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RECODIFICATION OF THE NORTH CAROLINA STATUTES

WILLIAM J. ADAMS, JR.*

The General Assembly of 1939 authorized and directed the current recodification by an Act¹ which is noteworthy in at least three respects:

1. Prior codifications of our laws have been prepared by commissioners working under temporary appointments by the General Assembly.² The "Department of Justice Act", in creating a division in the Department with bill drafting and codification duties,³ marks a departure from this practice but reflects the trend in other states to assign such duties (because of their recurring and specialized nature) to permanent state agencies.⁴

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¹ N. C. Pub. Laws 1939, c. 315, §5; See *A Survey of Statutory Changes in North Carolina in 1939* (1939) 17 N. C. L. REV. 327, 376.

² In outline, prior official codifications of the laws of North Carolina are as follows: First codification (in manuscript), 1716; first printed codification, SWANN'S REVISAL of 1751; IREDELL'S REVISAL of 1789; FRANCOIS X. MARTIN'S STATUTES (1792), PRIVATE ACTS (1794) and REVISAL (1804); POTTER'S REVISAL of 1821; REVISED STATUTES of 1837; REVISED CODE of 1854; BATTLE'S REVISAL of 1873; CODE of 1883; REVISAL of 1905; CONSOLIDATED STATUTES of 1919 (Volumes 1 and 2); and CONSOLIDATED STATUTES of 1924 (Volume 3).

For history of the codifications of our laws, see the prefaces of the REVISED CODE of 1854, the REVISAL of 1905, the CONSOLIDATED STATUTES of 1919, and the CONSOLIDATED STATUTES of 1924; REPORT OF COMMISSION ON STATE DEPARTMENT OF JUSTICE (1939), 15; GARDNER, *Ancestors of the Consolidated Statutes* (1938) 5 POPULAR GOVERNMENT, No. 7, p. 7.

³ The title given the division by the act is "Division of Legislative Drafting and Codification of Statutes."

⁴ In Wisconsin, Kansas, Maine and Minnesota there are Revisors of Statutes. See Brossard, *The Wisconsin Plan of Permanent Statute Revision*, MISSOURI BAR JOURNAL (March, 1938) 37; Corrick, *The Establishment and Operation of the Office of Revisor of Statutes in Kansas*, KANSAS STATE BAR JOURNAL (May, 1938); Maine Pub. Laws 1931, c. 210; Henderson, *Duties of Revisor of Statutes*, THE HENNEPIN LAWYER (September, 1939).

In Pennsylvania, revision is among the duties of the Legislative Reference Bureau. Lower, *Statutory Revision in Pennsylvania*, Memorandum of June 13, 1939.

In 1939, Florida created in the Attorney General's office a division on statutory revision. Tribble, *Florida Statutory Revision* (1939) (paper prepared for Extension Division, University of Florida); address by George Couper Gibbs, Attorney General of Florida, before National Association of Attorneys General on September 10, 1940, entitled "Statutory Revision and Legal Research."

In South Carolina there is a permanent Code Commissioner. See S. C. Pub. Laws 1940, No. 1015.

In Iowa, the duties of Supreme Court Reporter and Code Editor are combined. CODE OF IOWA (1939), c. 13. A similar arrangement has been adopted in Oregon. Oregon Pub. Laws 1939, c. 486.

In Kentucky, there is a Legislative Council with authority to appoint a

2. The Act indicates that the duties of this division with respect to the recodification are to be only supervisory, and that the work is to be initiated by the editorial staff of a selected publisher. However, the division could not effectively meet its responsibility unless it undertook to do in detail as much of the work as possible, and this procedure has been followed.

3. No appropriation was made for the publication of the completed work. The publisher's compensation must be derived from sales. This provision is in sharp contrast to substantial appropriations granted in some other states.⁵

The Attorney General approached the recodification program by appointing and consulting an advisory committee of fifteen members.⁶ This committee, after preliminary meetings, designated a sub-committee⁷ of five to keep in touch with the progress of the work.

The initial problem was that of making the necessary arrangements with a publisher. Although some of the leading law publishers were approached during the spring of 1939, it soon became apparent that, since no appropriation had been made for the publication, the Michie Company, of Charlottesville, Virginia, was the only publisher in a position to contract with the state for the work. The obvious reason was that this Company, as the publisher of the unofficial code widely used in the State since 1927, had much type standing that could be

research director and assistants; and to revise the laws. Kentucky Acts (Ex. Sess. 1938), c. 2.

⁵In Alabama, for the codification authorized by the 1939 legislature, the sum of \$187,500 was appropriated for publication. This was exclusive of \$25,000 paid the publishers for the preparation of a manuscript and of \$125,000 which the state agreed to pay for extra copies of the code within an eight year period after publication. In addition \$54,341 was paid the code commission as compensation. Letter and copy of contract furnished by Honorable Thomas S. Lawson, Attorney General of Alabama.

In Idaho, \$50,000 was appropriated to be paid the publisher in addition to any other sums which the legislature might appropriate for the preparation of the code. IDAHO CODE ANN. (1932) p. 1.

Florida, in addition to \$20,000 appropriated for the preparation of a code manuscript, appropriated out of the general fund "an additional sum sufficient to pay the cost of printing and binding the preliminary and permanent editions of said statutes." Florida Pub. Laws 1939, c. 19,140.

⁶This committee consists of Hon. A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. Van Hecke, of the University Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian; Bennett H. Perry, Henderson; H. G. Hedrick, Durham; H. Gardner Hudson, Winston-Salem; Clifford Frazier, Greensboro; and Bryan Grimes, Washington, representing the North Carolina Bar Association; and C. W. Tillett, Charlotte; Jack Joyner, Statesville; H. J. Hatcher, Morganton; Frank E. Winslow, Rocky Mount; and William T. Joyner, Raleigh, representing the North Carolina State Bar.

⁷The subcommittee consists of Judge Seawell and Messrs. Gardner, W. T. Joyner, Perry, and Winslow.

used without substantial alteration in the new code. This led to an agreement for the necessary editorial work and publication.

The scope that the work should take was a threshold problem. The General Assembly had directed a "recodification" of the general public statutes. The term is elastic in meaning⁸ and begged for practical definition. Certain aims were, of course, beyond question. There should be a satisfactory index and the annotations and editorial features should be improved as much as possible. But what should be the extent of the work on the statutes?

The approach lay between the opposing extremes of a compilation and a revision. A compilation is merely the "assembling, under a general plan, without alteration in form or substance, of a large mass of legislative acts covering different subjects and passed on different occasions."⁹ A revision is a rewriting or restatement of the law in refined or corrected form, with or without material changes, for adoption as one act by the legislature.¹⁰ Since the mere assortment and compilation of statutes is not enough to eliminate many conflicts, duplications, obsolete provisions and imperfections of form, a revision is necessary to approach the ideal of producing clarity, harmony and simplicity in the statutory law. However, most bulk revisions are plagued by urgent practical limitations, chief among which is that of time.¹¹ Redrafting requires the utmost care, and cannot be undertaken with haste. Further, the extent and nature of the problems to be encountered could not be anticipated by the division. Its task, therefore, became that of steering as near to a thorough revision as permitted by a tentative time budget which required that, if possible, the work be completed for submission to the General Assembly of 1941.¹²

⁸ BLACK, LAW DICTIONARY (3d ed. 1933) 345, defines codification as the "process of collecting and arranging the laws of the country or state into a code, i.e., into a complete system of positive law, scientifically ordered, and promulgated by legislative authority."

⁹ Henderson, *supra* note 4.

¹⁰ *Ibid.*; CRAWFORD, STATUTORY CONSTRUCTION (1940), §§127, 129.

¹¹ Witness the following statements in the legislative editions of the CODE of 1883 and the REVIVAL of 1905:

(1) "The Commissioners [for the CODE of 1883] have devoted to this work an immense amount of time and labor, and have barely been enabled to get the said bill ready for the action and consideration of the General Assembly, at its present session."

(2) "It has been a matter of great concern and deep regret that the statute has not been complied with as to the time of delivery of work by the commissioners [for the REVIVAL of 1905] to the Secretary of State. The commissioners and their assistants have labored industriously to accomplish the desired result, but the difficulties were too great and the labors too arduous."

See also VAN HECKE, STATUTORY REVISION IN ILLINOIS (1918) 54; Brossard, *supra* note 4.

¹² The act authorizing the recodification does not require that it be completed for the General Assembly of 1941. However, every effort has been made to complete the work within this time. Problems which could not have

The Attorney General decided that the results of the work should be presented to the General Assembly in two parts: (1) an accurate collection, in manuscript, of the public and general statutes in force; (2) an accompanying report containing recommendations for the repeal of obsolete and unconstitutional statutes, the correction of formal and obvious errors, the elimination of conflicts, duplications and inconsistencies, and the clarification of obscurities. It was thought that by adopting this explanatory procedure, each change could be more readily considered on its merits by a legislative committee; the work need not stand or fall as a unit, and the rejection of some recommendations would not prevent the acceptance of others. Further, the essence of the work would be preserved to be readily fitted into whatever form and legal effect the General Assembly might choose to give it. For example, a final manuscript based on the collection of statutes as modified by the recommended changes could be adopted as an official code;¹³ or, even if no official code is adopted, an omnibus bill could give effect to the approved recommendations.¹⁴

With the broad outlines of the program thus settled, preparations were made for the detailed work. While the codification division was established in the Department of Justice on July 1, 1939, much preliminary effort was necessary, and the actual review of the statutes could not be commenced until September 1st. The legal staff was increased from two to five by November 1st, and has been maintained at that number, with a few temporary lapses due to changes in personnel.¹⁵

The recodification work should be considered in four aspects:

been anticipated have disrupted the schedule, and it is now clearly apparent that more time is needed.

¹³ All of the major revisions of the North Carolina statutes have been adopted as official codes. For typical adopting provisions, see §§8100-8107 of the CONSOLIDATED STATUTES of 1919.

¹⁴ Such a bill could pave the way for a prima facie code. The effect of a prima facie code is that while it is presumed to be the law, this presumption may be rebutted by the production of prior unrepealed statutes at variance therewith. The United States Code has a prima facie status. 1 U. S. C. A., p. 4, the enacting clause; 1 U. S. C. A., General Provisions, 654 (Supp. 1939). See Lee and Beaman, *The Legal Status of the New Federal Code* (1926) 12 A. B. A. J. 833. And some states have given a prima facie effect to their compilations. Delaware Pub. Laws, Vol. 40, c. 74, provides that the REVISED CODE OF DELAWARE (1935) shall have this effect. Other examples are NEW MEXICO STAT. ANN. (Courtright, 1929) and DIGEST OF STAT. OF ARKANSAS (1937).

¹⁵ The present staff consists of James E. Tucker, of Madison, Cornelia McKimmon, of Raleigh, Harry McGalliard, of Chapel Hill, James McMillan, of McDonald, and the writer. M. B. Gillam, Jr., of Windsor, who served on the staff for a year, was promoted to another division of the Attorney General's Office. Carmon Stuart, of Raleigh, left the staff to join the Federal Bureau of Investigation. John E. Lawrence, of Scotland Neck, chose to leave the staff to enter the practice.

(1) the statutes; (2) the index; (3) the annotations; (4) the form and price of the completed code.

The Statutes

The recodification is to be made of the "general public statutes". North Carolina is notorious for the great volume of private, special and local legislation enacted.¹⁶ Prior codifications have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and intricacy of legislation it is apparent that to continue to include in the code statutes which are essentially local in nature will unnecessarily encumber and complicate the general laws.

The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924.¹⁷ Thus the basis for the present work is that revision and subsequent public session laws. The inclusion of a law in the "public laws" volume of the session laws is, of course, not controlling on the question of whether the statute is public or private, general or special, as regards a constitutional limitation,¹⁸ but for purposes of codification the statutes set forth in the "public laws" volumes form the major basis of the work.

It is a regrettable fact that in many instances public-local laws have altered or suspended for particular communities the operation of the general statutes. However, it is impossible to reflect all of these local variations in a general code.

The immediate task of examining the statutes in the "public laws" volumes alone involves a review of 4,161 statutes which have been enacted since 1919. These statutes, when added to laws appearing in the Consolidated Statutes, present a total of at least 13,000 sections that must be studied.

It is frequently exceedingly difficult, if not impossible, to determine for purposes of codification whether a statute is essentially general or local in nature. No rule of thumb can be applied. An effort is made

¹⁶ Van Hecke, *Four Suggested Improvements in the North Carolina Legislative Process* (1930) 9 N. C. L. REV. 1; Spruill, *The Proposed Constitution and Special, Private and Local Legislation in North Carolina* (1933) 11 N. C. L. REV. 140.

¹⁷ Volumes 1 and 2 of the CONSOLIDATED STATUTES, appearing in 1919, were enacted as an official code. §§8100-8107. The status of Volume 3, appearing in 1924, is not entirely clear. By Public Laws 1925, c. 99, (§8108 of MICHIE'S CODE), it was provided that Volume 3 be adopted as constituting the public laws enacted since the publication of Volumes 1 and 2, but that the adopting act should not have the effect of repealing any existing law. It is interesting to speculate as to the status of a public law at variance with the law as set forth in Volume 3. Since Volume 3 constitutes the public laws for the stated period, but no law is repealed, which law would prevail?

¹⁸ Webb v. Port Commission, 205 N. C. 663, 172 S. E. 377 (1934).

to strike a proper balance between the territorial application and the subject matter. If it is determined that the statute or provision (although published in the "public laws" volumes) is local in nature, but that it amends or is related to a general statute, a reference to the local provision is made for convenience in an annotation titled "*Local Modification*".

In codifying the statutes, it was necessary to determine what disposition should be made of certain standard provisions or parts of statutes. After a study of codes of other states and other research, the following policies were adopted:

(1) Preambles, enacting clauses, repeal provisions and "taking effect" provisions are not codified. If any of these provisions seems to have a peculiar importance, an annotation reference is made.

(2) Clauses purporting to exempt pending litigation from the operation of the law are numerous. These clauses have been employed without discrimination, and in many instances their true function has been abused.¹⁹ Their presence in many cases needlessly pads the statutes and thus presents a troublesome problem of codification. It is believed that the most satisfactory way to handle them is by a reference in an annotation paragraph entitled "*Pending Litigation Not Affected*".

(3) Constitutionality or separability clauses, providing that if any part of an act is held invalid, the remainder shall not be affected, have been given weight by the courts,²⁰ but since these clauses have a restricted utility, they will be referred to in an annotation reference headed

¹⁹ The operation of pending litigation clauses is, of course, closely related to the subject of retrospective legislation. An office memorandum on the subject, prepared by M. B. Gillam, Jr., leads to the following conclusions: (1) Since retrospective legislation affecting vested rights is invalid under federal and state constitutional provisions, clauses exempting pending litigation may safely be dispensed with where substantive rights only are affected by the statutes. And the general rule is that statutes will not be construed so as to make them operate retroactively unless a legislative intent to make them retrospective is expressly declared or appears by necessary implication. (2) In situations where the general rule is not applicable, particularly where statutes affect procedure, the pending litigation clause may serve a useful purpose since it is evidence of a legislative intent that the statute shall not apply to pending actions. (3) If the intent is that the statute be purely prospective, a pending litigation clause may not be sufficient to accomplish this purpose. It will be sufficient with reference to actions already commenced but may not prevent the application of the statute to transactions that have already taken place but have not given rise to litigation. A declaration that the statute shall not be retrospective in its operation would be more useful. (4) There is some doubt as to the validity of pending litigation clauses in curative or validating statutes. For example, if a statute validates the registration of all deeds that have been defectively acknowledged in a certain respect, but exempts deeds which are the subject of pending litigation, it is arguable that there is such a discrimination between persons who have already resorted to litigation and those who have not as to result in the invalidity of the statute.

²⁰ *Williams v. Standard Oil Co.*, 278 U. S. 235, 49 Sup. Ct. 115, 73 L. ed. 287 (1929). See also, *American Exch. Nat. Bank v. Lacy*, 188 N. C. 25, 123 S. E. 475 (1924).

"*Constitutionality*" under the first of the sections to which the clause applies.

The function of these stock annotation paragraphs should soon become familiar to the users of the code, and effectively relieve the statutes of some congestion.

For what purposes are the general public statutes to be examined? Questions of policy are carefully avoided. "State policies originate in the legislature; they form no proper part of statutory revision. Revision deals with details, not with fundamentals."²¹ The defects which are sought to be corrected by the codification are those arising from obsolete provisions, conflicts, duplications, ambiguities and imperfections of expression.

The review of the statutes follows a pattern by which each statute is examined from five different perspectives. These are as follows:

(1) *The black letter title*, which should accurately convey the purport of the section in general terms. These titles are frequently changed, either because as originally written they were incomplete or inaccurate or because by subsequent amendments they have been rendered so. Of course, if the statute has not appeared in a prior codification, the title must be written for it.

(2) *The wording*, which is checked by proofreading against the official law in the form of the Consolidated Statutes of 1919 or in subsequent session laws. In case of uncertainty as to the correct wording of the official law, reference is made to the enrolled bills in the office of the Secretary of State. In proofreading, amendments are fitted into their proper places.

(3) *The section history*, or citations at the end of each section to prior enactments and amendments of the section. If the section was contained in the Consolidated Statutes of 1919, the section history as therein stated is taken as correct because of exigencies of time; if the section has been amended or enacted since the Consolidated Statutes of 1919, the section history is checked by actual reference to the session law.

(4) *The content*, which is checked by an appraisal of the section as a clear, meaningful statute and of its relation to other statutes. It is from this perspective that an effort is made to discover obsolete provisions and provisions that have been held unconstitutional, conflicts, duplications, formal errors, and obscurities.

(5) *The indexing*, which is checked as to each statute by an index specialist and at least one other lawyer. The indexing is discussed in detail later in this article.

The mechanics of the work may be of interest. As a convenient

²¹ Brossard, *supra* note 4.

basis for the collection of the statutes, the page proof of the publishers' 1939 Code is used. Errors ascertained through proofreading are corrected on this proof. In order to keep an accurate record of the progress of the work, two card files are maintained. The first contains a card for each section. On each card are spaces to be checked when the five-way examination of the statute has been completed. Space is also provided for index titles which are suggested for whatever benefit they may be to the indexing specialist. The second file is one composed of cards which reflect all corrections to the statutes and all recommendations concerning them. The cards containing these recommendations are periodically collected and assorted and the recommendations are transferred in amplified form to the typewritten report for the General Assembly.

This section-by-section review is plowing up a great number and variety of defects. The statutes abound in all the imperfections of form once catalogued by Jeremy Bentham.²² But extensive improvements in language cannot be undertaken in a bulk revision. The verbosity, redundancy and circumlocution which are incidents of the traditional florid legal style impair the effectiveness of many of the statutes and unnecessarily increase the size of the statute books, yet these defects must await correction through some such more gradual refining process as a system of continuous or topical revision. In the current work, there is time for only those formal defects which offend elementary grammar and obscure the meaning.

Of far greater concern are the substantive defects: the obsolete, superseded and unconstitutional provisions; the conflicts, inconsistencies and duplications; the ambiguities and obscurities. Nourished by implied repeals, hastily considered legislation, and the lack of frequent revision, these defects have grown into a thicket which increasingly impedes the search for the law.

The recommended corrections differ according to the nature of the defects. (In the following examples, references are to sections in Michie's 1939 Code.)

Formal and obvious errors are corrected but noted for legislative approval. In this category fall grammatical errors, such as the failure to complete the first sentence of the second paragraph of §3411 (107), as well as obvious inadvertencies, such as the use of "merger" for "severance" in the third line of §1224 (q) or the use of "heretofore"

²² These imperfections, as set forth in Brossard, *supra* note 4, and in 11 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1938) 375-376, are essentially as follows: (1) Ambiguity, (2) obscurity, (3) over-bulkiness, (4) use of different words to express the same meaning, (5) giving different meanings to the same word, (6) redundancy, (7) long-windedness, (8) entanglement, (9) lack of helps to "intellection," such as proper classification, and finally, (10) disorderliness.

in the next to the last sentence of §1499 when "theretofore" was clearly intended.

Obsolete provisions are modernized wherever the essential utility of the statutes of which they are a part remains. Thus, in §§1545 and 1573, references to sentencing prisoners to jail for work on the county roads must be revised to conform to the sentence now required by §7748 (h)—*i.e.*, to jail, to be assigned to work under the State Highway and Public Works Commission. And §3925 requires a formal amendment to change the two year term for sheriffs to the four year term prescribed by the 1938 amendment to Art. IV, §24, of the constitution.

However, where there is no reason to modernize obsolete or superseded provisions, recommendations for their express repeal are made. Examples of such provisions are the last sentence of §45, fixing a maximum cost for the publication of a personal representative's notice to creditors, which is superseded by §2586, fixing charges for legal advertising at the local commercial rate; and §482, providing for service of summons by reading, which is superseded by §479 requiring only service by delivery.

Provisions which have been held unconstitutional, such as those of §§218 (v) and 2621 (331), are indicated with a recommendation for express repeal. Further, legislative attention is called to any provisions which seem to contravene the federal or state constitutions although their unconstitutionality has never been judicially determined. Such provisions are those of §1014 which seem to violate Art. IV, §24, of the State Constitution insofar as they authorize clerks of the superior court to fill vacancies in the office of coroner in other than special cases, and those of §1589, which are similar to provisions held invalid in *Durham Provision Co. v. Daves*.²³ Wherever feasible, a revision is submitted that will bring the statute clearly within constitutional bounds.

In making recommendations for the elimination of conflicts and inconsistencies, the problem is, of course, to determine which of the conflicting or inconsistent provisions is intended to be the law. In some instances, this is relatively simple. For example, in 1939, §§2621 (223) and 2621 (224) were amended to change the fifteen day limit therein fixed to twenty days, but through inadvertence a corresponding amendment was not made regarding the same time limit in §2621 (222). However, in other cases, the legislative intent may become particularly elusive. Section 1180 prohibits a foreign corporation from acting as the personal representative, guardian or trustee under the will of a person domiciled in this state at his death; but §6376 permits any corporation to act as fiduciary in this state

²³ 190 N. C. 7, 128 S. E. 593 (1925).

when given such charter powers and licensed by the Insurance Commissioner. The former provision was a later enactment than the latter, but any construction predicated on this fact is complicated by the enactment of both sections contemporaneously in the Consolidated Statutes of 1919, and the conflict should be clearly resolved by the General Assembly. Since the elimination of this conflict involves policy, the problem is indicated but a solution is not suggested. Again, it is probable that §3895, which provides that a commissioner to make partition shall receive a maximum per diem of three dollars, was intended to be superseded by §766 (a), which authorizes the clerk in all civil actions and special proceedings in which commissioners are appointed to allow said commissioners a reasonable fee. However, this conclusion is debatable since §3895 is specific and §766 (a) general, and all doubt should be removed by a repeal of §3895 or a revision of §766 (a) to indicate an exception. The resolution of conflicts is increased in difficulty where there are more than two conflicting statutes, as in the case of the three statutes prohibiting the hunting of game from airplanes.²⁴

Economy of wording is an important consideration in view of the constantly increasing volume of legislation. Duplications are needless, wasteful and confusing. For example, there are three statutes regarding the use of the word "trust" in corporate names,²⁵ two statutes regarding the right of a husband to convey when his wife is insane,²⁶ three statutes regarding the letting of public contracts,²⁷ and two statutes prohibiting the operation or possession of a motor vehicle equipped with a smoke screen device.²⁸ The fact that there may be some differences as between these statutes on the same subject in no way justifies the retention of all when a revision can easily be made covering the subject matter of all in one statute. Such revisions are being submitted where time has permitted their drafting.

Appropriate recommendations are made with regard to other defects. There are omissions, such as the failure to provide in §1554 whether the prosecuting attorney shall be elected or appointed; ambiguities, such as the provisions of §1261, which could be interpreted as meaning either that the county shall pay one-half the costs and *one-half* the sums expended by the defendant for the transcript and printing, or that the county shall pay one-half the costs and *all* sums expended for the transcript and printing; obscurities, such as sub-

²⁴ N. C. CODE ANN. (Michie, 1939) §§191(s), 2123, 2141(22) construed with 2141(27).

²⁵ N. C. CODE ANN. (Michie, 1939) §§224(c), 1124 and 1142.

²⁶ N. C. CODE ANN. (Michie, 1939) §§1004, 4103(a).

²⁷ N. C. CODE ANN. (Michie, 1939) §§1316(a), 2830 and 7534(o) 1.

²⁸ N. C. CODE ANN. (Michie, 1939) §§2621(285), 4506(b).

division 3 of §1241, the meaning of which has never been satisfactorily interpreted;²⁹ unintelligible statutes or provisions, such as §1608 (s)1, where defective amending has veiled the meaning.

Since the judicial construction placed upon a statute becomes in contemplation of law a part of the statute,³⁰ recommendations are being made for the redrafting of statutes which do not by their present wording express a well-settled construction placed upon them by the court. This promotes clarity in the law. For example, it is believed that §673, relating to the issuance of execution against the person of a judgment debtor, should be revised to reflect the judicial construction that a condition precedent to the issuance of the execution is the finding by a jury of the facts establishing the right to such execution.³¹

The defects occasionally reach astonishing proportions. In the chapter on Salaries and Fees as it now appears, there are 101 sections. In reviewing this chapter, it was necessary to make corrective recommendations with regard to 57 of these statutes, and most of the defects were substantive. In the chapter on Regulation of Intoxicating Liquors, 78 sections have been indicated for express repeal as being obsolete or superseded, and 21 of these sections now appear in the publishers' 1939 code. Many obsolete statutes were found in the chapters on Game Laws and Motor Vehicles. A few of the recurring obsolete provisions are references to the disability of coverture,³² to antique procedural provisions,³³ to taxes no longer levied,³⁴ to state agencies no longer in existence,³⁵ to the now abandoned county road control,³⁶ and to obsolete salary and personnel provisions.³⁷ The cumulative effect of these and other inaccuracies is tremendous.

All recommendations are sorted and embodied in the legislative report under one of four different classifications: (1) the correction of formal and obvious errors; (2) the express repeal of obsolete or superseded statutes; (3) the clarification or re-drafting of statutes; and (4) the suggestion of supplemental legislation not involving policy.

²⁹ See *Yates v. Yates*, 170 N. C. 533, 87 S. E. 317 (1915); *McINTOSH*, N. C. PRACTICE AND PROCEDURE (1929) 1124.

³⁰ *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968 (1880).

³¹ *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906); *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913); *Crowder v. Stiers*, 215 N. C. 123, 1 S. E. (2d) 353 (1939).

³² N. C. CODE ANN. (Michie, 1939) §§461, 708, 5181, 3012, 3245.

³³ N. C. CODE ANN. (Michie, 1939) §§479, 840, 876, 1608(x).

³⁴ N. C. CODE ANN. (Michie, 1939) §1148.

³⁵ N. C. CODE ANN. (Michie, 1939) §§1036, 5031, 7285-7308.

³⁶ N. C. CODE ANN. (Michie, 1939) §§1545, 3658, 3725.

³⁷ N. C. CODE ANN. (Michie, 1939) §§3852, 3887, 3883.

The Index

The demand for a satisfactory index is, of course, widespread and urgent. Before entering upon the indexing program, helpful reference works were sought in vain.³⁸ It became necessary to rely largely on the experience gained by law publishers, on a study of other indexes, and on the experience of the staff as the work progressed. A few fundamentals soon became clear. Indexing is not an exact science, and code indexing is particularly intricate. An index must be constructed not by a mere mechanical listing of definite titles, but by a collection of ideas logically associated with the statutes, and since individuals do not uniformly look for the same lead lines, the completeness with which any given point is indexed may vary. The work is extremely technical and calls for a high degree of imagination and a retentive memory. An easy pitfall is to index part of a subject in one place and part in another. Consistency is essential. It is not practicable to follow the frequently offered suggestion to dispense with cross references and reprint all the material wherever there is a reference to any part of it. Such an index would be too bulky to be effective.

An index must be constructed by a careful section-by-section reading of the statutes. As each statute is studied, indexing ideas are written down. These are passed along to the member of the staff who specializes in the indexing work. After supplementing the list with his own ideas, he refers to a card file prepared by the publishers which shows in detail how each section in the publishers' 1939 code is indexed. By comparing the list of ideas prepared by the staff with the indexing of the 1939 code, the accuracy and completeness of the present indexing can be weighed and rounded out wherever necessary by the addition of other references. To date, the present references, per section, have been supplemented by about one-fourth as many new lead lines.

An effort is being made to make the index reflect North Carolina usage. Such references as "Martin Act"³⁹ and "Connor Act"⁴⁰ are being added. The "see" references are being reduced to a minimum, and inclusive section numbers are being placed after black-letter titles wherever possible.

According to present plans, there will also be substantial improvements in form. The index type will be increased from six point to eight point (the type now used for statutes in Michie's 1939 Code).

³⁸Traditionally, revisors have found the preparation of an index a difficult problem. VAN HECKE, *STATUTORY REVISION IN ILLINOIS* (1918) 47. A request was made to the Library of Congress for a bibliography of works on code indexing. The few works referred to did not meet the problems faced in the current work.

³⁹N. C. CODE ANN. (Michie, 1939) §2507.

⁴⁰N. C. CODE ANN. (Michie, 1939) §3309.

There will be a two column page. Deeper indentations will be made for the second and third lines in order to clarify the relation of the references. Frontal tables, similar to the tables used in the Consolidated Statutes of 1919, will be placed at the head of each chapter. It is believed that these tables will render reference to the general index unnecessary in many cases.

The Annotations

Effective annotations are, of course, of the utmost importance. The task of examining and codifying the statutes has developed into one of such magnitude that so far there has been no time for any extensive work on the annotations in the codification division. It has therefore been necessary, for the time being, to assign the preparation of the annotations to the editorial staff of the publishers. It is hoped that, through an extension of time, this work may be done in the codification division. The publishers' editorial staff has been requested to assemble the material by a check of the following sources:

(1) Shepard's North Carolina Citations for cases citing the statute by the Consolidated Statutes or Michie Code number.

(2) The citator for cases citing the section by the session law citation.

(3) The annotations of the Consolidated Statutes of 1919.

(4) The citator for cases citing the section by its number in the Revisal of 1905.

(5) The annotations in Pell's Revisal of 1908 for earlier cases.

(6) The citator for federal and United States Supreme Court decisions affecting North Carolina statutes.

(7) The North Carolina Law Review.

References to standard treatises are also planned; and many cross-references are being made to link related statutes.

The material thus gathered must be sorted, classified, weighed and edited. An effort will be made to avoid annotations which are not helpful to a present understanding of the statute. It is believed that the proper function of code annotations is to illuminate the statutes, and that the annotations should not take the scope of a general digest of case law.

Form, Make-Up, and Price

The details here outlined with regard to form, make-up and price are those called for by present plans.

The code will be published in four volumes. A one-volume work is no longer practicable because of the increase in the volume of legislation, the increase in the size of the index, the use of much heavier paper, the inclusion of frontal tables, and the addition of supplemental

material, such as State Bar material⁴¹ and additional comparative tables translating sections from prior codes to the new code.

The type of the statutes and annotations will be the same size as that of the publishers' 1939 code. As already indicated, since no money was appropriated for the publication, the publishers' offer was based on a use of much standing type. The index type will be eight point instead of six. Fifty pound paper will be used instead of the thirty pound paper used in the publishers' 1939 code. The code will be bound in a durable keratol binding.

The code will be kept current for at least six years by pocket supplements. Annotation supplements will be issued at intervals of six months.

The classification and arrangement of the statutes has not been finally decided upon. It is likely that it will take the form of the classification of the fields of the law into certain broad divisions, such as "Master and Servant", "Husband and Wife", and the like. Within these divisions will be grouped the logically associated chapters. For example, in the division entitled "Decedents' Estates", one would find the chapters on Administration, Wills, Widows, and Descent. Such an arrangement seems to be much more effective than an alphabetical arrangement of narrow topics and will permit expansion by the addition of new chapters without upsetting the basic framework.

If such a classification is adopted, a change in section numbers is inevitable. Although any such change is always unpopular, since some initial confusion results and references in prior decisions must be translated to the new numbers when the decisions are studied, every major revision of our laws has necessarily resulted in a change in section numbers.

The numbers should not be changed unless the change is justified. It is believed that a change is now justified in order to improve the arrangement and facilitate the expansion of the statutes. One numbering system that is meeting with approval in other states is the decimal system adopted in Wisconsin and Florida. The outstanding advantage of this system is that it is infinitely expansible and will permit of the addition of new statutes without changing original numbers.⁴² The adoption of such a system should insure against another change in numbering.

The act authorizing the recodification provides that the sections shall be numbered consecutively, as in the Consolidated Statutes of 1919, but that blank section numbers may be left at the end of chapters

⁴¹ This material will include the Certificate of Incorporation of the North Carolina State Bar, and amendments thereto, and the Rules for Admission to Practice.

⁴² For an explanation of this system, see Tribble, *supra* note 4.

for future enactments. If this is a limitation on the use of the decimal or other system finally determined to be the most satisfactory for our use, the General Assembly will be asked to depart from this limitation by adopting the recommended system in the new code.

The price of the code will be \$45.00. After an examination of the prices of codes in other states, this price was found to be reasonable for an annotated code not subsidized as to publication by a state appropriation. Against this price, the publishers will allow \$20.00 for one of their 1939 codes, or \$10.00 for any of their codes prior to the 1939 code. The pocket supplements covering regular sessions of the General Assembly will be \$10.00 each. There will be no charge for supplements covering extra sessions unless the number of pages required is over thirty, in which case a maximum of \$5.00 will be charged. There will be no charge for the interim annotation supplements.

Recommendations

I

The multiplicity of defects discovered in the recodification invites speculation regarding their causes. Why is our statutory law today a scene of such confusion? And if the causes are traceable, can they be practicably avoided in the future? The answers to these questions are not new and revealing. They were pointed out in this Law Review ten years ago.⁴³ However, the practical experience growing out of the recodification work underlines them with a peculiar emphasis, and their repetition is justified. Briefly, the factors which have contributed to the disintegration of the statutes are as follows:

1. *Implied amendments or repeals.* Implied repeals are born of the stock provision appended to most of the session laws that "all laws and clauses of laws in conflict with the provisions of this act are hereby repealed". In view of the rule of construction that implied repeals are not favored,⁴⁴ and of the fact that the legislative intent is so vaguely phrased, the question of the effect of this clause in a given case is usually very difficult indeed. The result is that in many cases the effect can be satisfactorily determined only by a court decision. In the absence of frequent revision, statutes dealing with the same subject multiply because of the doubt as to whether they are intended to be repealed. This very multiplicity of statutes in turn makes it easy for legislators to pass laws on subjects already covered by existing

⁴³ Van Hecke, *supra* note 16.

⁴⁴ Bunch v. Commissioners, 159 N. C. 335, 74 S. E. 1048 (1912); Kornegay v. Goldsboro, 180 N. C. 441, 105 S. E. 187 (1920); Litchfield v. Roper, 192 N. C. 202, 134 S. E. 651 (1926); Monteith v. Commissioners, 195 N. C. 71, 141 S. E. 481 (1928).

laws, and a vicious circle is formed. In states where there are permanent revisors of statutes, implied repeals are kept at a minimum because the revisor searches out statutes which have apparently been impliedly repealed and draws bills for their express repeal. He further encourages the practice of specifically naming in a new bill the law or laws intended to be thereby amended or repealed. An example of how the troublesome implied repealing clauses may be reduced is to be seen in the fact that in Kansas, two years before a revisor was appointed, the clause appeared sixty times, but in 1937, after the revisor's office had begun to function, it appeared only five times; and in 1937 over 500 sections of the statutes were specifically amended or repealed—an indication of the trend away from implied and toward express amendments or repeals.⁴⁵

The confusing effect of implied amendments and repeals is seen most clearly in the troublesome problems of construction arising in those chapters of the code in which there have been successive strata of legislation, as in the chapters on Intoxicating Liquors, Game Laws, and Motor Vehicles.

2. *Legislation Enacted Through Inadvertence to Existing or Proposed Statutes.* A large number of laws are enacted without any regard to their effect upon the existing body of the statutory law. The inevitable result is that many conflicts, duplications, inconsistencies, ambiguities, and implied repeals result. Examples are numerous. Section 65(a) was amended in 1924 to make it apply to four counties, among which were Mecklenburg and Robeson; yet in 1929 another amendment added other counties, including Mecklenburg and Robeson. Further, many laws are enacted without regard to other laws proposed or enacted at the same session of the legislature. During the legislature of 1925 an amendment was made to §1131 requiring only a majority vote of stockholders for an amendment to a corporate charter (except as to banks and building and loan associations). Six days later an act (now §1167(a)) was passed providing that a corporation could create stock with or without par value (which is a charter amendment) by a *two-thirds* vote of the stockholders. The remedy for this evil is to require as a matter of routine that all legislation be submitted to a standing statutory revision committee in each house of the General Assembly or to a state bill-drafting or legislative research agency or both in order that the proposed legislation may be checked against existing law, all formal and obvious errors and grammatical defects corrected, and conflicts, ambiguities, duplications, and other defects noted and

⁴⁵ Corrick, *supra* note 4.

corrected before the bills become laws. It is certain that such a procedure would infinitely improve the quality of legislation.⁴⁶

3. *The Lack of Frequent Revision.* The traditional method of revising our statutes has been by the periodical bulk or general revision. This method served with fair success until the volume of legislation became so large and its nature so intricate. However, bulk revisions can no longer reach the highest degree of effectiveness. "The work is too big and the time too short, to say nothing of the difficulty of gathering a sufficient trained corps, and the necessity of dividing the work. Unity of purpose and familiarity with all the parts are essential to symmetry in every structure . . . A bill embracing all the general laws must be taken by the legislature on faith, or rejected. There can be no legislative deliberation."⁴⁷

After every revision (even at the session at which the revision is adopted) the deterioration of the statutes again sets in. After several years have elapsed, the confusion becomes so great that another general revision is necessary. This unsatisfactory situation can be avoided. The most effective means of keeping the defects in our statutory law at a minimum is by a system of continuous statutory revision which has worked with great success in Wisconsin,⁴⁸ Iowa,⁴⁹ Kansas⁵⁰ and Pennsylvania,⁵¹ and has recently been adopted in Minnesota⁵² and Kentucky.⁵³ Florida⁵⁴ has planned to institute this system in its 1941 Legislature.

Under such a system, a state agency prepares, between legislative sessions, a few carefully considered revision bills which restate in simplified and clarified form selected topics or chapters of the code. Those are submitted for legislative consideration, and, when acted upon, revision of other topics is undertaken. Further, bills are also submitted for the correction of statutory defects which have developed since the last session. Thus, implied repeals are kept at a minimum, and the obsolete statutes, conflicts, duplications, obscurities and imperfections of form are eliminated at the earliest possible time. In this way, the inevitable disintegration is checked as much as possible. In some states, the results appear in a code with a permanent numbering system and a classification that preserves a fundamental arrangement while allowing for the addition of new material.

The act establishing the Division of Legislative Drafting and Codification of Statutes in the Department of Justice is silent regarding the

⁴⁶ See Gardner, *A Way to Better Law* (1937) 5 POPULAR GOVERNMENT, No. 3, p. 16.

⁴⁷ Brossard, *supra* note 4.

⁴⁸ *Ibid.*

⁴⁹ CODE OF IOWA (1939), c. 13.

⁵⁰ Corrick, *supra* note 4.

⁵¹ Lower, *supra* note 4.

⁵² Henderson, *supra* note 4.

⁵³ Kentucky Acts (Ex. Sess. 1938), c. 2.

⁵⁴ Tribble, *supra* note 4; Gibbs, *supra* note 4.

performance of any such duties by the division; however, there seems to be no reason why the preparation of biennial revision and corrective bills should not be undertaken by the division for submission to the General Assembly. The Report of the Commission on a State Department of Justice seems to have envisioned such a practice.⁵⁵

II

At this writing, slightly less than two-thirds of the statutory material has been covered. It now appears that in spite of the fact that every effort has been made to push the work to a satisfactory completion before the meeting of the General Assembly of 1941, it will be impossible to do so for several reasons:

1. The volume of legislation to be examined, sifted and codified is much greater than that dealt with in any prior revision. In the last one hundred years the trend in the volume of legislation enacted has been consistently upwards.⁵⁶ Each revision of our laws has involved a study of more laws than the preceding revision.⁵⁷ As already pointed out, it is necessary to examine at least 13,000 sections in preparing the current recodification. Further, the complexity in the interrelation of the statutes has increased.

2. The increase in material has not been offset by a corresponding increase in time or staff. Four years have been required for the preparation of some of our recodifications,⁵⁸ and two years for others.⁵⁹ The current work will have been under way with a staff of the present

⁵⁵ "D. This division, acting through the Attorney General, would recommend to the Governor and the General Assembly legislation which the work and investigation of the department render advisable." REPORT OF COMMISSION ON STATE DEPARTMENT OF JUSTICE (1939) 13.

⁵⁶ The following table indicates the trend upwards in the volume of legislation since 1840. The totals represent all laws other than those classified as private laws in the publication of the session laws. There was no separate classification of public-local laws until 1911.

<i>Decade</i>	<i>Laws other than those classified in session laws as private</i>	<i>Decade</i>	<i>Laws other than those classified in session laws as private</i>
1840-1849.....	429	1890-1899.....	2877
1850-1859.....	525	1900-1909.....	4542
1860-1869.....	1013	1910-1919.....	5450
1870-1879.....	1999	1920-1929.....	5502
1880-1889.....	2255	1930-1939.....	5835

⁵⁷ Between the CODE of 1883 and the REVISAL of 1905, the number of laws enacted other than those officially classed as private was 6731; between the REVISAL of 1905 and the CONSOLIDATED STATUTES of 1919, the number increased to 7538; and between the CONSOLIDATED STATUTES of 1919 and the present, the number increased to 10,831. While many of these are public-local laws that are not codified, they are indicative of the trend.

⁵⁸ The preparation of the REVISED STATUTES was authorized in 1833 and the CODE adopted in 1837. The REVISED CODE was authorized in 1850 and adopted in 1854.

⁵⁹ The CODE of 1883, REVISAL of 1905, and CONSOLIDATED STATUTES of 1919 were each prepared in two years. The Revisors of the first two, at least, felt the press of time. See *supra* note 11.

size for only fourteen months when the General Assembly of 1941 convenes. And inevitably, changes in personnel have broken the pace of the work.

3. As hereinbefore stated, statutes cannot be effectively codified without some redrafting. An example is seen in §§4108-4127, dealing with year's support. In 1939, §4111 was amended to provide for separate allowances to the widow and children.⁶⁰ However, the remaining sections are worded with regard to the former law under which one allowance was made to the widow for herself and the children. These statutes should not be left in their present state in a new code. All such redrafting must be done carefully and without haste. Further, since an attempt has been made to adhere to a schedule by which the work would be completed by the 1941 legislature, much needed redrafting has necessarily been left undone with merely a note of the statutes in which it is needed. There should be an opportunity to go back and do this work.

4. The work on the chapters or statutes relating to the duties of state agencies, such as the Commissioner of Banks, Utilities Commissioner, and Department of Agriculture, should be examined in detail by the agencies affected (not, of course, as to matters of policy), in order that the work may be judged in the light of practical experience. This involves time for study by the agencies and for conferences between the agencies and the Department of Justice.

5. The statutes are so interrelated that the work must be completed as a unit. Progress through the statutes throws new light on the ground covered. Additional duplications or conflicts are noted. The work done on different statutes by the various members of the staff must be integrated. For example, the chapter on Counties and County Commissioners contains many references that must be checked with information gained in work on the chapters on Roads and Highways, Education, and Elections. Since it is obviously impossible for each member of the staff to review all the statutes, frequent conferences must be had in order that problems may be checked by those most familiar with them.

6. Several chapters of the utmost importance, such as Education, Elections and Insurance, have not been reached and will require much study.

7. More time is needed to make a carefully considered rearrangement of the statutes on the basis of a useful classification that will allow for future expansion within the fundamental structure.

8. Time for extensive work on the annotations in the codification division is urgently needed.

⁶⁰ N. C. Pub. Laws 1939, c. 396.

The advisory subcommittee⁶¹ at a meeting held on October 24, 1940, carefully considered the problems involved in the work and came to the unanimous conclusion that final action on the recodification should be deferred until the General Assembly of 1943 in order to make available enough time for the preparation of a thorough, effective code.

The wisdom of this course will be readily apparent to all who become familiar with the problems involved. The delay will not be great; and the difference in the quality of the final product will be inestimable.

⁶¹ See *supra* note 7.