

# Michigan Law Review

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Volume 19 | Issue 6

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1921

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### Recommended Citation

W L. Jenks, *History of Michigan Constitutional Provision Prohibiting a General Revision of the Laws*, 19 MICH. L. REV. 615 (1921).

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## HISTORY OF MICHIGAN CONSTITUTIONAL PROVISION PROHIBITING A GENERAL REVISION OF THE LAWS

**A**LONE among the states of the Union, Michigan has, since 1850, prohibited any general revision of the laws and permits only a compilation of laws in force without alteration. As practically all the neighboring states, as well as New York, from which much of the early legislation of Michigan was derived, have continued to revise their statutes from time to time, it may be interesting to see why Michigan alone has thought it desirable not only to stop the practice which it followed until 1850, but to prevent effectually its legislature from ever attempting it in the future.

Michigan became a territory in 1805, and from July 1 of that year to 1824 its legislature consisted of the governor and three judges. From 1824 until statehood the legislative council, first appointive, then elective, became the legislative body.

The first publication of Michigan laws was the so-called Woodward Code, now a very rare book. It is a small octavo volume of 179 pages, printed at Washington, D. C., in 1806. Judge Woodward had been the leading spirit in the preparation and enactment of the laws adopted from July to October, 1805, at which time he and Governor Hull left for Washington to secure some much needed legislation from Congress on territorial subjects. Woodward remained at Washington and in the East for nearly a year, and obtained authority from the Secretary of State to have the laws printed.

The book contains thirty-four acts in all, printed in the order in which they were adopted, and as printed the sections of the acts are numbered consecutively through the book. It is in no sense a code, however, as it does not attempt to state the whole body of the law, but consists of separate enactments covering only those subjects which the new government of the territory found most essential.

The title page reads, "The Laws of Michigan, Volume 1," followed by a quotation from the *Æneid*, addressed perhaps to President Jefferson, whose faithful and admiring friend Judge Woodward was. The translation reads, (O thou) "to whom Jupiter has

granted the founding of a new city, and the ruling of proud peoples with justice."

The volume contains an interesting preface by Judge Woodward explaining the construction which the Governor and Judges of Michigan had given to the clause of the Ordinance of 1787 empowering them to "adopt" laws.

Although eleven acts were adopted in 1806, fourteen in 1807, nine in 1808, thirty-seven in 1809, ten in 1810, seven in 1812, the last one only three days before the surrender of Detroit, there was no further publication of the laws of the territory until 1816.

The Americans retook possession of Detroit September 29, 1813, but it was more than a year before the legislative part of the territorial government functioned. The first act adopted under the new governor—Cass—was on the first day of October, 1814. Six acts were adopted in that year and nineteen during the following year, and by this time it was too plain to admit denial that the existence of one hundred twenty statutes unprinted, and of necessity generally unknown, was a gross injustice to the people of the territory.

The legislative journal for this period cannot be found, so that we are ignorant of the time and form of the resolution to publish these unprinted laws, but in 1816 there appeared a unique volume in statute publication. It was printed in Detroit, was entitled "Some of the Acts of the Territory of Michigan with the Titles and a Digest of all of the acts of the said Territory now in force," and contained eight laws in full, the titles only of eight laws, and a digest of fifty-six more. They were arranged alphabetically under the general subject treated of in the act. The reason given for this extraordinary action is found in an unsigned note at the end of the volume stating that the funds at the disposition of the territorial government were not sufficient to print a complete copy of all the laws.

One title is, "An Act authorizing Aliens to hold lands in the Territory of Michigan, by purchase or otherwise," without any further statement or explanation. One of the digested acts reads, "An Act concerning the City of Detroit. This Act provides for the incorporation of the City of Detroit," and this is all the information furnished.

Under the title, "An Act concerning the Militia of the Territory

of Michigan," it is said the original roll of this law has been lost and the only copy now to be found is so imperfect as to render it inexpedient to print it."

As an example of the digesting process, the first section of the act concerning forcible entry and detainer, as adopted, read (omitting the enacting clause), "That no person or persons shall hereafter make any entry into any lands, tenements, or other possessions but in cases where entry is given by law, and in such case, not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, and if any person from henceforth do to the contrary and thereof be duly convicted, he shall be punished by a fine."

The digested section reads, "Persons shall not make unlawful entry into lands, nor lawful entry with force."

Some of the statutes digested, or indicated by titles, have never yet been printed in full.

By whom this statute digesting was done is not known, but if the same method were used upon our later compiled statutes all our laws might be printed easily in one volume.

The book itself is of octavo size, contains 144 pages, and is extremely rare. It is generally known as the Cass Code, although that is as inappropriate a designation as in the case of the Woodward Code.

The Ordinance of 1787—the constitution of the territory—provided that the Governor and Judges should adopt and publish the laws. It might have been a serious question whether the ordinary citizen who had no actual knowledge of the full letter of statutes as adopted would be bound by such a condensation as was published.

Such a publication obviously was not a credit either to the territory or to the United States, which through Congress had general control of the territorial finances and conditions, and on April 24, 1820, an Act of Congress was approved authorizing the printing of the laws of the territory in force. Under this law there was printed in Detroit the so-called Revised Statutes of 1820, the title page reading, "Laws of the Territory of Michigan, with marginal notes and an index, to which are prefixed the ordinance and several acts of Congress relating to this territory—published by authority, 1820." It actually was not printed until 1821, and contains statutes adopted as late as July 3, 1821. On March 29, 1821, the Governor and Judges

passed an act that the edition of the statutes then printing be completed to the number of three hundred copies and handsomely and substantially bound. This direction was followed, and such copies, few in number, as still exist are well bound in strong, well-finished leather.

The volume contains one hundred and twenty-one acts arranged without much regard to date of adoption or character of subject. Of the laws printed, one was adopted in 1805, one in 1810, three in 1815, three in 1817, eighteen in 1818, fifteen in 1819, thirty-nine in 1820, and forty-one in 1821. Five laws adopted in 1817, 1818 and 1821, and apparently in force, were not included in the volume. A general repealing act, passed May 8, 1821, excepted from its operation a number of statutes, and several of these excepted statutes also were not included.

In evident preparation for this publication, many laws were passed in 1820 and 1821 covering subjects of previous legislation and intended to replace them, and in that sense the collection might be termed a revision.

This collection of laws met with general favor with the public and also the lawyers, but when the first legislative council met in 1824, Governor Cass in his first message referred to some deficiencies "in the Territorial Code" which the council proceeded to correct.

Prior to this, in the same year, there was printed a small volume entitled "Laws of the Territory of Michigan Compiled by the Legislative Board in the year 1824." It contained 29 acts passed in 1821, 1822 and 1823 and three resolutions.

At the second session of the first legislative council on April 21, 1825, a resolution was adopted which provided for the printing of certain laws which were omitted from the 1820 volume, eleven in all; also the Acts of Congress relating to Michigan passed in 1825, and the Executive Acts establishing county boundaries and fixing county seats, and these were printed at Detroit in 1825 with the acts of the session.

At the same session resolutions were adopted reciting that it was highly important that the public acts of the territory be revised and a plain and simple code of laws formed acceptable to the people of the territory and calculated to promote their interest and protect their rights.

The resolutions named five persons as a commission to revise the laws. William Woodbridge, then secretary of the territory, received the smallest number of votes, but in the enrolled resolution was named first on the list, followed by Abraham Edwards, John Stockton, Wolcott Lawrence and William A. Fletcher.

The commissioners were directed to revise, consolidate and digest the laws, making such alterations or additions as might be deemed expedient, reporting the result to the legislative council at their next session, which was due to be held in November, 1826. Of this commission three were members of the council, Edwards, Stockton and Lawrence, only one of them, Lawrence, a lawyer, but all men of good standing, ability and experience. Woodbridge was secretary of the territory, an able and experienced lawyer. Fletcher was a young man who came to Detroit in 1821 and two years later was appointed chief justice of the County Court of Wayne County. Shortly after the session of 1826 was opened the resignation of William Woodbridge as member of the revision commission was presented to the council, accepted, and Asa M. Robertson (or Robinson), a lawyer of Detroit, was appointed in his place.

During the session various bills, the result of the commission's work, were presented, and on December 27, 1826, the commission presented their final report to the council. In this report they stated that they had digested the different statutes and provisions relating to the same subject as far as practicable into a single statute. In making alterations they had taken great care not to infringe upon long-established principles, and where legislation on new subjects was necessary they had supplied it.

Mr. Lawrence, one of the commission and also member of the council, having the "plain people" in mind, offered a resolution, which was duly adopted, providing that there be published with the laws a table or explanation in the English language of the names of writs and other process made use of in the statutes not expressed in proper English words.

Accordingly, we find in the volume printed in 1827, preceding the index, definitions or explanations of such words as *bona fide*, *defeazance*, *certiorari*, *venue*, and other words and phrases, mainly of Latin origin, frequently used in statutes or legal proceedings.

The result was a substantial, well-printed, indexed and bound vol-

ume of 709 pages, with marginal notes, the statutes relating to the same general subject grouped together, in many cases only verbal changes or changes in arrangement and phrasing being made, in others entire statutes were retained bodily without any change, the whole making a much more complete and systematic collection of laws than had theretofore existed.

The sessions of the legislative council following 1827 were prolific in new laws and amendments of old ones, so that in May, 1832, a committee was appointed to inquire into the expediency of making a general revision of the laws. This committee reported that there were but few copies of the laws remaining undistributed and it was inexpedient to republish them in their existing form; that the many amendments of different laws should be condensed so that the acts on each subject would be entire and could be more readily and conveniently referred to. The result was that the president of the council was authorized to appoint a committee to divide among the members of the council willing to perform the service the labor of condensing and collecting the statute laws of the territory. At the next session in January, 1833, they reported this duly performed, and found no difficulty in approving their own work, which made considerable change in the laws and in the judicial system. One advantage of this method of condensing and revising was that the council was thoroughly informed on all important changes in the laws. One result of the condensation was that the volume containing all the laws in 1833 had 87 fewer pages than the laws of 1827. There was, however, no order of arrangement, so that the book was no improvement in that respect.

After the revision of 1833 there came each year a copious supply of new legislation and amendments to old laws. The state constitution of 1835 was adopted; the legislature elected under the constitution met in November of that year and enacted some laws. As Michigan had not yet been received into the Union, it was questioned whether the state existed, and therefore whether any laws enacted by this legislature were valid. The Supreme Court of the state, in the case of *Scott v. Detroit Young Men's Society, lessee*, decided in 184-, held that Michigan became a state in 1835 by the adoption of its constitution, regardless of its non-admission into the Union, and in consequence the acts of the legislature of 1835 were

valid. The Supreme Court of Ohio, in the case of *Myers v. Manhattan Bank* (20 Ohio, 283), decided in 1852, involving the identical question, held directly to the contrary.

However, only one law of general nature—fixing the salary of the governor—was passed at the first session, owing, probably, to doubts of legality; but at the adjourned session beginning in February, 1836, a considerable number were passed. Governor Mason, in his message at the opening of this session, called attention to the need of properly organizing the judicial department of the new state and revising its laws. He recommended the lopping off of useless branches and periodical revisions, so that the laws might be understood by others than those whose profession it was to interpret them. Following this recommendation the legislature promptly passed an act which the governor approved March 8, 1836, appointing Hon. William A. Fletcher a commissioner to prepare, digest and arrange a code of laws for the state. He was to have them ready for the legislature on the first Monday of January following, and to receive not more than fifteen hundred dollars (\$1,500.00) for his services. Naturally enough, this time proved insufficient, the commissioner having judicial duties to perform, first as circuit judge and later as chief justice of the Supreme Court, and the time was extended to November 9, 1837. An adjourned session of the legislature met at that date for the express purpose of acting on the report, and sat until the last day of the year, when the act was in part acted on, and completed early in the following year. This act was more than a revision or condensation; it was an attempt really to codify the law of the state, and the result was for the first time a unified treatment of the entire subject, with an entire recasting of language. The work was divided into four parts, treating respectively of the Internal Administration of the State, Private Right, Administration of Civil Justice, and Administration of Criminal Justice.

The contrast in arrangement, compared with the revisions of 1827 and 1833, was great. In neither of them was there any attempt to do more than collect existing statutes upon any subject and put them together, but without any particular order or logical connection; still less was there any definite plan of arrangement of subjects.

The code, or, as the title page of the volume names it, "The Revised Statutes of Michigan," made many changes from the terri-



torial statutes. The judicial system was made to consist of a Supreme Court with a chief justice and three associate justices, a court of chancery with a chancellor, four circuit courts, a probate court and justice courts. Return was made to the system of county government by three commissioners instead of supervisors.

The codifier for many years was a very prominent figure in the legal history of the state. Born in New Hampshire, he came to Detroit in 1821 at the age of thirty-three, and impressed himself rapidly on the community as a man of force and ability. In 1823 Governor Cass, who early formed and always retained a high opinion of his legal ability, appointed him chief justice of the Wayne County Court, and in 1825 appointed him attorney general of the territory. In 1833 the county court system was abolished in the lower peninsula except for Wayne County, and the rest of the peninsula was formed into one circuit, and the governor appointed Fletcher the circuit judge. The performance of his duties required him to hold yearly two terms at each county seat, and as there were thirteen counties named in the act at which court should be held, it can readily be seen that traveling alone would consume much time. The law requiring that the judge after his appointment should reside within his district, Judge Fletcher removed to Ann Arbor where he lived during the remainder of his life.

In March, 1836, the state legislature passed a law providing for a Supreme Court consisting of a chief justice and associate judges and Governor Mason promptly appointed Fletcher the chief justice at a salary of sixteen hundred dollars (\$1,600.00) yearly, and he continued to hold that position until he resigned in 1842. He died at Ann Arbor in 1852, and for many years even the place of his burial was unknown. In 1916 the matter was called to the attention of the Michigan Bar Association and the Michigan Pioneer and Historical Society. His remains were found inclosed in an iron casket, disinterred, and reinterred in a prominent location in the Ann Arbor Cemetery, and a suitable monument will be erected.

The compensation for doing this important work was not to exceed fifteen hundred dollars (\$1,500.00), and later critics of the work intimated that Judge Fletcher did only a small part of the work, and employed General Edward Clark, a militia general living at Ann Arbor, a man of good standing and ability, but not of any

legal training, to do the main part, and it is certain that in the code as presented there were important omissions which the succeeding legislatures were compelled to fill.

In December, 1837, the legislature passed an act authorizing the governor to appoint two commissioners to superintend the publication of the revised laws, and he appointed E. B. Harrington and E. J. Roberts. Ebenezer Burke Harrington was a young lawyer who was at the time of his appointment living in Port Huron, but at once moved to Detroit to fulfill his part of this monotonous but important work. He later reported the decisions of the Chancery Court of Michigan from 1839 to 1844, and died in the latter year.

Elijah J. Roberts, a brilliant and versatile man, was at this time thirty-seven years old. Previous to coming to Detroit, about 1833, most of his life had been spent in New York as editor of various newspapers, which vocation he occasionally followed in Michigan at times in combination with the practice of the law. In the speculative period of 1835-6 he went to St. Clair, where he speculated in village lots and promoted a railroad from St. Clair to Romeo, beginning its construction. He was later a justice of the peace in Detroit and took an active part in the militia, rising to be colonel, and in the Canadian Patriot War of 1837 was heartily in sympathy with the movement and took considerable part in recruiting and assisting the Patriots. He was adjutant general of the state from 1842 to 1844, and in 1845 was appointed assistant mineral agent for the upper peninsula. While there he presented Chippewa County in the Constitutional Convention of 1850, was state senator from the upper peninsula in 1851, but died April 29 of that year.

Serious omissions and deficiencies soon began to appear in the revision. Being the work of one man, who was much of the time actively engaged in other work, it was perhaps unavoidably incomplete, but it also made some radical changes which were not generally desired or understood. For some years county affairs had been under the management of an elected board of supervisors. The code changed this to a board of three commissioners. Imprisonment for debt was continued, although the governor and public sentiment were strongly opposed to it. One great merit of the revision was that for the first time there was an orderly, systematic arrangement of the subjects treated, which brought into a connected whole all the statute law.

The state grew rapidly in population; each session of the legislature produced new laws and amendments to the revision, and in 1841 one thousand copies of the revision were ordered sold at two dollars, no doubt in contemplation of another revision soon to be made.

When the legislature met in 1844 an act was passed, March 2, amended March 12, 1844, providing for the consolidation and revision of the general laws of the state. The first act created a Council of Revision, consisting of the chancellor, the presiding judge of the first circuit and a commissioner to be appointed by the judges of the Supreme Court and the chancellor. Immediately after that act was passed the legislature was advised that it was impossible for the chancellor and judge to devote the necessary time and attention to the work, and therefore it amended the act so that the commissioner should perform the work. The day following this action Sanford M. Green, then a member of the state senate, was appointed commissioner. This was an excellent choice. Judge Green had come to Michigan eight years before and had acted as justice of the peace and prosecuting attorney in Shiawassee County, was judge of the Supreme Court from 1848 to 1852, and from the latter year was circuit judge and as such also a member of the Supreme Court from 1852 to 1857. He later sat as circuit judge for several years.

The work of revising occupied Judge Green nearly two years. He reported in January, 1846, that he had devoted all his energies to the preparation and arrangement of the laws, with such modifications, amendments and additions as seemed best adapted to the people of the state and calculated to secure their permanent happiness and prosperity.

In accordance with a resolution of the legislature, the commissioner prepared his revision and had it printed for the use of the legislature, so that they had it before them as an entirety.

To the code as reported the legislature made numerous changes and additions; it changed entirely the judicial system, abolishing the Court of Chancery; abolished capital punishment, which had been retained by the reviser. In the revision as reported and adopted the chapter on evidence was entirely rewritten and for the first time permitted parties to suits to be witnesses.

There was present, however, in this revision one danger: when

the law is put into a single statute it becomes very difficult for a body of men like the ordinary legislature to examine and compare the proposed code with the previously existing statutes minutely and thoroughly enough to have an intelligent understanding of all the changes made and their bearing upon the parts unchanged. It thus follows that succeeding legislatures promptly claim that provisions of the code as adopted were not understood and should be amended.

Another objection to a single reviser, which had been the case both in 1838 and 1846, was that, in preparing a code of laws for the people of the state, there should be more than one mind, one viewpoint, used in the framing of the laws.

Four years later the Constitutional Convention of 1850 met and prepared a new constitution, which was adopted the same year. In it perhaps the most noticeable feature is the policy of restriction of the powers of the legislature; no more internal improvements, small fixed salaries for state officials, biennial sessions of the legislature, and many enactments which properly should be found only in statutes were inserted.

One provision was: "No general revision of the laws shall hereafter be made. When a reprint thereof becomes necessary the legislature in joint convention shall appoint a suitable person to collect together such acts and parts of acts as are in force, and, without alteration, arrange them under appropriate heads and titles."

The first reference to this subject was on the fifteenth day of the convention, when Mr. Britain proposed as Section 39 of the article on Legislative Department, "The legislature may authorize a compilation and reprint of the laws actually in force \* \* \* but no revision or alteration of the laws shall at any time be authorized except \* \* \*"

This brought the strong objection of Mr. Williams, the first president of the Michigan Agricultural College. "Compilation and reprint," he said, was the plan out of which the last revision grew. The reviser had proposed not to codify but compile the laws at a cost of five or six hundred dollars, but it grew into a revision, with the pay of the reviser several thousand dollars and the cost of printing, including cost of legislation, \$6,500.00.

The next day the subject came up again and was considerably discussed. In the course of his argument Mr. Britain said: "A revision of the laws should never be necessary except so far as may

be necessary to adapt them to amendments of the constitution. No man could draw up a code suited to all the various wants of the people." Michigan had suffered three inflictions of this kind since his acquaintance, and they were among the greatest calamities by which she had been visited; the revision of 1838 cost the state about \$90,000.00. The revised statutes of 1846 went from the hand of the reviser the reflection of his own peculiar views rather than those of the people. A general murmur of disapproval ran through the state, "produced first by ignorance of the new laws, second by their want of adaptation to the people's wants and interests."

The matter was then passed and received no further discussion, but later on Mr. Britain's motion, the section as it now stands, was adopted as Section eleven of the article "Schedule," and referred to the committee on "Enrollment." On the last day of the session this committee presented the entire constitution in its final form, and had transferred this particular section to the article "Miscellaneous," where it appears as Section fifteen, and so stands as adopted by the convention and voters.

In the proposed constitution of 1867 this provision was entirely omitted with no discussion. In the Constitutional Convention of 1907 the committee having the subject in charge proposed to omit the section, but after a short discussion, in which reference was made to former revisions, the section with some slight changes was retained but placed in another article.

Judge Campbell, always well informed and interested in the early history of the state, referred at some length to the experience of Michigan in his opinion in the *State Tax Law Cases* (54 Mich. 450). He said that Judge Fletcher, instead of compiling the laws, which was all the legislature intended, prepared a new and what was meant to be a complete code whereby the law on several subjects was essentially revolutionized and some important matters entirely overlooked. Some of these defects were remedied before the Revised Status went into effect; and before the session of January, 1839, so many further omissions and defects were discovered that much of the time of the legislature was spent in changing the code and supplying defects. The revision of 1846 introduced some radical changes and superseded the great body of general laws, and was intended to be a complete code. Subsequent legislatures

also made numerous changes in this, but there were not so many omissions. In the convention of 1850 the basis of objections to revisions and codifications was the mischief of allowing laws to be changed except by the sole action of the legislature, which could not be applied with full intelligence to extended schemes which reflected the minds of others, and could not be thoroughly compared and digested by the body of legislators so as to enable them to realize their full effect on the whole legal system of the state. The result was the provision as adopted.

It is singular that the experience of no other state has produced a similar result. Where other states have occasional revisions of the laws which tend to consolidate and omit contradiction and superfluous statutes, Michigan is restricted to piecemeal treatment, such as has been done in the Judicature Act and the Corporation revision now under consideration.

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