

# Commission and the Courts

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# THE COMMISSION AND THE COURTS

*Stanley H. Fuld\**

## I

### THE COMMISSION AS A MINISTRY OF JUSTICE

No system of jurisprudence, whether statutory or common law, can ignore the need for continuing self-appraisal and adjustment to meet the problems of a dynamic and complex society. Rules fashioned in other days and in the context of other conditions, whether by the legislature or the courts, may prove inadequate or unjust in the light of subsequent experience under altered social or economic conditions. Properly to fulfill its role as a stable, and yet a just, regulatory force, the law must obviously keep pace with changing times while at the same time adhering to basic principles and maintaining necessary continuity with our rich legal heritage.

In achieving that goal, the judiciary as well as the legislature has a function to perform, each within its own sphere. Although our jurisprudence has its roots in the common law, there has been constantly increasing resort in recent years to legislation to weed out the defects and correct the anachronisms that develop. Legislative intervention has come to the assistance of the courts particularly where the doctrine of stare decisis has deterred change by judicial decision.

That is not to say that stare decisis has been an insuperable barrier to judicial re-examination and revision of prior rulings which latter day developments have shown to be erroneous or archaic.<sup>1</sup> As perusal of the books readily discloses, the courts themselves have on occasion modified or overruled decisions earlier made, in response to current needs and experience.<sup>2</sup> There is no doubt, however, that the interests of stability and certainty, particularly in fields such as those involving property interests and commercial transactions, may often preclude judicial de-

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\* See Contributors' Section, Masthead, p. 764, for biographical data.

<sup>1</sup> See Loughran, "Authoritative Force of Precedents," 10 N.Y. County Lawyers Ass'n Bar Bulletin 125-134, 180-189 (1952-53); Douglas, "Stare Decisis," 4 Bar Ass'n Record 152 (1949); Green, "The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied," 40 Ill. L. Rev. 303 (1946).

<sup>2</sup> See, e.g., *Baker v. Lorillard*, 4 N.Y. 257, 261 (1850); *Rumsey v. N.Y. & N.E. R.R. Co.*, 133 N.Y. 79, 85, 30 N.E. 654, 655 (1892); *Klein v. Maravelas*, 219 N.Y. 383, 114 N.E. 809 (1916); *Vaughan v. State*, 272 N.Y. 102, 5 N.E.2d 53 (1936); *Village of Lawrence v. Greenwood*, 300 N.Y. 231, 90 N.E.2d 53 (1949); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951). See also, *Smith v. Allright*, 321 U.S. 649, 665 (1944); *Helvering v. Hallock*, 309 U.S. 106 (1940).

parture from settled rules of law, no matter how antiquated.<sup>3</sup> In such areas, any change of decision made by the courts would necessarily be retroactive in application, and the courts have rightly been loath to announce new rules which would adversely affect transactions entered into in reliance on previously declared doctrines.<sup>4</sup> The legislature, on the other hand, would not be subject to any such limitation, since legislation generally has a prospective effect.<sup>5</sup>

Judicial reluctance to overturn a settled decisional rule or the prior interpretation of a statute has, moreover, often controlled the course of decision even where there could be no prejudice by reason of reliance on the law as previously announced.<sup>6</sup> Here, too, obviously, alteration or modification by statute affords a vital remedy, and the courts themselves, when bound by precedent, have frequently noted that the problem is one for legislative consideration.<sup>7</sup>

A further restriction on the availability of judicial change is that it can generally occur only at the appellate level, and the difficulty and expense of appeal may limit the possibility of such essential review. The tribunals at *nisi prius* will rarely take it upon themselves to depart from the decision of an upper court, and where, as in this state, there are different grades of appellate courts, the intermediate appellate tribunals will generally not assume the power to override the decision of a higher court.

Moreover, a court may properly decline to overturn a decisional rule or to announce a new or modified one, where the problem presented entails complex considerations that transcend the particular case and cannot be resolved in the context of the litigation before the court.<sup>8</sup> Sometimes, indeed, the question may turn on problems of a technical

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<sup>3</sup> See, e.g., *Crowley v. Lewis*, 239 N.Y. 264, 146 N.E. 374 (1925); *Cammack v. Slattery & Bro., Inc.*, 241 N.Y. 39, 148 N.E. 781 (1925); *Madfes v. Beverly Development Corp.*, 251 N.Y. 12, 166 N.E. 787 (1929); *Cardozo, Paradoxes of Legal Science* 67 (1928).

<sup>4</sup> See, e.g., *Cammack v. Slattery & Bro., Inc.*, 241 N.Y. 39, 46, 148 N.E. 781, 782 (1925).

<sup>5</sup> See *Shielcrawt v. Moffett*, 294 N.Y. 180, 188-189, 61 N.E.2d 435, 439 (1945).

<sup>6</sup> See, e.g., *Ultramares Corp. v. Touche*, 255 N.Y. 170, 187, 174 N.E. 441, 447 (1931); *Schindler v. Royal Insurance Co.*, 258 N.Y. 310, 179 N.E. 711 (1932); *Meyers v. Credit Lyonnais*, 259 N.Y. 399, 182 N.E. 61 (1932); *Maher v. Randolph*, 275 N.Y. 80, 9 N.E.2d 786 (1937); *Sweet & Co. v. Provident Loan Society*, 279 N.Y. 540, 18 N.E.2d 847 (1939); *Cullings v. Goetz*, 256 N.Y. 287, 291-292, 176 N.E. 397, 398 (1931).

<sup>7</sup> See, e.g., *Crowley v. Lewis*, 239 N.Y. 264, 266, 146 N.E. 374 (1925); *Cammack v. Slattery & Bro., Inc.*, 241 N.Y. 39, 46, 148 N.E. 781, 782 (1925); *Schindler v. Royal Insurance Co.*, 258 N.Y. 310, 314, 179 N.E. 711, 712 (1932); *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N.Y. 245, 251, 188 N.E. 726, 728 (1934); *Sweet & Co. v. Provident Loan Society*, 279 N.Y. 540, 545, 18 N.E.2d 847, 848 (1939).

<sup>8</sup> See *Heineman, "A Law Revision Commission for Illinois,"* 42 Ill. L. Rev. 697, 701 (1948).

nature demanding investigation for which the courts are not equipped.<sup>9</sup> These are all zones better reserved for legislative action.

The legislature undoubtedly has the power to provide the necessary remedy in these situations in which the courts feel themselves powerless to act. The legislature, however, is predominantly occupied with matters of public law and policy problems affecting the state government, and it may have neither the time nor the facilities to undertake the systematic and scientific revision of the large body of private law.<sup>10</sup> It has, accordingly, long been recognized that there is need for a permanent competent agency to serve as the liaison between the courts and the legislature, to devote itself to continuous survey and study of the operation of the judicial process and to make appropriate recommendations to the legislature whenever the need arises for legislative intervention to correct either shortcomings in the body of judicially-declared rules of law or defects in the statutory law uncovered by judicial interpretation.<sup>11</sup>

In 1921, Judge Benjamin N. Cardozo sounded the call for the creation of a Ministry of Justice "to watch the law in action, observe the manner of its functioning, and report the changes needed when function is degraded."<sup>12</sup> The call was not answered until 1934, when, upon the recommendation of the Commission on the Administration of Justice,<sup>13</sup> the legislature created a permanent agency, known as the Law Revision Commission, to fill that need.<sup>14</sup> The Commission was specifically directed to make a continuous study of the decisional and statutory law for the purpose of discovering "defects" and "anachronisms," and to recommend needed changes to bring the law "into harmony with modern conditions."<sup>15</sup>

Scientific revision of the private law requires a scholarly yet functional approach by disinterested experts who will apply themselves with diligence, broad perspective and restraint and who will view the need and desirability of a particular change, not in isolation, but in relation

<sup>9</sup> See *Woods v. Lancet*, 303 N.Y. 349, 355-356, 102 N.E.2d 691, 694 (1951). See also dissenting opinion of Lewis, J., 303 N.Y. 349, 357, 102 N.E.2d 691, 695 (1951).

<sup>10</sup> See Stone and Pettee, "Revision of Private Law," 54 Harv. L. Rev. 221, 223-224 (1940); Heineman, *supra* note 8, at 716.

<sup>11</sup> See Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113 (1921); Pound, "Anachronisms in the Law," 3 J. Am. Jud. Soc'y 142 (1920); Pasley, "Jurisprudence: Legal History: Ministry of Justice," 20 Cornell L.Q. 119 (1934).

<sup>12</sup> See Cardozo, *supra* note 11, at 114.

<sup>13</sup> See Report of Commission on the Administration of Justice in New York State, Leg. Doc. No. 50 at 51-56 (1934).

<sup>14</sup> N.Y. Legis. Law, Art. 4-A, §§ 70-72, as added by Laws 1934, c. 597.

<sup>15</sup> N.Y. Legis. Law § 72.

to the whole body of the law. The revisers must not only exercise the utmost care in determining whether there is a need for legislative intervention and, if so, the sort of statutory correctives most appropriate, but they must also take heed to choose language adequate to accomplish the end in view. Legislative draftsmanship is itself an extremely fine art, requiring precise, direct and clear expression which will meet the problem at hand, and yet not yield unintended results going far beyond the demonstrated need. Ill-considered or poorly drafted statutory revision may well usher in more troublesome problems or produce more serious defects than the evils sought to be remedied.

The Law Revision Commission has discharged its functions admirably, with skill and diligent application, and has fully justified the hopes and expectations of its founders. When it embarked upon its appointed task, many defects and anachronisms, which the courts felt powerless to eliminate, stood deeply rooted in the law. In careful, methodical fashion, and only after comprehensive and painstaking study of the problems involved, the Commission recommended legislation designed to root out many antiquated and unjust rules of law, whose only reason for being was often merely that of historical accident. Today, many of the changes effected as the result of the Commission's proposals are taken for granted, without realization of the thought and labor that went into the work.

## II

### THE WORK AND ACHIEVEMENTS OF THE COMMISSION

Over one hundred and fifty recommendations made by the Commission, of different degrees of importance, and covering a wide variety of fields, have been enacted into law during the twenty years of its existence. Some of the proposals entailed simplification, clarification or rearrangement of existing statutory provisions.<sup>16</sup> However, its principal contributions have consisted of major reforms affecting concepts of wide application, as well as rules governing specific situations.

In the field of contracts, the Commission has succeeded in securing the abolition of the ancient doctrine as to the sanctity of the seal, and in substituting therefor provisions permitting contracting parties to ac-

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<sup>16</sup> E.g., Laws 1950, c. 823, Leg. Doc. No. 65 (A), Report of Law Rev. Com. 27-47 (1950) (assignment of earnings); Laws 1950, c. 758, Leg. Doc. No. 65 (L), Report of Law Rev. Com. 285-360 (1950) (assignment for benefit of creditors); Laws 1939, c. 870, Leg. Doc. No. 65 (I), Report of Law Rev. Com. 385-389 (1939) (consolidation of the several acts governing Public Authorities).

comply, by a simple agreement in writing, many of the advantages formerly available through the use of the seal.<sup>17</sup> The doctrine of consideration has been modified in significant respects, to accord with the practices of the business community and to give binding force to certain types of agreements, including executory accords, though not supported by consideration as traditionally defined.<sup>18</sup>

In the area of torts, the Commission has been responsible for the abrogation of other ancient rules which were productive of apparent injustice—for example, that a cause of action for personal injury did not survive the death of the injured person or of the wrongdoer<sup>19</sup> and that an infant plaintiff, suing for personal injuries, might be charged with contributory negligence on the part of his parent or other custodian.<sup>20</sup> Another change has been to extend the liability of receivers, appointed in mortgage foreclosure actions, to cases in which they are chargeable with passive negligence.<sup>21</sup>

Significant reforms have also been effected in the field of real property. The Commission has modernized and broadened the scope of the statutory action for securing a determination of adverse claims and removing clouds on title.<sup>22</sup> And it has brought about important statutory changes concerning the recording of executory contracts for the sale of

<sup>17</sup> Laws 1941, c. 329, adding N.Y. Civ. Prac. Act § 342, N.Y. Real Prop. Law § 282, and N.Y. Pers. Prop. Law § 33-c, and amending N.Y. Gen. Corp. Law § 14, N.Y. Civ. Prac. Act §§ 47, 47-a, 48 and 11; Laws 1941, c. 328, amending N.Y. Real Prop. Law § 279 and N.Y. Pers. Prop. Law § 33; Laws 1941, c. 330, amending N.Y. Real Prop. Law § 279 and N.Y. Pers. Prop. Law § 33; see Leg. Doc. No. 65 (M), Report of Law Rev. Com. 345-414 (1941).

<sup>18</sup> Laws 1936, c. 281, adding N.Y. Pers. Prop. Law § 33 (2); Laws 1941, c. 331, adding N.Y. Pers. Prop. Law § 33 (3); Laws 1941, c. 330, adding N.Y. Pers. Prop. Law § 33 (4); Laws 1941, c. 328, adding N.Y. Pers. Prop. Law § 33 (5); Laws 1937, c. 77, adding N.Y. Pers. Prop. Law §§ 33-a, 33-b and N.Y. Real Prop. Law §§ 280, 281; see Leg. Doc. No. 65 (C), Report of Law Rev. Com. 65-373 (1936); Leg. Doc. No. 65 (K), Report of Law Rev. Com. 201-248 (1937); Leg. Doc. No. 65 (M), Report of Law Rev. Com. 345-414 (1941).

<sup>19</sup> Laws 1935, c. 795, adding new N.Y. Dec. Est. Law §§ 118 and 119; see Leg. Doc. No. 60 (E), Report of Law Rev. Com. 157-225 (1935).

<sup>20</sup> Laws 1935, c. 796, adding new N.Y. Dom. Rel. Law § 73; see Leg. Doc. No. 60 (C), Report of Law Rev. Com. 47-89 (1935).

<sup>21</sup> Laws 1946, c. 402, adding N.Y. Civ. Prac. Act § 977-c; see Leg. Doc. No. 65 (A), Report of Law Rev. Com. 21-29 (1946).

<sup>22</sup> Laws 1943, c. 561, amending N.Y. Real Prop. Law, Art. 15, and N.Y. Civ. Prac. Act § 425; see Leg. Doc. No. 65 (G), Report of Law Rev. Com. 628 et seq. (1943). See also Laws 1948, c. 105, amending N.Y. Real Prop. Law § 500; Leg. Doc. No. 65 (N), Report of Law Rev. Com. 575-599 (1948); Laws 1951, c. 610, adding N.Y. Real Prop. Law §§ 500-a, 506-a, and 506-b; Leg. Doc. No. 65 (K), Report of Law Rev. Com. 501-548 (1951).

land,<sup>23</sup> of judgments affecting the title to real property<sup>24</sup> and of assignments of rent;<sup>25</sup> the right of a tenant for life or for a term of years to make substantial changes in existing structures on the land;<sup>26</sup> and the judicial authorization of mortgages, leases and sales of real property.<sup>27</sup>

In the field of corporation law, revisions have been made with regard to such vital matters as the renewal of a corporation's life after the expiration of its charter;<sup>28</sup> the dissolution of corporations whose stockholders are evenly divided;<sup>29</sup> and the authorization of provisions in the certificate of incorporation requiring the affirmative vote of more than a majority or plurality of the stockholders or directors for specified kinds of corporate action.<sup>30</sup> Simplification, clarification and rearrangement of the provisions for amendment of corporate charters<sup>31</sup> and for reimbursement of the litigation expenses of corporate officials have also been effected.<sup>32</sup>

The Commission has made especially valuable contributions to the judicial process in the form of far-reaching changes in the rules of law affecting remedies. Under the old doctrine of election of remedies, a mistake in pursuing the wrong theory or in proceeding against an agent rather than against his principal was often fatal and resulted in forfeiture of the right to relief.<sup>33</sup> The harshness of these rules has been

<sup>23</sup> Laws 1940, c. 745, amending N.Y. Real Prop. Law § 294; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 157-166 (1940).

<sup>24</sup> Laws 1949, c. 447, adding N.Y. Real Prop. Law § 297-b; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 365-414 (1949).

<sup>25</sup> Laws 1944, c. 262, adding N.Y. Real Prop. Law § 294-a; see Leg. Doc. No. 65 (I), Report of Law Rev. Com. 221-289 (1944).

<sup>26</sup> Laws 1937, c. 165, adding N.Y. Real Prop. Law § 537; see Leg. Doc. No. 65 (D), Report of Law Rev. Com. 41-46 (1937).

<sup>27</sup> Laws 1937, c. 141, amending N.Y. Real Prop. Law §§ 105 and 106, and adding §§ 107 and 107-a to 107-n; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 47-60 (1937).

<sup>28</sup> Laws 1944, c. 591, adding N.Y. Gen. Corp. Law § 49; see Leg. Doc. No. 65 (A), Report of Law Rev. Com. 19-32 (1944).

<sup>29</sup> Laws 1944, c. 176, amending N.Y. Gen. Corp. Law § 103; see Leg. Doc. No. 65 (K), Report of Law Rev. Com. 349-377 (1944).

<sup>30</sup> Laws 1948, c. 862, adding N.Y. Stock Corp. Law § 9; see Leg. Doc. No. 65 (K), Report of Law Rev. Com. 381-427 (1948).

<sup>31</sup> Laws 1949, c. 805, adding N.Y. Stock Corp. Law §§ 35 and 36; see Leg. Doc. No. 65 (F), Report of Law Rev. Com. 415-608 (1949).

<sup>32</sup> Laws 1945, c. 869, amending N.Y. Gen. Corp. Law § 61-b, and adding new §§ 63-68; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 131-175 (1945).

<sup>33</sup> See, e.g., *Fowler v. Bowery Savings Bank*, 113 N.Y. 450, 21 N.E. 172 (1889); *Terry v. Munger*, 121 N.Y. 161, 24 N.E. 272 (1890); *Henry v. Herrington*, 193 N.Y. 218, 221, 86 N.E. 29, 30 (1908); *Georgi v. Texas Co.*, 225 N.Y. 410, 122 N.E. 238 (1919); *Weigel v. Cook*, 237 N.Y. 136, 141-142, 142 N.E. 444, 446 (1923); *Allen v. U.S. Insurance Co.*, 245 App. Div. 31, 282 N.Y. Supp. 420 (1st Dep't 1935), *aff'd*, 270 N.Y. 597, 1 N.E.2d 348 (1936).

eliminated by a series of Commission-prompted amendments, abrogating the doctrine of election of remedies in certain situations.<sup>34</sup> By another amendment, the more liberal rule applied in equity cases, dispensing with the need for tender as a condition precedent to seeking rescission, has been extended to causes of action at law based on an executed rescission.<sup>35</sup> Another major change has been to abandon the long settled rigid limitation denying restitution for a mistake of law. Under the new rule, relief against mistake is not to be refused merely because the mistake was one of law rather than one of fact.<sup>36</sup>

The Commission has likewise given attention to the criminal law. Soon after its organization, it sponsored important changes affecting the crime of perjury.<sup>37</sup> In addition, it furthered the adoption of a modified version of the Uniform Criminal Extradition Act.<sup>38</sup> The requirements with regard to advising a defendant of his right to counsel, long prevalent in the field of indictable crimes, have been extended to prosecutions for less serious crimes and offenses.<sup>39</sup> The operation of the provisions governing reduction of sentences for good behavior has been simplified.<sup>40</sup> And modifications have been made in the rules concerning the civil disability of convicts sentenced to state prisons.<sup>41</sup>

A considerable number of miscellaneous statutory reforms are also attributable to the Commission. They include authorization for the allowance of alimony in an action for the annulment of a marriage;<sup>42</sup> modification of the rules governing the disaffirmance of contracts made by

<sup>34</sup> Laws 1939, cs. 126, 128, 127, 147, adding N.Y. Civ. Prac. Act §§ 112-a, 112-b, 112-c and 112-d; Laws 1941, c. 315, adding N.Y. Civ. Prac. Act § 112-e; See Leg. Doc. No. 65 (F), Report of Law Rev. Com. 205-299 (1939); Leg. Doc. No. 65 (L), Report of Law Rev. Com. 283-344 (1941).

<sup>35</sup> Laws 1946, c. 683, adding N.Y. Civ. Prac. Act § 112-g; see Leg. Doc. No. 65 (B), Report of Law Rev. Com. 31-78 (1946).

<sup>36</sup> Laws 1942, c. 558, adding N.Y. Civ. Prac. Act § 112-f; see Leg. Doc. No. 65 (B), Report of Law Rev. Com. 27-67 (1942).

<sup>37</sup> Laws 1935, c. 632, amending §§ 1620, 1632, and 1633, and adding §§ 1620-a, 1620-b, and 1632-a, of N.Y. Penal Law; see Leg. Doc. No. 60 (F), Report of Law Rev. Com. 227-343 (1935).

<sup>38</sup> Laws 1936, c. 892, adding N.Y. Code Crim. Proc. Pt. VI, Tit. IV, §§ 827-859; see Leg. Doc. No. 65 (A), Report of Law Rev. Com. 27-58 (1936).

<sup>39</sup> Laws 1940, c. 423, amending N.Y. Code Crim. Proc. § 699; see Leg. Doc. No. 65 (C), Report of Law Rev. Com. 91-104 (1940).

<sup>40</sup> Laws 1948, c. 631, amending N.Y. Correction Law §§ 230, 232, 235, 236, 240, 241 and 242; See Leg. Doc. No. 65 (M), Report of Law Rev. Com. 521-573 (1948).

<sup>41</sup> Laws 1946, c. 260, amending N.Y. Penal Law § 510; see Leg. Doc. No. 65 (F), Report of Law Rev. Com. 159-195 (1946).

<sup>42</sup> Laws 1940, c. 226, adding N.Y. Civ. Prac. Act § 1140-a and amending §§ 1140, 1169, 1171, 1171-a, 1171-b, 1172, 1172-a, 1172-b, and 1172-c; See Leg. Doc. No. 65 (H), 1940 Report of Law Rev. Com. 237-297 (1940).



infants over the age of eighteen;<sup>43</sup> changes in the rules concerning the measure and distribution of damages in actions for wrongful death;<sup>44</sup> revision of the trust fund provisions of the Lien Law;<sup>45</sup> extension of the statute of frauds to claims for business brokers' commissions;<sup>46</sup> liberalization and clarification of the statute governing the tolling of the statute of limitations in cases of disability;<sup>47</sup> and the adoption of new provisions facilitating the bringing of suits against nonresident natural persons doing business within the state,<sup>48</sup> as well as against business trusts and joint stock associations.<sup>49</sup>

Apart from effecting changes in settled rules of the past, the Commission has also come to the aid of the courts in areas in which the course of judicial decision over the years has generated uncertainty or such tenuous refinements as to make imperative the need for clarifying legislation.

One such example is the frequently litigated question concerning the revocability of an inter vivos trust instrument which provides for the payment of income to the settlor during his life and for payment of principal, upon his death, to a class described only as his heirs or next of kin. The issue has been whether the class so described, including persons yet unborn, constitute "persons beneficially interested," so as to prevent the settlor from revoking the trust without their consent.<sup>50</sup> In *Doctor v. Hughes*,<sup>51</sup> the rule was held settled, on the basis of ancient common law doctrine, that such trust provisions are, without more, inoperative to create any remainder interest and that, in the absence of "clearly expressed" intention to the contrary, the settlor will be regarded as having merely directed a reversion to himself. In consequence, the

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<sup>43</sup> Laws 1941, c. 327, adding N.Y. Debtor & Creditor Law § 260; see Leg. Doc. No. 65 (B), Report of Law Rev. Com. 43-48 (1941).

<sup>44</sup> Laws 1949, c. 638, amending N.Y. Dec. Est. Law §§ 120, 132 and N.Y. Lien Law § 189 (2); Laws 1949, c. 639, amending N.Y. Dec. Est. Law § 133; see Leg. Doc. No. 65 (C), Report of Law Rev. Com. 203-291 (1949).

<sup>45</sup> Laws 1942, c. 808, adding N.Y. Lien Law, Art. 3-A, §§ 70-76, and amending §§ 4-a, 13, 15, 25, 25-a, 36, 36-a, and 36-b; see Leg. Doc. No. 65 (H), Report of Law Rev. Com. 271-336 (1942).

<sup>46</sup> Laws 1949, c. 203, adding new subd. '10 to N.Y. Pers. Prop. Law § 31; see Leg. Doc. No. 65 (G), Report of Law Rev. Com. 609-651 (1949).

<sup>47</sup> Laws 1951, c. 263, amending N.Y. Civ. Prac. Act §§ 43 and 60; see Leg. Doc. No. 65 (L), Report of Law Rev. Com. 549-585 (1951).

<sup>48</sup> Laws 1940, c. 99, adding N.Y. Civ. Prac. Act § 229-b; see Leg. Doc. No. 65 (D), Report of Law Rev. Com. 105-155 (1940).

<sup>49</sup> Laws 1937, c. 66, amending § 2, and adding §§ 18 and 19, of N.Y. Gen. Ass'n Law; see Leg. Doc. No. 65 (L), Report of Law Rev. Com. 249-342 (1937).

<sup>50</sup> N.Y. Pers. Prop. Law § 23; N.Y. Real Prop. Law § 118.

<sup>51</sup> 225 N.Y. 305, 122 N.E. 221 (1919).

settlor was free to revoke the trust without the consent of any of his presumptive heirs or next of kin.<sup>52</sup>

There then followed a series of decisions in which the courts were called upon to determine whether the design to establish a remainder interest was "clearly expressed" in the instruments under review. Distinctions developed on the basis of slight differences in language, and it became exceedingly difficult to predict whether the trust language in a particular case would be held to create a reversion or a remainder.<sup>53</sup>

The latest in this line of cases to come before the Court of Appeals was *Matter of Burchell*.<sup>54</sup> The trust instrument in that case reserved a power of appointment to the settlor and provided that, in default of appointment, the principal was to pass, upon the settlor's death, to the next of kin. A majority of the court regarded the reservation of the power of appointment as sufficient to establish a remainder interest in the next of kin, while the minority took the position that that reservation was of no significance, and that, if anything, it was indicative of the settlor's desire to retain control of the property up to the time of death and direct its devolution thereafter.

Both opinions, however, emphasized the highly uncertain state of the law and noted the desirability of legislation. The majority posited the possibility of complete legislative abrogation of the rule of *Doctor v. Hughes*.<sup>55</sup> The minority opinion, on the other hand, suggested clarification, rather than abrogation, in view of "the volume of litigation on the subject, the diversity of opinion, not to mention the difficulty, frequently, of decision."<sup>56</sup>

The Law Revision Commission—on the basis of an exhaustive study of the subject—concluded that it was impossible to formulate, by statute, more definite criteria than the courts had been able to develop.<sup>57</sup> The only possible solution, therefore, was either entirely to abandon the doctrine of *Doctor v. Hughes*, and recognize a remainder

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<sup>52</sup> See 225 N.Y. 305, 312, 122 N.E. 221, 222 (1919): "But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed."

<sup>53</sup> Compare the cases holding the language of the particular trust instrument sufficient to create a remainder—e.g., *Whittemore v. Equitable Trust Co.*, 250 N.Y. 298, 165 N.E. 454 (1929); *Engel v. Guaranty Trust Co.*, 280 N.Y. 43, 19 N.E.2d 673 (1939); *Richardson v. Richardson*, 298 N.Y. 135, 81 N.E.2d 54 (1948) with those reaching contrary results, e.g., *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919); *Matter of Scholtz v. Central Hanover Bank & Trust Co.*, 295 N.Y. 488, 68 N.E.2d 503 (1946).

<sup>54</sup> 299 N.Y. 351, 87 N.E.2d 293 (1949).

<sup>55</sup> *Id.* at 360, 87 N.E.2d at 297.

<sup>56</sup> *Id.* at 362, 87 N.E.2d at 298.

<sup>57</sup> See Leg. Doc. No. 65 (D), Report of Law Rev. Com. 79-132 (1951).

interest in the heirs or next of kin in every case, or to adopt, for all cases, the contrary rule that a limitation to heirs or next of kin would be no bar to revocation of the trust by the settlor alone. The Commission chose the latter alternative, because it felt that it would be contrary to previously declared legislative policy to make the revocability of an inter vivos trust depend upon obtaining the consent of an indefinite class comprising persons yet unborn.<sup>58</sup> The Commission proposed amendments, enacted in 1951—applicable only to trusts created after their effective date—which flatly provide that, for purposes of determining the revocability of an inter vivos trust instrument, “a gift or limitation in favor of a class of persons described only as heirs or next of kin or distributees of the creator of the trust, or by other words of like import, does not create a beneficial interest in such persons.”<sup>59</sup>

Whether one agree or disagree with the policy or soundness of these amendments, there can be no question that they serve the salutary purpose of providing a definite standard for future cases. The Commission’s explanatory comment explicitly states that the settlor may effectually create an irrevocable remainder interest, by identifying the persons who are to receive the principal or by making the gift or limitation to a class comprising persons other than those who would take in the event of the settlor’s intestacy.<sup>60</sup>

The Commission has also proposed legislation designed to extend the benefits of a newly-announced decisional rule into areas in which the courts themselves would be powerless to grant relief. Thus, in *Estin v. Estin*,<sup>61</sup> the court held that, where a wife had previously obtained a judgment of separation, with provisions for her support and maintenance, in a New York court, those provisions survived an *ex parte* divorce decree procured by the husband from a court in another state which did not have personal jurisdiction over the wife. Although the divorce decree effectually terminated the marriage between the parties—since the husband had established a bona fide domicile in the other state<sup>62</sup>—the foreign court was held to be without power to adjudicate with respect to the wife’s right to support under the New York judgment or to deprive her thereof, since that out-of-state tribunal had acquired no in personam jurisdiction over her.

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<sup>58</sup> See Report, *supra* note 57, at 85.

<sup>59</sup> Laws 1951, c. 180, amending N.Y. Pers. Prop. Law § 23 and N.Y. Real Prop. Law § 118.

<sup>60</sup> See Report, *supra* note 57, at 86.

<sup>61</sup> 296 N.Y. 308, 73 N.E.2d 113 (1947), *aff’d*, 334 U.S. 541 (1948).

<sup>62</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

The impact of the *Estin* decision, however, encompassed only the situation where the wife had previously obtained a judgment or order for support or maintenance in this state. The courts would thus be powerless to grant relief, following rendition of the foreign divorce, to a wife who had not obtained such a prior judgment or order. That followed from this state's settled law that a wife may be granted support or maintenance only as an incident to a judgment of divorce, separation or annulment<sup>63</sup> and could not secure such a judgment after the termination of the marriage by divorce. The Commission concluded that a remedy should be made available to the wife, even though she had not previously obtained a judgment or order for support.<sup>64</sup> It proposed the enactment of a new statute—passed in 1953—authorizing the court to award alimony to the wife in a matrimonial action notwithstanding the court's refusal to grant her a judgment of divorce, separation or annulment because of a prior judgment of divorce or annulment obtained by the husband in an action in which jurisdiction was lacking over the person of the wife.<sup>65</sup> While some may, perhaps, question the validity of this enactment under the full faith and credit clause of the Federal Constitution, no one can doubt that the Commission has taken a bold step forward in an area in which the courts themselves would be incapable of acting without enabling legislation.

Displaying commendable wisdom and restraint, the Commission has confined itself each year to about fifteen or twenty subjects which seem to call for treatment. Although not all of its recommendations have been enacted, they have met with an extremely high degree of success in the legislature. On some occasions, particular proposals, failing of adoption when first offered, have been resubmitted, sometimes with amendments designed to overcome asserted objections, and have then been approved at a subsequent session of the legislature.<sup>66</sup>

An important proposal which the Commission first recommended in 1936, but which has not yet been accepted, although periodically renewed, is concerned with abrogation of the long-established restrictions upon the availability of contribution among joint tortfeasors.<sup>67</sup> Among

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<sup>63</sup> See *Querze v. Querze*, 290 N.Y. 13, 18, 47 N.E.2d 423, 425 (1943).

<sup>64</sup> See Leg. Doc. No. 65(K) (1953). [At printing, Report of Law Rev. Com. (1953) unbound. No page citations available—Ed.]

<sup>65</sup> N.Y. Civ. Prac. Act § 1170-b, as added by Laws 1953, c. 663.

<sup>66</sup> See, e.g., amendment involved in *Garzo v. Maid of Mist Steamboat Co.*, 303 N.Y. 516, 521, 104 N.E.2d 882, 885 (1952); see also, Leg. Doc. No. 65, Report of Law Rev. Com. 15, 16 (1952); Leg. Doc. No. 65, Report of Law Rev. Com. 13-16 (1953).

<sup>67</sup> See Leg. Doc. No. 65 (K), Report of Law Rev. Com. 699-747 (1936); Leg. Doc. No. 65 (G), Report of Law Rev. Com. 67-82 (1937); Leg. Doc. No. 65 (G), Report of

other proposals not adopted, have been ambitious projects for clarification of a large body of statutory law, as in the case of the Statute of Frauds<sup>68</sup> and the statute of limitations,<sup>69</sup> and for introduction of a statutory scheme for the registration of trademarks in this state.<sup>70</sup>

In a number of instances, the Commission has, after careful appraisal of the problems, concluded that legislation is not needed or desirable. It has in such cases submitted detailed studies on the subjects involved for the guidance and information of the legislature and has published the studies in its annual reports. They have provided a wealth of source material for courts and lawyers, and have sometimes covered broad fields of the law, including those of homicide,<sup>71</sup> sexual crimes,<sup>72</sup> the Rule Against Perpetuities,<sup>73</sup> property rights following adoption,<sup>74</sup> anticipatory breach of contract,<sup>75</sup> liability for injuries caused by an independent contractor<sup>76</sup> and assignments of accounts receivable.<sup>77</sup>

One of these studies, submitted without any accompanying recommendation for legislation, was made in 1935 on the subject of an infant plaintiff's possible right of action to recover for prenatal injuries.<sup>78</sup> The study was made at the suggestion of the then Chief Judge of the Court of Appeals—Cuthbert W. Pound—who in 1921 had written the opinion for the court in *Drobner v. Peters*,<sup>79</sup> in which it was held that there was no such right of action under the common law as it then existed. Although its study favored a right of recovery for such injuries, the Commission declined to propose any statutory rule on the subject, evidently considering it preferable to leave the matter for development by the courts. In 1951, the subject was again presented to the Court of Appeals in the

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Law Rev. Com. 65-88 (1938); Leg. Doc. No. 65 (A), Report of Law Rev. Com. 27-58 (1939); Leg. Doc. No. 65 (A), Report of Law Rev. Com. 17-41 (1941); Leg. Doc. No. 65 (A), Report of Law Rev. Com. 21-73 (1952).

<sup>68</sup> See Leg. Doc. No. 65 (O) (1953), presenting the first of a number of contemplated proposals affecting the Statute of Frauds. This initial proposal is concerned with the subject of contracts not performable within a year or a lifetime.

<sup>69</sup> See Leg. Doc. No. 65 (H), Report of Law Rev. Com. 187-258 (1952) (effect of new promise, acknowledgment or part payment, as tolling of statute of limitations; and effect of agreement to extend limitations period).

<sup>70</sup> See Leg. Doc. No. 65 (T) (1953).

<sup>71</sup> See Leg. Doc. No. 65 (P), Report of Law Rev. Com. 515-870 (1937).

<sup>72</sup> See Leg. Doc. No. 65 (O), Report of Law Rev. Com. 399-514 (1937).

<sup>73</sup> See Leg. Doc. No. 65 (H), Report of Law Rev. Com. 473-608 (1936).

<sup>74</sup> See Leg. Doc. No. 65 (G), Report of Law Rev. Com. 245-269 (1942).

<sup>75</sup> See Leg. Doc. No. 65 (M), Report of Law Rev. Com. 385-404 (1940).

<sup>76</sup> See Leg. Doc. No. 65 (K), Report of Law Rev. Com. 409-684 (1939).

<sup>77</sup> See Leg. Doc. No. 65 (K), Report of Law Rev. Com. 351-652 (1946).

<sup>78</sup> See Leg. Doc. No. 60 (H), Report of Law Rev. Com. 449-476 (1935).

<sup>79</sup> 232 N.Y. 220, 133 N.E. 567 (1921).

case of *Woods v. Lancet*,<sup>80</sup> and the court overruled the *Drobner* decision as based on "an outmoded, time-worn fiction not founded on fact"<sup>81</sup> and concluded that the interests of "common-sense justice"<sup>82</sup> demanded the common law's recognition of a right of action by an infant for prenatal injuries, at least in certain circumstances. The court took note of the Law Revision Commission's study and observed that its decision not to propose any legislative change was a recognition that "it was for the courts to deal with this common law question."<sup>83</sup>

As much as the Commission has come to the aid of the courts in securing the legislative elimination of defects and anachronisms, so the courts have likewise been of assistance to the Commission in highlighting or uncovering problems meriting legislative consideration. The courts, while feeling impelled to follow prior decisions, have at times been candidly critical of a judicially declared rule or a settled interpretation of a statutory provision and have in opinions suggested the possibility of legislative amendment,<sup>84</sup> in some cases calling attention to legislation on the subject adopted in other jurisdictions.<sup>85</sup> At other times, the need for legislative intervention has become apparent through judicial interpretation revealing limitations or defects in existing statutory provisions.<sup>86</sup> The Commission has been alert to respond to such demonstrations of need for legislative action, and a number of important recommendations have resulted from such judicial commentary.<sup>87</sup>

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<sup>80</sup> 303 N.Y. 349, 102 N.E.2d 691 (1951).

<sup>81</sup> *Id.* at 357, 102 N.E.2d at 695.

<sup>82</sup> *Id.* at 355, 102 N.E.2d at 694.

<sup>83</sup> *Id.* at 356, 102 N.E.2d at 695.

<sup>84</sup> See, e.g., *Cammack v. Slattery & Bro., Inc.*, 241 N.Y. 39, 45-46, 148 N.E. 781, 782 (1925); *Schindler v. Royal Insurance Co.*, 258 N.Y. 310, 313-314, 179 N.E. 711, 712 (1932); *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N.Y. 245, 250-251, 188 N.E. 726, 728 (1934); *Meyers v. Credit Lyonnais*, 259 N.Y. 399, 404, 182 N.E. 61, 63 (1932); *Sweet & Co. v. Provident Loan Society*, 279 N.Y. 540, 545, 18 N.E.2d 847, 848 (1939); *Matter of Patterson*, 139 Misc. 872, 875-876, 249 N.Y. Supp. 441, 444 (Surr. Ct. Kings County 1931).

<sup>85</sup> See, e.g., *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N.Y. 245, 251, 188 N.E. 726, 728 (1934).

<sup>86</sup> See, e.g., *Williams v. Alt*, 226 N.Y. 283, 291, 123 N.E. 499, 501 (1919); *Fox v. Western New York Motor Lines, Inc.*, 257 N.Y. 305, 308-309, 178 N.E. 289, 290 (1931); *Maher v. Randolph*, 275 N.Y. 80, 84, 9 N.E.2d 786, 787 (1937); *Sweet v. Provident Loan Society*, 279 N.Y. 540, 544-545, 18 N.E.2d 847, 848 (1939); *Benintendi v. Kenton Hotel, Inc.*, 294 N.Y. 112, 60 N.E.2d 829 (1945); *Matter of Levin*, 302 N.Y. 535, 90 N.E.2d 877 (1951); *Burgoyne v. James*, 156 Misc. 859, 282 N.Y. Supp. 18 (Sup. Ct. N.Y. County 1935), *aff'd*, 246 App. Div. 605 (1st Dep't 1935); *Matter of Schwimmer*, 49 N.Y.S.2d 481 (Surr. Ct. N.Y. County 1944).

<sup>87</sup> For example, the recommendation with regard to the revocation of inter vivos trusts was motivated by *Matter of Burchell*, 299 N.Y. 351, 87 N.E.2d 293 (1949), discussed in the text, *supra* at 654 (see Leg. Doc. No. 65 (D), Report of Law Rev. Com. 79, 82, 84-85

## III

## THE COMMISSION'S RECOMMENDATIONS IN THE COURTS

The courts have, on the whole, experienced little difficulty in applying or interpreting the enactments recommended. It is to the Commission's credit that there are very few cases in which any of its proposals has presented some serious question of interpretation. Generally speaking, the Commission-sponsored enactments have been clear on their face and have readily lent themselves to application by the courts in the manner intended.<sup>88</sup>

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(1951); Laws 1951, c. 180, amending N.Y. Pers. Prop. Law § 23 and N.Y. Real Prop. Law § 118).

A recommendation extending the remedy of summary proceedings to cases involving a holding over by a tenant of a life tenant whose life estate has terminated or by a licensee whose license has terminated, carried out suggestions made in *Williams v. Alt*, 226 N.Y. 283, 291, 123 N.E. 499, 501 (1919) (see Leg. Doc. No. 65 (C), Report of Law Rev. Com. 43, 49 (1951); Laws 1951, c. 273, amending N.Y. Civ. Prac. Act §§ 1411 and 1414).

Modifications limiting the disaffirmance of contracts by infants over the age of eighteen years, were prompted by the comments of the Court of Appeals in *Sternlieb v. Normandie Nat. Sec. Corp.*, 263 N.Y. 240, 250-251, 188 N.E. 726, 728 (1934) (see Leg. Doc. No. 65 (B), Report of Law Rev. Com. 43-48 (1941); Laws 1941, c. 327, adding N.Y. Debtor & Creditor Law § 260).

A proposal to overcome the long settled rule that an unincorporated association lacked capacity to receive a devise or bequest, followed strong condemnation of that rule in *Matter of Patterson*, 139 Misc. 872, 876, 249 N.Y. Supp. 441, 444 (Surr. Ct. Kings County 1931) (see Leg. Doc. No. 65 (F), Report of Law Rev. Com. 147-161 (1952); Laws 1952, c. 832, adding N.Y. Dec. Est. Law § 47-e).

A clarifying amendment to § 18 of the N.Y. Dec. Est. Law was prompted by the opinion in *Matter of Schwimmer*, 49 N.Y.S.2d 481 (Surr. Ct. N.Y. County 1944), pointing out the troublesome obscurities and ambiguities in the legislative text (see Leg. Doc. No. 65 (H), Report of Law Rev. Com. 227-266 (1946); Leg. Doc. No. 65 (A), Report of Law Rev. Com. 21-26 (1947); Laws 1947, c. 379).

A recommendation to change the New York rule that a bondholder's claim for breach of trust against a trustee under an indenture securing the bond issue did not pass with a transfer of the bond, in the absence of an express assignment, was the result of the strong criticism of that rule in *Phelan v. Middle States Oil Corporation*, 154 F.2d 978, 1000-1001 (2d Cir. 1946) (see Leg. Doc. No. 65 (D), Report of Law Rev. Com. 67-94 (1950); Laws 1950, c. 812, amending N.Y. Pers. Prop. Law § 41).

There have also been other recommendations, similarly motivated, which have not been enacted. See, e.g., Leg. Doc. No. 65 (A), Report of Law Rev. Com. 19-39 (1940) (recommendation to extend statutory protection to purchaser from factor who obtains possession by fraud, motivated by comments in *Sweet v. Provident Loan Society*, 279 N.Y. 540, 545, 18 N.E.2d 847, 848 (1939)); Leg. Doc. No. 65 (E), Report of Law Rev. Com. 95-130 (1950) (proposal with respect to allowance of interest upon recovery of damages for violation of property rights, prompted by criticism of existing rule in *Flamm v. Noble*, 296 N.Y. 262, 268, 72 N.E.2d 886, 888 (1947)).

<sup>88</sup> See, e.g., *People v. Samuels*, 284 N.Y. 410, 414-415, 31 N.E.2d 753, 754 (1940) (amendments concerning crime of perjury); *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 379-380, 49 N.E.2d 489, 491 (1943) (enactment anent election of remedies); *Johnson*

That does not mean, though, that the Commission's proposals have always had smooth sailing. It has sometimes found it necessary to propose further revision of its previously adopted recommendation, in order to overcome a judicial interpretation which has revealed ambiguities in the statute or has yielded a result deemed by the Commission to be unduly restrictive.

*Green v. Doniger*<sup>89</sup> reflects such an instance. The case arose under section 33-c of the Personal Property Law, which was adopted on the Commission's recommendation in 1941.<sup>90</sup> As originally enacted, that section provided that "An executory agreement hereafter made shall be ineffective to change or modify, or to discharge in whole or in part, a written agreement or other written instrument hereafter executed which contains a provision to the effect that it cannot be changed orally, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification or discharge is sought."<sup>91</sup>

The *Green* case involved a written employment agreement entered into by a salesman with his employer. It provided that, while the contract could not be changed or amended except by a writing signed by both parties, it could be terminated by either party upon thirty days' written notice to the other. The issue presented was whether, notwithstanding section 33-c of the Personal Property Law, the parties could enter into a binding oral agreement to abandon the contract and substitute a new oral agreement of employment containing most of the terms of the written contract, but adding additional provisions for payment of a bonus. A majority of the court held that the application of the statutory prohibitions to a given contract depended "upon the intent of the parties as expressed by the inclusion or exclusion, in some form, of the statutory clause, prohibiting oral change"; and that, in the contract before the court, the parties had expressed their intent to depart from the statutory rule as respects the matter of termination, since the contract

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v. Johnson, 295 N.Y. 477, 480, 68 N.E.2d 499, 500 (1946) (changes as to allowance of alimony in actions for annulment); Garzo v. Maid of Mist Steamboat Co., 303 N.Y. 516, 521-522, 104 N.E.2d 882, 885 (1952) (statute permitting revival of corporation after expiration of charter); Rehill v. Rehill, 306 N.Y. 126, 131, 116 N.E.2d 281, 283 (1953) (amendment concerning modification of written contract); Fontheim v. Third Avenue Railway Co., 257 App. Div. 147, 148, 150-151, 12 N.Y.S.2d 90, 92, 94-95 (1st Dep't 1939) (changes affecting survival of causes of action for personal injury).

<sup>89</sup> 300 N.Y. 238, 90 N.E.2d 56 (1949).

<sup>90</sup> Laws 1941, c. 329; see Leg. Doc. No. 65 (M), Report of Law Rev. Com. 345-414 (1941).

<sup>91</sup> The section was amended in 1944, on the Commission's recommendation, to permit the writing to be signed by an agent. Laws 1944, c. 588; see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 103-129 (1944).



provided for termination by either party merely upon written notice to the other, and without the latter's consent or signature.<sup>92</sup> It was further held that, in accordance with the general law of contracts, the parties could abandon the contract by mutual consent, without any writing, even though they simultaneously entered into a new oral contract containing one or more of the terms of the abandoned contract.<sup>93</sup> On the other hand, a minority of the court regarded the decision as a frustration of the purpose and design of the statute.<sup>94</sup>

The Commission shortly thereafter recommended amendment of the statute to overcome the *Green* decision. A bill introduced in the legislature in 1951 passed both houses, but was vetoed by the Governor.<sup>95</sup> The Commission revised its recommendations, and a new bill was introduced the following year and was then enacted into law.<sup>96</sup> The 1952 amendment, spelling out with greater precision the design that binding effect be given to contractual provisions against oral termination or discharge, expressly specified that such provisions would bar an oral termination even by mutual consent which did no more than substitute another executory agreement for the prior contract.

Another instance in which one of the Commission's recommendations stirred judicial controversy was presented in *Matter of Radom & Neidorff, Inc.*<sup>97</sup> That case arose under a Commission-sponsored amendment to section 103 of the General Corporation Law, which permits a petition for dissolution of a corporation by the holders of one half of the shares of stock entitled to vote for directors "if the votes of [the] stockholders are so divided that they cannot elect a board of directors."<sup>98</sup> The Court of Appeals divided four to three on the question whether the financial condition of the corporation was a factor relevant for consideration in passing upon such a petition. The majority was of the opinion that the prosperous condition of the company was a weighty factor militating against the petition for dissolution.<sup>99</sup> The minority of the court, however, observed that dissolution under section 103, depending as it did solely on

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<sup>92</sup> 300 N.Y. 238, 244-245, 90 N.E.2d 56, 59 (1949).

<sup>93</sup> *Id.* at 245, 90 N.E.2d at 59.

<sup>94</sup> *Id.* at 246-247, 90 N.E.2d at 60.

<sup>95</sup> See Leg. Doc. No. 65 (N), Report of Law Rev. Com. 659-678 (1951); Report of Law Rev. Com. 20 (1952).

<sup>96</sup> See Leg. Doc. No. 65 (E), Report of Law Rev. Com. 135-145 (1952); Laws 1952, c. 831.

<sup>97</sup> 307 N.Y. 1, 119 N.E.2d 563 (1954).

<sup>98</sup> Laws 1944, c. 176; see Leg. Doc. No. 65 (K), Report of Law Rev. Com. 349-377 (1944).

<sup>99</sup> 307 N.Y. 1, 7, 119 N.E.2d 563, 565 (1954).

the existence of a deadlock, required no showing of insolvency, such as was specifically made requisite under other sections of the General Corporation Law.<sup>100</sup> Both the majority and the minority cited the Law Revision Commission's report—the majority for the proposition that the court was bound to consider the general welfare of the stockholders,<sup>101</sup> and the minority in support of the argument that the only criterion envisaged by the Commission was that of a deadlock between the stockholders.<sup>102</sup>

Of major assistance to the courts in the interpretation of statutes resulting from the Commission's proposals, are the explanatory notes and comments which accompany such proposals. The Commission has made it a practice to append a brief explanation of its proposal to each of the bills introduced in the legislature upon its recommendation. These notes remain appended to the printed law which results from the recommendation, and they are obviously pertinent and persuasive source material for ascertaining the design and purpose of the legislation.<sup>103</sup> More detailed explanatory comments are submitted in the legislative documents which are transmitted to the legislature together with the drafts of proposed legislation. Since these comments are thus also directly brought to the attention of the legislature, they likewise are relevant interpretive aids in searching for the legislative intent in the event of any apparent ambiguity in the text of the statute.<sup>104</sup>

On a number of occasions, the courts have looked to the Commission's explanatory notes and comments for guidance.<sup>105</sup> In one case,

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<sup>100</sup> *Id.* at 12-14, 119 N.E.2d at 568-569.

<sup>101</sup> *Id.* at 7, 119 N.E.2d at 565.

<sup>102</sup> *Id.* at 13, 119 N.E.2d at 568.

<sup>103</sup> See *Matter of Greenberg*, 141 Misc. 874, 882, 253 N.Y. Supp. 667, 677 (Surr. Ct. Kings County 1931), *aff'd*, 236 App. Div. 733 (2d Dep't 1932), *aff'd*, 261 N.Y. 474, 185 N.E. 704 (1933); *Matter of Fisher v. State Retirement System*, 279 App. Div. 315, 318, 110 N.Y.S.2d 16, 19 (3d Dep't 1952), *aff'd*, 304 N.Y. 899, 110 N.E.2d 733 (1953); *Matter of McGarry*, 155 Misc. 467, 469, 280 N.Y. Supp. 202, 204 (Surr. Ct. Kings County 1935), modified 245 App. Div. 834 (2d Dep't 1935), *aff'd*, 270 N.Y. 514, 200 N.E. 296 (1936); cf. *Manice v. Manice*, 43 N.Y. 303, 375, 376, 378 (1871); *The People v. Conroy*, 97 N.Y. 62, 69-70 (1884).

<sup>104</sup> See *People v. Samuels*, 284 N.Y. 410, 414-415, 31 N.E.2d 753, 754 (1940); *Johnson v. Johnson*, 295 N.Y. 477, 480-481, 68 N.E.2d 499, 500 (1946); *Garzo v. Maid of Mist Steamboat Co.*, 303 N.Y. 516, 522, 104 N.E.2d 882 (1952); *Fontheim v. Third Avenue Railway Co.*, 257 App. Div. 147, 150-151, 12 N.Y.S.2d 90, 92, 94-95 (1st Dep't 1939). See also 2 *Sutherland, Statutes and Statutory Construction* §§ 5006, 5008, 5010 (3d ed., Horack, 1943).

<sup>105</sup> See, e.g., *People v. Samuels*, 284 N.Y. 410, 414-415, 31 N.E.2d 753, 754 (1940); *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 380, 49 N.E.2d 489, 491 (1943); *Johnson v. Johnson*, 295 N.Y. 477, 480-481, 68 N.E.2d 499, 500 (1946); *Garzo v. Maid of Mist Steamboat Co.*, 303 N.Y. 516, 522, 104 N.E.2d 882, 885 (1952); *Fontheim v. Third Avenue Railway Co.*, 257 App. Div. 147, 151, 12 N.Y.S.2d 90, 92 (1st Dep't 1939).

indeed, the court cited, in support of its conclusion, a discussion in the Commission's report of the very problem under review.<sup>106</sup> Commentary of this kind, of course, affords greater assurance that the underlying purpose of the enactment will be fully achieved.

The question has been presented, however, whether the studies prepared at the direction of the Commission, and on the basis of which its recommendations are made, should also be treated as pertinent sources for interpreting the resulting legislation. Some of these studies are prepared by research assistants on the Commission's staff, and some by special consultants, frequently law professors. While each study forms the background for the Commission's particular recommendation, and finds space in its annual report, the Commission does not formally adopt or approve the analysis or conclusions of the study as its own product. The Commission, instead, sets forth its own views in a separate document entitled "Recommendation," which generally embodies a briefer treatment of the underlying problems and the current state of the decisional and statutory law, as well as an explanatory discussion of the proposed legislation.

Undoubtedly, the study is, in any case, pertinent reference material for ascertaining the background of the statute and the problems or defects which motivated its adoption.<sup>107</sup> To that extent, certainly, the study is as proper an aid as would be independent research into the prior law. Where, however, an issue arises as to the meaning of some particular provision of the statute or as to its applicability to a particular situation, the study itself may not be regarded as persuasive a clue to the legislative design as are the Commission's own comments.

That issue recently came before the Court of Appeals in *Matter of Schwarz v. General Aniline & Film Corp.*<sup>108</sup> The case involved the interpretation of article 6-A of the General Corporation Law, as amended in 1945 upon the recommendation of the Law Revision Commission.<sup>109</sup> Section 64 provides for assessment against a corporation of the expenses of any person made a party to "any action, suit or proceeding" because of his being an officer, director or employee of the corporation, unless it shall have been adjudged that he was liable for negligence or misconduct in the performance of his duties. The question for decision was

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<sup>106</sup> See *Kane Realty Co., Inc. v. Nat. Children's Stores, Inc.*, 169 Misc. 699, 701, 8 N.Y.S.2d 505, 507 (N.Y. Munic. Ct. 1938).

<sup>107</sup> Cf. *Matter of Radom & Neidorff, Inc.*, 307 N.Y. 1, 7, 119 N.E.2d 563, 565 (1954).

<sup>108</sup> 305 N.Y. 395, 113 N.E.2d 533 (1953).

<sup>109</sup> Laws 1945, c. 869, see Leg. Doc. No. 65 (E), Report of Law Rev. Com. 131-175 (1945).

whether those provisions embraced expenses incurred by a director in defense of a criminal prosecution, to which the corporation was also a party defendant, for alleged violations of the Sherman Anti-Trust Act.

The statute permits an application for the assessment of the expenses to be made either in the action, suit or proceeding in which they have been incurred or in a separate proceeding in the Supreme Court. The purpose of the latter provision, as explained in the study accompanying the Commission's recommendation, was to provide a remedy for certain types of actions which might be covered by the broad language, "action, suit or proceeding," yet in which the court might lack the necessary equitable jurisdiction to determine the right to indemnity or to make allowances.<sup>110</sup> As an example of such an action, there was specifically mentioned, in a footnote in the study, "a criminal proceeding against the corporation and its officers or directors for violation of the anti-trust laws."<sup>111</sup>

By a closely divided vote, the Court of Appeals, nevertheless, held that the statute did not apply to expenses incurred in the defense of a criminal action. The author of one of the opinions for the majority of the court declined to attach any significance to the discussion of the matter in the study, stating:

There just is no evidence whatever that the Legislature was talking about criminal cases. Appellant gets some comfort from a brief, equivocal footnote in a study, made by an attorney employed by the Law Revision Commission, and attached to the 1945 Report of the Law Revision Commission. The writer of that study said in the footnote that it had been urged that the language of section 64 ('any action, suit or proceeding') might cover a criminal proceeding for violation of the antitrust law. But that was a mere comment by the writer of a study made for the commission, referring to a contention made, or which might be made, by somebody else that the section might be applicable in a criminal cause. There is nothing to indicate that the Legislature, or, indeed, the Law Revision Commission, ever had any such thing in mind.<sup>112</sup>

In the view of the three dissenting judges, on the other hand, the comments made in the study were entitled to great weight as pointing to the legislative intent, since they clearly indicated the reason for the legislature's adoption of the provision authorizing a separate proceeding in the Supreme Court for the assessment of expenses.<sup>113</sup>

Apart from furnishing guidance in the construction of statutes, the Commission's recommendations and the accompanying studies may also

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<sup>110</sup> See Report, *supra* note 109, at 161.

<sup>111</sup> See Report, *supra* note 109, at 161, fn. 36.

<sup>112</sup> 305 N.Y. 395, 401-402, 113 N.E.2d 533, 535 (1953).

<sup>113</sup> *Id.* at 408-9, 113 N.E.2d at 539.

serve the courts as intelligent and learned discussions of the basic subject matter of the proposals. Chief Justice Harlan F. Stone long ago suggested that the coordination of court-declared and legislatively-enacted law into a single system could be better accomplished if the courts would accord "recognition to statutes as starting points for judicial law-making comparable to judicial decisions."<sup>114</sup> Justice Stone urged the courts to treat a statute, not merely as a command to govern the precise situations defined by it, but more like a judicial precedent, "as both a declaration and source of law, and as a premise for legal reasoning," in order to extend its application to analogous situations.<sup>115</sup> That same thought has also recently been expressed in a federal case, in which the New York courts were urged to apply the principle behind a certain amendment, enacted upon the recommendation of the Commission, to cases not within its precise terms.<sup>116</sup>

There is, of course, no assurance that the courts are prepared to apply the principles underlying particular statutory reforms as premises for "judicial law-making" in cases coming within the spirit, though not the letter, of the statutes. If, however, the courts should, in the future, adopt such an approach, the explanatory comments and studies of the Commission would provide a particularly valuable aid for the further growth and development of the judicial process.

#### IV

##### THE COMMISSION'S ROLE FOR THE FUTURE

In a legal society constantly striving for betterment and growth, the need for a Ministry of Justice and the vital role it serves, of mediating between courts and legislature, is necessarily a continuing one.<sup>117</sup> While the Law Revision Commission has already scored outstanding gains in the battle for law reform, there is undoubtedly much that remains to be done. Apart from an imposing agenda of topics for future consideration,<sup>118</sup> the Commission has for the past two years been devoting itself to a comprehensive study and analysis of the lengthy proposed Uniform Commercial Code that has been drafted under the joint auspices of the American Law Institute and the National Conference of Commissioners

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<sup>114</sup> See Stone, "The Common Law in the United States," 50 Harv. L. Rev. 4, 12 (1936).

<sup>115</sup> See Stone, *supra* note 114, at 12-15. But cf. Pound, "What of Stare Decisis?" 10 Fordham L. Rev. 1, 12 (1941).

<sup>116</sup> See *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*, 206 F.2d 103, 107 (2d Cir. 1953); cf. *Fitzgerald v. Title Guarantee & Trust Co.*, 290 N.Y. 376, 380, 49 N.E.2d 489, 492 (1943).

<sup>117</sup> See Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113 (1921).

<sup>118</sup> See, e.g., Leg. Doc. No. 65, Report of Law Rev. Com. 9-11 (1953).

on Uniform State Laws.<sup>119</sup> In addition to its own research, the Commission has held public hearings in various areas of the state in an endeavor to marshal informed opinion as to the soundness of the proposed Code and its adaptability to the law of this state.

The courts as well as the legislature have accepted the Commission as the official medium for investigating and fashioning proposed statutory correctives for maladjustments in the substantive law. In a recent case, for instance, in commenting upon changes in the law that might better be reserved for legislative action, the Court of Appeals specifically noted that such matters would be "peculiarly appropriate for Law Revision Commission scrutiny."<sup>120</sup> And, on their part, the courts are on hand to scrutinize and apply the results of the Commission's studies and recommendations. By such continued mutual cooperation of courts and Commission, we may hope in time to achieve the full promise of a Ministry of Justice.

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<sup>119</sup> See Report of Law Rev. Com. (1955).

<sup>120</sup> See *Woods v. Lancet*, 303 N.Y. 349, 356, 102 N.E.2d 691, 694 (1951).