



# THE PATH OF VIRGINIA CODIFICATION

by Kent C. Olson

Caplin Reading Room in the Morris Law Library at the University of Virginia School of Law. Photo by Philip Beaurline

Most Virginia lawyers and legal researchers are quite familiar with the *Code of Virginia 1950*, the black volumes which have been the official source for the state's statutes for the past 50 years. The current *Code of Virginia* volumes may be sufficient for most research needs, but there are times when researchers need to trace the development of laws now in force, or to determine the laws in effect when potential legal rights or liabilities were created. It is then necessary to turn to older volumes, either superseded *Code of Virginia 1950* volumes or earlier codes.<sup>1</sup>

The General Assembly has been enacting laws since the 17th century, and every few decades Virginians have sought to revise this mass of legislation into a coherent statement of the laws in force. The struggles of the committee working on the revision of 1706 continue to exemplify the revisor's lot: "The assignment was taking longer than had been anticipated. The members of the committee found that the job required 'great care diligence & study, sedate quiet thought & the most intense application of minds not disturbed with business of another nature'."<sup>2</sup>

In the past two centuries, the state has seen just five general revisions of its statutes, enacted as the Codes of 1819, 1849, 1887, 1919, and 1950. Private publishers have recompiled the laws in force between these revisions, but their efforts have never been more than *prima facie* evidence of the law found in the *Acts of Assembly*. The five revisions, however, were enacted to embody all general statutes in force and expressly repealed

earlier versions found in the Acts of Assembly.<sup>3</sup> This article surveys these revisions of Virginia law as well as other major developments in code publication, beginning with the most familiar source and working back into the recesses of time.

## Code of 1950

By the late 1940s, more than 30 states had multi-volume annotated codes similar to those published today. Virginia statutes, however, were found in a single 3,160-page volume and a separate hardbound supplement. Pursuant to a 1944 General Assembly resolution,<sup>4</sup> the Virginia Advisory Legislative Council looked at the other states' codifications, surveyed the bench and bar, and recommended a multivolume code (estimating that four volumes would be sufficient) with provision for pocket part supplementation.<sup>5</sup>

A Commission on Code Recodification was created in 1946, with Delegate Willis E. Cohoon (1902-60) of Suffolk as Chairman, and it submitted its report in December 1947.<sup>6</sup> The proposed code filled two large volumes, but a *Separate Supplemental Report* explaining its changes was a mere 81 pages. The new *Code of Virginia 1950* was enacted by the General Assembly in 1948 with a few amendments, published in 1949 in ten volumes by the Michie Company, and became effective on February 1, 1950.

Even before the Code of 1950 was published, the recodification commission was renamed the

## Code of 1919

Virginia Code Commission and made a permanent body responsible for publishing and maintaining the Code.<sup>7</sup> The revision had not rewritten the laws or made substantive changes, and in 1952, Title 38, Insurance, was completely repealed and replaced by a new Title 38.1. The following year, the Code Commission recommended that the General Assembly continue to revise the law on a title-by-title basis rather than contemplate a wholesale revision of the Code, noting that this was the method followed by Congress in revising the *United States Code*.<sup>8</sup> The General Assembly in turn gave the Code Commission the responsibility for drafting recodification bills.<sup>9</sup> To date more than 50 titles have been repealed and replaced by successor titles, and nine of these have been replaced a second time. Two titles (Costs, Fees, Salaries, and Allowances; and Justices of the Peace) have been repealed altogether, and new titles have been added to cover the Commercial Code, Persons with Disabilities, and Juvenile Justice. The *Code of Virginia 1950* has stayed with us because it has been reinvented title by title.

At first pocket parts for the new Code were issued biennially, and then annually once the General Assembly began meeting every year in 1970. As the pocket parts have grown cumbersome or titles have been recodified, volumes have been recompiled and reissued. The first replacement volume was published in 1953 to incorporate the revised Insurance title. The pace of replacement was slow at first, but has now reached four or more volumes per year. Since 1950 more than a hundred new volumes have been issued, and every one of the original volumes has been split into two or more parts. The set now contains 21 volumes of statutes, none published earlier than 1991.

Tracing the development of a code section is usually a straightforward process, although it may require consulting several different volumes. Unlike some code publications, such as *U.S. Code Annotated* or *U.S. Code Service*, the *Code of Virginia 1950* does not include notes indicating the precise nature of each change in the law over the years. Pocket parts do explain recent changes, but those predating the publication of a replacement volume are simply listed in a string of citations after the text of the statute. Reconstructing the path of legislation from the annual *Acts of Assembly* volumes is possible, but it may be necessary to work through several acts to pinpoint a particular change. It is generally much easier to compare the current statute with the version in an older code volume.<sup>10</sup>

Researchers with an older reference, to a Code of 1919 section, a session law, or a section from a since-recodified title can use one of several tables in volume 10 to find the current section. The history references for current Code sections depend on the age of the statute. Enactments or amendments since 1950 are cited to the *Acts of Assembly*, and sections in recodified titles provide references to the earlier Code of 1950 title.<sup>11</sup> To go farther back, it is necessary to examine the section prior to recodification and find its history references. In titles that have not been recodified, sections carried over from pre-1950 statutes are cited either to the Code of 1919 or to subsequent Acts of Assembly and the unofficial Michie Code of 1942. For example, Va. Code § 1-12, establishing that statutes commence on July 1st unless otherwise specified, provides a reference to Code 1919, § 4. To trace its history before 1950, that is the next place to go.

In the 1910s Virginia faced much the same dilemma it would face in the 1940s: an aging Code of 1887, with no official revision for nearly 30 years and a structure straining under the weight of added legislation. Under an act of March 21, 1914,<sup>12</sup> the governor appointed a revision committee of Richmond attorney Samuel A. Anderson (1850-1928), Washington & Lee Law School Dean Martin P. Burks (1851-1928), and retired Abingdon judge Francis B. Hutton (1858-1928). Their proposed code, containing laws enacted through 1916, was passed by the General Assembly with few amendments and approved by governor in March 1918. The Code of 1919, effective January 13, 1920, contained 63 titles, with 6,571 consecutively numbered sections. It was published in both an unwieldy one-volume unannotated edition (1918) and a two-volume annotated version (1919).

Neither version of the Code of 1919 had any provision for supplementation. A *Virginia Law Register* editorial in 1920 expressed its sincere hope “that the General Assembly will not at its present session make any amendments. Let us give the Code a working chance for a couple of years.”<sup>13</sup> But the General Assembly refused to stop legislating, and the Code rapidly became outdated. In 1923 C.H. Morrissett (1892-1976), the director of the State Legislative Reference Bureau, published *General Laws of the Commonwealth of Virginia*, incorporating amendments and assigning section numbers to new statutes. As Morrissett noted in his preface, “This is an age of statutes. In Virginia, as elsewhere, the codification of the law continues apace . . . . The increased and increasing volume of legislation, much of it on vital subjects, requires a more frequent publication of the statutes than formerly sufficed.”

Morrissett may have recognized the need for more frequent publication, but he issued just one edition of his work. The following year, however, the Michie Company published *The Code of Virginia as Amended to Adjournment of General Assembly 1924*, the first edition of what would become known as the “Michie Code.” The 1924 edition was prepared under the supervision of Thomas Johnson Michie (1867-1938), one of the founders of the Michie Company and reporter for the Supreme Court of Appeals. Unlike Morrissett’s *General Laws*, the Michie Code was supplemented after each session of the General Assembly. By 1927 a reviewer was able to note that the Michie Code had “deservedly won the unstinted commendation of the Virginia Bar.”<sup>14</sup> A new edition of the Code was published in 1930 under the supervision of Michie’s son, A. Hewson Michie. This pattern, of republication every six years and biennial supplements, was repeated with 1936 and 1942 editions. By the time of the Michie Code of 1942, the one-volume code had grown to more than 3000 pages and Michie editors were squeezing new statutes into the 1919 scheme as best they could. New sections dealing with industrial loan associations, for example, were assigned §§ 4168(11)\_a-4168(11)\_e, to fit before the chapter on credit unions. The time had arrived for both a new codification and a multivolume code.

The Code of 1919 and each of the Michie Codes contain tables showing the disposition of sections in the earlier Code of 1887. As with the Code of 1950, tracing statutes back in time requires following the Code and session law references following each

section. The Code section specifying July 1st as the commencement date for statutes, § 4, provides a reference to the Code of 1887, § 4.

## Code of 1887

In 1884 the General Assembly authorized the appointment of three revisors and called for a new code that corrected contradictions, omissions, and imperfections in the statutes “without producing a radical change in the present system.”<sup>15</sup> It also specified that the sections be numbered in one sequence, following the system adopted in 1873 by the *Revised Statutes of the United*

### ***Legal indexes have always troubled users, and the indexes to Virginia codes are no exception.***

States. The revisors appointed were two former Supreme Court of Appeals judges, E. C. Burks (1821-97) and Waller R. Staples (1826-97), and one future member of that Court, John W. Riely (1839-1900). They issued no printed reports, but simply submitted their proposed code in manuscript to the General Assembly in 1887. The code was passed by both houses without amendment, received the governor’s approval, and went into effect May 1, 1888.

The Code of 1887’s major innovation of numbering the 4,205 sections of the code in one consecutive sequence was a relatively minor change, but one that simplified citation to Virginia statutes. Its source for § 4, on the commencement of statutes, is a cumbersome note in the margin: “Code of 1849, p. 98, c. 16, § 3.”

In other respects the Code of 1887 was no great achievement. It had no provision for supplementation, few references to cases decided under the statutes, and an outdated index. Lawyers and publishers would work to remedy each of these shortcomings over the next several years.

To find the current law, a 19th century lawyer would often have to use both the code and several volumes of session laws. Many attorneys would note new laws and amendments in the margins and endpapers of their copies of the codes. As a book notice at the end of the 19th century remarked, “it is the rule rather than the exception, that the lawyer has annotated his Code quite thoroughly.”<sup>16</sup>

In 1894 a young Richmond attorney named John Garland Pollard (1871-1937) published *Amendments to the Code of Virginia*, 1887, printed on slips of paper intended to be pasted over the sections affected, as well as a volume of new acts, *General Laws of Virginia 1887-’94*. Four years later he published a *Supplement to the Code of Virginia*, which printed amended sections, assigned new laws appropriate locations in the code, and noted citations of cases and *Virginia Law Register* articles. His approach of printing only affected sections was innovative enough that the preface explains it in italics: “*The book omits entirely all sections of the Code that have neither been changed by the legislature nor considered by the Supreme Court of Appeals.*” Pollard’s most important contribution to Virginia code

publication, however, came the following decade with his two-volume *Code of Virginia as Amended to Adjournment of General Assembly, 1904 . . . Annotated*.

Pollard’s Code of 1904 was significant in two respects. It was the first Virginia code to be regularly updated. The first *Pollard’s Code Biennial* was published in 1906, and every two years there appeared either a *Biennial* or a cumulative supplement. Pollard’s other innovation was his annotations. Case references in the Code of 1887 were limited to citations in the margins. The revisors explained in their preface: “It was much desired that the references to adjudged cases should be by their titles in full, but it was found that references in that form would greatly increase the size of the volume.” For case law, attorneys had to turn to digests which summarized the statutes by subject and provided extensive footnotes describing relevant cases.<sup>17</sup>

More than half of the states’ codes included case annotations by the end of the 19th century, and Pollard finally brought Virginia into this modern era. The profession reacted enthusiastically. George Bryan, editor of the *Virginia Law Register*, wrote: “It is far and away the best Code that the state has ever had. . . . We have now, for the first time, an *Annotated Code*. Where, in the others, there have been a few blind citations of cases construing the several sections, we now have not only the names of the cases, but a summary of their rulings.”<sup>18</sup> An article the following year called the work “the most ambitious of the kind ever undertaken in Virginia upon individual effort. The value of an *Annotated Code* has for the first time been demonstrated to the Virginia lawyer, and having once seen the practical advantage of such a work, it is not probable that the profession will ever be content with anything but an *Annotated Code*.”<sup>19</sup> Having set a new standard for code publication, Pollard moved on to other endeavors including service as attorney general from 1913 to 1917 and governor from 1930 to 1934.

Legal indexes have always troubled users, and the indexes to Virginia codes are no exception. The preface to the Code of 1803 noted that “All the gentlemen of the law, with one voice, complained of the imperfections of the former index,” and more than a century later Virginia law professor F. D. G. Ribble commented that “The indexes of codes are often among the most troublesome of the devices which aid or confound the lawyer, as few indexes seem thoroughly logical except to their makers.”<sup>20</sup> The Code of 1887 followed the old approach of simply listing entries under each general heading in the order in which they appeared in the volume. A *Virginia Law Journal* editorial in 1888 recognized that there was a better way: “The index seems to be full and accurate enough, but only actual use can sufficiently test that. We regret exceedingly, however, that it was not differently arranged. It would be difficult to overestimate its increased usefulness if the entries had been made in alphabetical order under the titles, . . . As it is we experience a painful sense of discouragement upon turning, say to the title ‘Clerks of Courts,’ and finding six and a half columns of index to toil through.”<sup>21</sup>

In just a few years, however, *Howard’s Index to the Code of Virginia of 1887* (1895) provided a more modern and accessible index. The preface explained the wonders of the alphabetically arranged subheadings, and recommended that students read the

index in its entirety as a way of reviewing the Code. The index in Pollard's Code of 1904 was even better, "a scientific system of inclusion and exclusion, prepared by the expert in that line of the West Publishing Company."<sup>22</sup> These indexes continue to be useful today because they may be the only way to track older legislation. Neither the Code of 1887 nor Pollard's Code of 1904 contains tables indicating the disposition of earlier code sections or session laws before 1887.

## Code of 1849

The Code of 1849 stands as the most thorough revision ever of Virginia law. It was principally the work of John M. Patton (1797-1858) and Conway Robinson (1805-84). Patton had served in Congress and as acting governor, and Robinson was a respected legal scholar and former reporter of the Supreme Court of Appeals. The General Assembly asked the revisors to "suggest such contradictions, omissions or imperfections, as they may perceive in the statutes" and to execute the revision "in such a manner as in their opinion will render the said general statutes most concise, plain and intelligible."<sup>23</sup>

Patton and Robinson submitted five reports to the General Assembly between 1847 and 1849, summarizing their changes and their frustrations in trying to make sense of some statutes. At one point they note: "What is the difference between 'white oak staves' and 'rough white oak staves,' we do not know. In the existing law, the dimensions of both are the same, and yet they are carefully repeated as to both."<sup>24</sup> Their reports reveal some of the interplay between the revisors, as in this footnote to a section on an attorney's liability to his client: "One of us thinks this section may be omitted as of no value."<sup>25</sup>

Patton and Robinson were proud that their code could be published in a single volume of under 1000 pages. They wrote in 1848: "To attain this result is a work of great labour; a hundred fold greater than would be required to have a Code of three or four volumes. But such a result we regard as so desirable that we shall not relax our endeavours to accomplish it."<sup>26</sup> After numerous, mostly minor amendments by the General Assembly, the code was passed in 1849 and entered into force on July 1, 1850. It contained 216 chapters in 56 titles, with sections in each chapter individually numbered. Numerous footnotes trace the development of major institutions and legal doctrines back to the seventeenth century, and marginal notations indicate the source for each section. The section on the commencement of statutes (now the first day of May rather than July) cites to the Revised Code of 1819, the Acts of Assembly, and Hening's *Statutes at Large*. A few sections even include references to Acts of Parliament.

The Code of 1849 remained in force for almost 40 years. It was generally accepted as a modernization of Virginia statutory law, but some felt it had gone too far. An 1857 journal article commented: "The Code of Virginia, of 1849, contains much that is new to the jurisprudence and legislation of the Commonwealth; and unfortunately, its faults are about of equal magnitude with its novelty. Its framers seem to have labored under a delusion as to the nature of their duties. Too many of its provisions seem to have been enacted merely under the influence of a restless

desire for change; and a servile spirit of imitation after untried experiments, recently inaugurated in England and at the North."<sup>27</sup>

The Code of 1849 was updated in 1860 and 1873 by George W. Munford (1803-82), who served as Secretary of the Commonwealth until 1865, but neither edition was adopted as a revision. By the 1870s, the code had swelled to more than 1,500 pages and its clarity had dimmed. William Green wrote in an 1879 *Virginia Law Journal* article: "Repetitions, often once, sometimes twice, not never thrice, of the same matter in the same words, increases the bulk of the volume, till we are made to *feel* that 'a great book is a great evil.' While, on the other hand, some enactments and other matter which should be contained therein are omitted totally."<sup>28</sup>

## Code of 1819 and Its Predecessors

The first effort in Virginia to classify the statute law by subject matter, the Revised Code of 1819, was prepared by Benjamin Watkins Leigh (1781-1849), who had served in the House of Delegates and would later be the reporter of the Supreme Court of Appeals. He was assisted by William Waller Hening (1767-1828) and William Munford (1775-1825), who had already collaborated on a series of *Virginia Reports* volumes. The General Assembly provided Leigh with an eight-page list of laws to codify, and charged him to "prescribe the order, in which the several laws shall be published in the code, carefully classing them according to their subject matter, without reference to the time of their passage."<sup>29</sup> Although several other states' codes were arranged by subject, Leigh understood that Virginia's conservative bar might object to the new arrangement and wrote in his preface: "This novel order of publication rendered it impossible to designate the year of the Commonwealth, at the top of the page, as in all the other publications of our laws since the revolution. Loath to deviate from the custom of dating all public acts from the epoch of our independence, (a custom grateful to public feeling, and, in my opinion, of real utility,) I have placed the year, of the foundation of the republic, as well as the year of our Lord, in the side margin."

The Revised Code was adopted by the General Assembly in 1819 and entered into force on January 1, 1820. It contained 262 chapters arranged in 23 subject titles, and was published in two volumes. Chapter 41, on the commencement of statutes, simply reprints an 1819 act, but a footnote provides comparisons to earlier acts back to 1785. Footnotes throughout the work have a wealth of information about earlier enactments dating back to the seventeenth century.

Numerous compilations of Virginia statutes were prepared before 1819, although these all printed statutes chronologically by date of enactment rather than by subject. The revision immediately preceding 1819 was adopted in 1792, with updated editions published in 1803 and 1814. The essential source for early Virginia legislation is William Waller Hening's *Statutes at Large* (13 vols., 1809-23). This monumental work covered all the session laws Hening could find from 1619 to 1792, and included a number of colonial revisions dating back to 1632.<sup>30</sup>

Perhaps times have changed since 1896, when a reviewer remarked that “the Code is read with delight by the profession, for the general purpose of instruction and entertainment.”<sup>31</sup> But let us hope we have also moved beyond the somber days of 1918, when a *Virginia Law Register* editorial on the brand new Code of 1919 briefly considered comparing it with the Code of 1819 a century earlier before opting instead to get right down to business: “But our profession is too busy today to make comparisons or look to the past.”<sup>32</sup> 🍷

ENDNOTES:

- 1 Most of the publications discussed in this article — superseded volumes of the Code of 1950, as well as earlier codifications — are available at Virginia’s law school libraries, the larger public law libraries, and several libraries in Richmond including the Library of Virginia and the Virginia Historical Society.
- 2 H. F. Rankin, *Virginia Laws: Codification and Printing*, 1-30 (1957) (quoting 2 Executive Journals of the Council of Colonial Virginia 87 (1927)).
- 3 See, e.g., Va. Code § 1-3.
- 4 House Joint Resolution No. 28, 1944 Va. Acts 809.
- 5 *Recodification of the Code of Virginia: Report of the Virginia Advisory Legislative Council*, 1946 House Doc. No. 19.
- 6 Chairman Cohoon had lost his House seat in 1947 to Mills Godwin, and in 1948 the chairmanship of the Commission passed to Senator John S. Battle (1890-1972) of Charlottesville, who would be elected governor the following year.
- 7 Ch. 262, 1948 Va. Acts 496.
- 8 *Revision of the Code of Virginia*, Report of the Virginia Code Commission, 1953 House Doc. No. 29.
- 9 Ch. 706, 1954 Va. Acts 934; Va. Code § 9-77.11.
- 10 Even attorneys accustomed to accessing Virginia statutes electronically will still need to hit the books. CaseFinder, Lexis, and Westlaw have the same source notes as the current volumes, while the General Assembly’s Legislative Information System Web site <<http://leg1.state.va.us/000/src.htm>> has no

- source information at all. The online databases retain archived annual editions of the Code, but these extend only back to 1987 (on Westlaw) and 1991 (on Lexis).
- 11 Sections in titles which have been recodified twice provide references to both earlier versions, with the exceptions of titles 18.2 (Crimes and Offenses Generally) and 19.2 (Criminal Procedure). These, unfortunately, have references only to titles 18.1 and 19.1.
  - 12 Ch. 193, 1914 Va. Acts 300.
  - 13 Editorial: The Code of 1919, 5 Va. L. Reg. (n.s.) 790 (1920).
  - 14 Lucien M. Abbot, Book Review: *Georgia Code 1926, Annotated*, 13 Va. L. Rev. 254, 255 (1927).
  - 15 Act of March 18, 1884, ch. 523, 1883-84 Va. Acts 702, 703.
  - 16 G. Carlton Jackson, Book Notice: *Howard’s Index to the Code of Virginia of 1887*, 1 Va. L. Reg. 939 (1896).
  - 17 This approach was used by Joseph Tate in *Digest of the Laws of Virginia* (1823; 2d. ed. 1841) and by James Matthews in *Digest of the Laws of Virginia of a Civil Nature* (2 vols., 1856-57) and *Digest of the Laws of Virginia of a Criminal Nature* (1861; 2d ed. 1871). When Matthews published a third edition of his criminal digest in 1890, however, he switched from a subject plan and simply printed the code sections in numerical order accompanied by extensive footnotes. In effect, his work had become an annotated criminal code. Abram C. Eby’s *Citations to the Code of Virginia* (1895) summarized cases decided under each section, but did not reprint the statutes themselves.
  - 18 George Bryan, Book Review: *Code of Virginia*, 10 Va. L. Reg. 757 (1904) (emphasis in original). Bryan also noted: “Ample margins are afforded for future statute and case-annotation, and it is an easy matter to start with these volumes, and monthly or quarterly, to ‘post’ them to date,” id. at 758, but the regular supplementation made this unnecessary.
  - 19 William E. Ross, History of Virginia Codification, 11 Va. L. Reg. 79, 98-99 (1905) (emphasis in original).
  - 20 F. D. G. Ribble, Book Review: *Virginia Code of 1924, Annotated*, 11 Va. L. Rev. 500 (1925).
  - 21 Editorial: The New Code of Virginia, 12 Va. L. J. 294, 295 (1888).
  - 22 Bryan, *supra* note 18, at 758.
  - 23 Act of Feb. 20, 1846, ch. 33, 1845-46 Va. Acts 26, 26-27.

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## The Path of Virginia Codification *continued*

- 24 2 Report of the Revisors of the Code of Virginia 480 (1848).
- 25 *Id.* at 826.
- 26 *Id.* at v.
- 27 Imprisonment for Debt, 2 Q.L.J. 209, 214 (1857).
- 28 William Green, Editions of the Code, 3 Va. L. J. 709, 712-713 (1879) (emphasis in original).
- 29 Act of March 12, 1819, ch. 35, 1819 Va. Acts 50, 63.
- 30 The 1632 revision, from a manuscript belonging to Thomas Jefferson, appears at 1 Hening 178. Volume 13 includes some of the revisal acts from 1792, but a more complete collection is printed in A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, As Are Now in Force (1794). A three-volume continuation of the Statutes at Large, with acts through 1806, was published by Samuel Shepherd in 1835-36, and contains 1792 acts omitted by Hening.
- 31 Jackson, *supra* note 16, at 939.
- 32 Editorial: The Code of 1919, 3 Va. L. Reg. (n.s.) 770, 771 (1918).



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