an event in our system of jurisprudence hardly less important than was the Declaration of Independence in civil government. In that year Jeremy Bentham published his criticism of Blackstone, which was in fact a criticism of "judge-made" law and an argument in favor of codification. From that time until his death in 1832, in a series of publications covering almost every department of law, Bentham marshalled the arguments in favor of reducing all law to a statutory form. Though codification has been the most prominent subject of legal discussion during the century, it is safe to say that not an argument in its favor has been made which cannot be found in the writings of its first advocate. Unheeded for a quarter of a century, toward the close of his life, Bentham drew to his support a brilliant school, composed of such men as Austin, John Stewart Mill, father and son, Macauley, Romilly, Brougham and Langdale. The extreme conservatism of England and the reaction against all innovation, caused by the atrocities of the French Revolution, prevented the early success of codification. The immediate effect of the teachings of Bentham and his associates was limited to comprehensive reforms in the existing system of law, instead of resulting in the adoption of that system for which he contended.

The writings of Bentham and Austin made a profound impression in the United States and were potent factors in producing great reforms in the law of practice and evidence. Codification, however, received only a casual and theoretical consideration at the hands of the great masters of American jurisprudence in the early part of this century. No person appeared among them to take up the subject with the zeal of a reformer. In the thirties it found such an advocate in David Dudley Field. He brought to this cause an enthusiasm akin to that of Garrison in the anti-slavery movement. To it he consecrated his life, placing it above personal gain or professional success. His first pamphlet was published in 1837 and so vigorous was the campaign which he carried on in the state of New York that his reform was made a part of the constitution of 1846. Section 17 of article 1 of that constitution, providing for a commission to codify the substantive law, read as follows:

"The legislature at its first session after the adoption of this constitution, shall appoint three commissioners whose duty it shall be to reduce into a written and systematic code, the whole body of the law of this state, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient; and the said commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the legislature when called upon to do so; and the legislature shall

pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of said commissioners, and shall also provide for the publication of the said code, prior to its being presented to the legislature for adoption."

Section 2 of article 6 of the constitution, providing for a commission on the subject of practice and pleadings, read as follows:

"The legislature at its first session after the adoption of this constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this state, and to report thereon to the legislature, subject to their adoption and modification from time to time."

Pursuant to these constitutional provisions the legislature of New York in 1847 passed an act creating the two commissions, and the commissioners were appointed that year. Mr. Field was not a member of either commission as originally constituted, but one of the first appointees resigned immediately, and Mr. Field was appointed in his place as one of the commissioners on practice and pleading. This commission in 1848 reported the code of civil procedure which was adopted that year and which has been enacted in most of the states of the Union. The code of criminal procedure, which the commission reported the following year, was not adopted in New York until 1881.

More difficulty was experienced in securing commissioners to codify the substantive law. The first commission appointed in 1847 resigned. In 1849 a new act was passed providing for another commission, but John C. Spencer, one of its most prominent members refused to serve and in 1850 the commission was abolished by an act of the legislature. In 1857 another act was passed under which David Dudley Field, Wm. Curtis Noyes and Alexander W. Bradford were appointed commissioners to continue in office for five years and to prepare codes of all the law not covered by the work of the commission on practice and pleading. In April, 1862, the term of office of these commissioners was extended to 1865. In the last named year they reported to the legislature the draft of a political code, a penal code and a civil code. Of these the penal code alone has become a law in the state of New York though it was not adopted there until 1882. The civil code has twice passed the legislature and each time been vetoed, owing to the opposition of the bar.

This state is so largely indebted to California for modifications in its system of codes that it is proper to give a brief sketch of codification in that state. Stephen J. Field, a brother of David Dudley Field, was his law partner in New York City from 1841 to 1848, during the period of the latter's greatest activity in the cause of codification. In 1848 he removed to California. As a member of the judiciary committee of the first legislative assembly of that state he exercised a controlling influence over its legislation. He framed two acts on the subject of criminal and civil practice which became laws and were thereafter known in that state as the Civil and Criminal Practice Acts. They were modeled upon the codes of civil and criminal procedure drafted by the New York commission. In 1868 a commission was appointed to revise the laws of the state. This commission apparently did not accomplish much, for the next legislature passed an act creating another commission upon the same subject. The latter commission

reported to the legislature of 1872 four codes, the civil, political, penal and civil procedure, and the same were adopted March 12th, 1872, after having been revised by a joint committee of the legislature. "Adopt the codes and amend them afterwards," was the motto of the commission and of the legislative committee. The codes were to go into effect January 1st, 1873. In June, 1872, a commission was appointed to examine them and propose amendments for the consideration of the next legislature. Stephen J. Field, then a justice of the supreme court of the United States, was appointed one of the members of this commission. The commission organized at once and worked steadily at their task until October, 1873, when they reported to the governor what is known as "The Report of the Examiners of the Codes." This consisted of a draft of four acts, one to amend each of the codes. Their proposed amendments to the civil code covered eighty-eight pages, to the code of civil procedure one hundred and eight pages, to the penal code twenty-three pages and to the political code twenty pages. These amendments were adopted in 1874. The codes as thus amended, are the ones which are now familiar to the profession in this state.

In the early days of the territory of Dakota, the legislative assembly, was as active on the subject of codification as the most ardent reformer could ask. Hardly a session passed during the first ten years—and the sessions were then annual—in which one or more codes were not introduced and adopted. These codes were taken either from those prepared by the New York commissioners, or from other states in which codes based on the work of the New York commissioners, had been adopted. The following is a record of the various enactments of this kind:

A code of civil procedure taken from Ohio was adopted at the first session of the legislative assembly in 1862. In 1868 this code was repealed and the code of civil procedure of New York adopted in its place.

A code of criminal procedure was also passed at the first session of the legislative assembly in 1862. The code thus adopted was repealed in 1869 and replaced by the code of criminal procedure prepared by the New York commissioners. This code was again amended and re-enacted in 1875.

A justices' code was adopted at the first session of the legislative assembly in 1862. This was repealed at the next session of the legislative assembly in 1863 and a new code adopted in its place. This again was repealed in 1866 and another complete code on the subject enacted.

A penal code was adopted at the second session of the legislative assembly in 1863. It was repealed in 1865 and the penal code drafted by the New York commissioners adopted in its place.

A probate code was adopted in 1865.

The civil code prepared by the New York commission was adopted in 1865, taking effect January 12th, 1866. The territory of Dakota was the first English community to adopt a codification of its substantive law. It has been quite generally supposed that California took the lead in this matter. This is a mistake, however, as the civil code was not adopted there until 1872.

All the above codes were adopted by the legislative assembly of Dakota without any revision by a commission and with only such adaptation to the other laws of the

territory as could be given by the legislative committees. Having been prepared with respect to a system of laws in New York and in many cases referring to other statutes of that state, the codes, as adopted by the territory, were incomplete and contained many provisions wholly inapplicable to the conditions of our people.

In 1875 an act was passed providing for a commission of three to revise the codes and statutes of the territory, (chapter 23 of the laws of 1874-5). Pursuant to this act the governor appointed P. C. Shannon, then chief justice of the supreme court of the territory, Granville G. Bennett, an associate justice of the supreme court, and Bartlett Tripp, as commissioners. They prepared the revision of 1877. In their work this commission was greatly aided by the system of codes which had just been adopted in California and most of the changes made by them were taken from that source.

Chapter 83 of the laws of 1887 provided for a commission to compile the laws of the territory. E. W. Caldwell and Charles H. Price were appointed as commissioners pursuant to this act and prepared the compilation of 1887. The act under which they served limited their powers to compilation and for this reason nothing was done by them either to supply deficiencies in the law or remove its repugnant provisions. By chapter 36 of the laws of 1889, this compilation was declared to be admissible in the courts of the territory as legal evidence of the statutes therein printed.

Upon the admission of the state of North Dakota, the necessity was at once felt of a commission to adapt the laws then in force to the constitution of the state and harmonize the large body of statutes which had been passed since the revision of 1877. Chapter 82 of the laws of 1891 provided for a commission of three to accomplish this object—two of the commissioners to be attorneys at law and one an experienced business man. The governor of the state appointed as commissioners under this act, P. H. Rourke of Lisbon, Robert M. Pollock of Casselton and J. G. Hamilton of Grand Forks. The commission organized at once, appointing J. F. Philbrick of Bismarck, secretary, and on the meeting of the legislative assembly in January, 1893, presented a report showing in detail those provisions of our statutory law which should be continued in force and those which should be repealed. They also prepared a large number of bills for the purpose of supplying deficiencies in the system of laws then in force and adapting those laws to the new constitution. Owing, however, to the protracted contest for the election of a United States senator during this session of the legislative assembly, nothing was done towards carrying the recommendations of the commission into effect.

The same session of the legislative assembly, (chapter 74 of the laws of 1893), provided for the present commission. The appointments were made in March of that year and soon after the commission organized and appointed Charles J. Fisk of Grand Forks, secretary. In carrying out the work, certain codes were assigned to each member. The probate and justices' codes were assigned to Mr. Corbet, the penal code and code of criminal procedure to Mr. Newton, and the civil code and code of civil procedure to Mr. Amidon. The political code was reserved for the joint action of the entire commission, with the assistance of its secretary. When the legislative assembly convened in January, 1895, the commission reported to

that body seven bills providing for seven different codes, embracing the entire statutory law of the state. A special joint committee was appointed to take charge of this work. Many changes were made by the committee and the legislative assembly in the report of the commission. The most important of these changes was the substitution of an entirely new system of revenue and taxation in the political code, which was made by the legislative assembly too late in the session for careful consideration.

In printing the codes the commission has indicated in the margin opposite each section the origin of any statute embraced in the codes, taken from the laws of the territory of Dakota or the state of North Dakota. Where entirely new matter was introduced by the present commission no reference whatever is contained in the margin.

In preparing this revision the commission has undertaken a task of great magnitude and difficulty. It involved much more than a mere compilation or rearrangement of pre-existing statutes. Not only have many changes been made in the form of existing law, but in each of the new codes a large number of provisions wholly new in this jurisdiction have been added. The period since our last revision in 1877 has been marked by great activity in legislation and codification. The codes embraced in that revision have been enacted in many other states, and before such enactment were subjected to careful revision and have since been largely modified by amendment. It has been the aim of the commission to bring the codes of this state down to date—to embody in them the improvements of other states, and add such new provisions as were necessary to give effect to our constitution and harmonize and complete our system of law. While fully expecting that experience will discover many imperfections in our work, we also trust that experience will show the revision to be a substantial improvement in the honorable work of our commonwealth in the cause of codification.

BURKE CORBET,
GEO. W. NEWTON,
CHARLES F. AMIDON.