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Recommended Citation

W. David Curtiss, *Commission and the Law of Real Property*, 40 Cornell L. Rev. 735 (1955)
Available at: <http://scholarship.law.cornell.edu/clr/vol40/iss4/7>

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THE COMMISSION AND THE LAW OF REAL PROPERTY

*W. David Curtiss**

In his eloquent plea in 1921 for a Ministry of Justice, Judge Cardozo spoke of

. . . the need of the detached observer, the skilful and impartial critic, who will view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.¹

Since its establishment in 1934 the New York Law Revision Commission has been ready on many occasions with "warning and suggestion" for law reform in this state. In perhaps no single area of law has the impact of the Commission's work been more keenly felt than in the general field of real property. Over the course of this twenty year period some sixty recommendations have been made for improvement in the handling of real property problems. These recommendations may be grouped roughly into the following general classifications: mortgages; the recording acts; wills, trusts and future interests; and miscellaneous.

I. MORTGAGES

The Commission's first venture into the field of real property mortgages related to the liability of receivers in mortgage foreclosures for passive negligence. This problem had come into sharp focus in 1934 in *Woman's Hospital v. Louborn Realty Corporation*,² in which the Court of Appeals denied the liability of a receiver in his official capacity for passive negligence. A receiver of rents and profits appointed in an action to foreclose a mortgage upon real property is an officer of the court, and he cannot be sued in his official capacity in the absence of authorization by the court appointing him. The *Woman's Hospital* case involved an application by a tenant for leave to sue a receiver for injury to her person and property caused by the collapse of the ceiling of her apartment. The allegation against the receiver was of passive, not active, negligence; he had failed to fix the defective ceiling. By the

* See Contributors' Section, Masthead p. 764, for biographical data. C. Addison Keeler, Jr. of the third-year class of the Cornell Law School provided helpful assistance in the preparation of this article.

¹ Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 119 (1921).

² 266 N.Y. 123, 194 N.E. 56 (1934).

court order appointing him, the receiver was empowered to keep the premises in repair. It was held, however, that leave to sue him should be denied.

Neither in the petition for leave to sue nor in the complaint appears any allegation that the receiver participated in any affirmative act of negligence. The complaint is based wholly on his passivity. . . . Generally, a receiver of rents and profits in a foreclosure suit has no power without order of the court to lessen the funds in his hands by expenditures for repairs (*Wyckoff v. Scofield*, 103 N.Y. 630), and an order which empowers him to keep buildings in repair is permissive only and not mandatory. (*Ranney v. Peyser*, 83 N.Y. 1, 5, 6.) Such authority as has been conferred upon him as an agent of the court imposes no duty to act in respect to making repairs.³

The Commission was critical of the rule established by the *Woman's Hospital* decision on three grounds: (1) that it was "in conflict with legal theory applied in analogous situations"—the recognized liability for passive negligence of a receiver of railroad properties, of a receiver in a corporate dissolution proceeding, of a receiver appointed to preserve property during an appeal; (2) that it was "undesirable in its social consequences" in that it flew in the face of New York's established policy of promoting the keeping of dwelling houses in a proper state of repair; and (3) that it was "unjust," since the tenant, denied recovery against the receiver, was still subject to the terms of his own lease.

The Commission, therefore, in 1936 proposed a bill designed to change the rule exempting a receiver from liability for passive negligence. The bill failed to pass that year, and the Commission thereupon renewed its recommendation in 1937 and again in 1938. It was not until 1946, however, that section 977-c of the Civil Practice Act was enacted, thus bringing to fruition this initial effort in the field of mortgages.⁴

Section 977-c now provides:

Liability of receiver of rents and profits for injury. A receiver of rents and profits appointed in an action to foreclose a mortgage upon real property shall be liable, in his official capacity, for injury to person or property hereafter sustained by reason of conditions on the premises, in a case where an owner would have been liable. Nothing herein contained shall be construed to enlarge the liability of the receiver in his personal capacity.

One of the important tools of a property lawyer in this state is Article 15 of the Real Property Law which affords a procedure for the de-

³ *Woman's Hospital v. Louborn Realty Corp.*, 266 N.Y. 123, 125-126, 194 N.E. 56, 57 (1934).

⁴ See Leg. Doc. No. 65(A), Report of Law Rev. Com. 1-9 (1946); Leg. Doc. 65(F), Report of Law Rev. Com. 57-63 (1938); Leg. Doc. No. 65(B), Report of Law Rev. Com. 27-33 (1937); and Leg. Doc. No. 65(J), Report of Law Rev. Com. 619-698 (1936).

termination of claims to real property. On three separate occasions—in 1943, 1948 and 1951, the Commission has acted to make Article 15 a more useful and effective instrument in accomplishing its purpose.

In 1943 the Commission successfully recommended a series of amendments designed to broaden the scope of Article 15 and to enlarge the class of claimants who might take advantage of its provisions. Prior to that time an action under Article 15 could be brought only by a plaintiff who had been in possession of land for one year, and whose interest was in fee or for life or for a term of years not less than ten; an executor or administrator could not maintain the action. So too, prior to 1943, an Article 15 proceeding was limited in the type of adverse claims which might be determined. For example, the validity of liens and incumbrances of a value of less than two hundred and fifty dollars could not be determined. The 1943 amendments eliminated all these and other restrictions, thereby making Article 15 available to any person claiming any estate or interest in real property to compel the determination of any adverse claims, provided only that plaintiff's interest in the property is of a duration of at least five years.⁵

In 1948 the Commission considered the problem of the status of an outlawed mortgage. What rights, if any, remain in a mortgagee after the statute of limitations has run on his claim?⁶ Does an uncanceled mortgage outlawed by the statute of limitations constitute a cloud on title which renders the title to the property unmarketable?⁷ These and related questions, to which no completely satisfactory answers could be given, pointed up the importance of establishing a procedure for the cancellation and discharge of record of such incumbrances. Upon the Commission's recommendation, this procedure was created by a new subdivision 4 to section 500 of the Real Property Law, which became effective March 4, 1948.⁸ The procedure is available regardless of whether the mortgage indebtedness has or has not been paid; it is immaterial whether or not it is a purchase money mortgage that is involved. The action cannot be maintained, however, against a mortgagee in possession. The procedure provided for in this statute is made equally applicable in the case of outlawed vendor's liens.

The lawyer who proposes to take advantage of this new procedure

⁵ See Leg. Doc. No. 65(G), Report of Law Rev. Com. 233-326 (1943).

⁶ In *House v. Carr*, 185 N.Y. 453, 78 N.E. 171 (1906), the court held that a mortgage could be foreclosed by advertisement under a power of sale even though the running of the statute of limitations had barred its foreclosure by judicial action.

⁷ See *Ouvier v. Mahon*, 117 App. Div. 749, 102 N.Y. Supp. 981 (2d Dep't 1907), holding such a title to be marketable.

⁸ See Leg. Doc. No. 65(N), Report of Law Rev. Com. 575-599 (1948).

to cancel and discharge of record an outlawed mortgage must keep in mind two possible limitations on its use. In the first place, the procedure is available only if the mortgagee's right of foreclosure has been barred not only as to principal but as to interest as well. In *Nelson v. Fantino*⁹ the Appellate Division recognized this fact, saying:

That statute authorizes the maintenance of this action to secure a cancellation and discharge of record of a mortgage when it becomes unenforceable by reason of an applicable Statute of Limitations. The mortgage here involved, insofar as concerns the principal thereof, became unenforceable, under section 47-a of the Civil Practice Act, on September 1, 1944. It however may have continued to be available by way of foreclosure for the enforcement of the payment of interest due thereon prior to September 1, 1944, in an action commenced within six years thereafter, i.e., not later than September 1950.¹⁰

A mortgagor, faced with the prospect of waiting out the period for the statute of limitations to run on the interest, might perhaps be tempted to pay up the interest so as to take advantage of section 500(4). But the possible danger involved in such action is clear.

Undoubtedly a payment into court, or a payment coupled with a disavowal of any implied promise to revive the barred principal, would not raise the principal from the limbo of the Statute of Limitations. But the typical situation involves the debtor who makes an unguarded payment, unaware of the consequences under the principles of acknowledgment.¹¹

There is another possible limitation on section 500(4) to be kept in mind. It involves the question of whether this is a substantive statute and hence inapplicable to mortgages in existence prior to its effective date of March 4, 1948, or whether it is procedural and thus retroactive in its operation.

In *Armstrong v. Germain*¹² Official Referee Lapham said: "This section [500(4)] supplies a remedy where none existed, and therefore a right to action. A careful reading convinces me that it is devoid of any expression of legislative purpose that it be retroactive."¹³

The retroactive effect of this statute was likewise discussed in *Continental Bank and Trust Co. v. Tanager Construction Corp.*¹⁴ In this

⁹ 277 App. Div. 1058, 100 N.Y.S.2d 874 (2d Dep't 1950). See also *Radish v. Shulman*, 91 N.Y.S.2d 459 (Sup. Ct. Kings County 1949) (not officially reported).

¹⁰ 277 App. Div. 1058, 1059, 100 N.Y.S.2d 874, 875 (2d Dep't 1950).

¹¹ Comment, "Separability of Post-Maturity Interest in New York," 36 Cornell L.Q. 107, 120 (1950).

¹² 98 N.Y.S.2d 946 (Sup. Ct. Steuben County 1949) (not officially reported).

¹³ *Id.* at 963.

¹⁴ 193 Misc. 245, 84 N.Y.S.2d 55 (Sup. Ct. N.Y. County 1948), *aff'd*, 276 App. Div. 988, 95 N.Y.S.2d 275 (1st Dep't 1950), *aff'd* without opinion, 302 N.Y. 663, 98 N.E.2d 476 (1951).

case the Special Term said: "Furthermore, the relief in said statute [500(4)] provided for is unavailable in respect of a mortgage satisfied prior to its enactment. We do not, therefore, reach the larger question involving the retroactivity of this statute."¹⁵ The judgment of the Special Term was affirmed in the Appellate Division and again in the Court of Appeals. Dissenting in the Appellate Division, Judge Van Voorhis made a thoughtful appraisal of this matter, saying, in part:

The question in this case is whether that amendment applies to the cancellation of mortgages in existence when it became law. That, in turn, depends upon whether this statute is substantive or procedural in nature. Strict logic might reach the conclusion that it is substantive (and unconstitutional also) since it aims at the destruction of a right of indebtedness. But such an indebtedness could not be collected by any legal remedy, and, therefore, has ceased to be a substantive right. . . . A right without a remedy is so shadowy and disembodied a legal concept, as not to be property. . . . It is then clear that a debt which is barred no longer partakes of the nature of property, whether it has been paid or not, from which it follows that a statute providing a remedy to expunge its shadow from the record, is procedural. . . . This salutary amendment, like most of Article 15 of the Real Property Law, would lose much of its usefulness, if it were deemed to extend only to mortgages made after its enactment.¹⁶

The important question of the retroactive effect of this statute does not as yet seem to have been satisfactorily answered.

The Commission's 1948 recommendation resulting in section 500(4) has increased the usefulness of Article 15 in a significant way. The same thing can be said with respect to a 1951 recommendation which culminated in sections 500-a, 506-a and 506-b of the Real Property Law, effective September 1, 1951.¹⁷

The 1951 legislation pertains to defective mortgage foreclosures, and was an outgrowth of cases like *McDonald v. Daly*.¹⁸ Here the plaintiff-mortgagee in 1935 foreclosed on property owned by the defendant-mortgagor. The defendant had been adjudicated incompetent and his wife had been appointed as committee of his person and property. The wife was made a party to the foreclosure proceedings in her representative capacity as committee. The defendant, however, was not made a party to the action in his individual capacity. The plaintiff bought in the property at the foreclosure sale and went into possession of the premises. In 1946 the plaintiff discovered the defect in his title resulting from the failure to make the incompetent a party defendant in his in-

¹⁵ Id. at 249, 84 N.Y.S.2d at 59.

¹⁶ 276 App. Div. 988, 989-990, 95 N.Y.S.2d 275, 276-278 (1st Dep't 1950).

¹⁷ See Leg. Doc. No. 65(K), Report of Law Rev. Com. 501-548 (1951).

¹⁸ 190 Misc. 136, 71 N.Y.S.2d 546 (Sup. Ct. Kings County 1947).

dividual capacity in the original foreclosure action. The plaintiff, as purchaser at the foreclosure sale, became an assignee of the foreclosed mortgage by operation of law. He could have cleared his title by reforeclosing this mortgage against the defendant had such a reforeclosure action not been barred by the six year statute of limitations of section 47-a of the Civil Practice Act. The plaintiff therefore brought an action for strict foreclosure pursuant to subdivision 2 of section 1082 of the Civil Practice Act to extinguish the defendant's interest. This section provides that where a subordinate interest in mortgaged premises survives a foreclosure action because its owner was not made a party to the proceedings, such owner may be required to redeem within a prescribed time or face the extinguishment of his interest. The court dismissed the plaintiff's complaint, however, on two grounds: (1) that strict foreclosure is barred by the same six year period as foreclosure by action and sale, and (2) that strict foreclosure is not available against the owner of the fee. In *McDonald v. Daly* the defendant had counter-claimed for ejectment on the theory that as to him the plaintiff was a mere trespasser. The statute of limitations in such an action to recover possession of real property is fifteen years.¹⁹ The defendant's counter-claim was dismissed for the plaintiff had gone into possession as a mortgagee under color of right and was thus protected in his possession from ejectment.

There was an obvious need for a procedure by which a purchaser in a defective foreclosure action could perfect his title despite the fact that the statute of limitations had barred reforeclosure. One suggested solution was to toll the six year statute of limitations until discovery of the facts constituting the defect in title.²⁰ The Commission, however, proposed a more comprehensive remedy which was enacted as sections 500-a, 506-a and 506-b of the Real Property Law, effective September 1, 1951. Under this legislation a purchaser at a void foreclosure sale may bring an action to determine claims even though an action to reforeclose the mortgage would be barred by the statute of limitations. The action is available against an owner of the mortgaged property as well as other claimants. Where it appears in such an action that the defect in the

¹⁹ N.Y. Civ. Prac. Act § 34. An action to redeem likewise available to an omitted party, may also be maintained for a period of fifteen years in accordance with N.Y. Civ. Prac. Act § 46.

²⁰ The Committee on State Legislation of the Association of the Bar of the City of New York favored this solution over that recommended by the Law Revision Commission, pointing out that: "This bill has the advantage of being an amendment of the C.P.A. where procedural matters belong." See Memorandum No. 15, p. 59 of the Association's 1951 Legislative Bulletin.

original foreclosure proceedings was not due to the plaintiff's fraud or wilful neglect, the judgment may reforeclose the mortgage by action and sale; where the defect was not due to the fraud or wilful neglect of the plaintiff and the defendant was not actually prejudiced as a result, the judgment may provide for strict foreclosure by fixing a time within which the defendant must redeem or thereafter lose his interest. Under either alternative the plaintiff is allowed the value of any improvements to the property made subsequent to the original sale.

Presumably some day the New York courts will be called upon to construe those provisions in the new legislation which permit strict foreclosure provided "that the defect in the foreclosure proceedings was not due to fraud or wilful neglect of the plaintiff and that the defendant . . . was not actually prejudiced thereby." In *Moulton v. Cornish*²¹ and *Denton v. Ontario County Bank*²² the Court of Appeals limited the use of strict foreclosure pursuant to section 1082(a) of the Civil Practice Act to the case where the plaintiff bought at the foreclosure sale in good faith without knowledge of the defendant's outstanding interest and where the defendant knew of the sale and permitted the plaintiff to buy without disclosing his own outstanding interest. It will be interesting to see the influence, if any, of these decisions on comparable litigation under the 1951 legislation.

Most law blank printers are no doubt familiar with section 258 of the Real Property Law which sets forth various short forms of deeds and mortgages. Schedules M and N consist of the short form mortgage and the integrated bond and mortgage, respectively. The use of any of these forms is optional. The lawyer, however, cannot stop with section 258 but must also include section 254 in his thinking because this latter section establishes the construction which must be given to the various clauses and covenants in the statutory short form mortgage. In 1945 the Commission discovered in a number of instances that the language of a particular provision in the short form mortgage was unclear or even misleading in the light of the construction required to be given it. For example, under covenant 7 in the short form mortgage the mortgagor agreed to furnish a statement of the amount due on the mortgage. According to the mandatory construction given to covenant 7 by section 254, however, the mortgagor was required in addition to certify whether there were any offsets or defenses existing against the mortgage debt. The Commission therefore recommended, and successfully, that the language of this covenant in the statutory short form be

²¹ 138 N.Y. 133, 33 N.E. 842 (1893).

²² 150 N.Y. 126, 44 N.E. 781 (1896).

amended to conform to the construction required to be given it. Four other comparable discrepancies were also corrected.²³

Any accounting of the Commission's contributions to the real property mortgage law of this state must of necessity recognize its role in the enactment in 1948 of a new section 321 of the Real Property Law relating to the recording of mortgage discharges.²⁴ Up to that time there had been an unfortunate lack of uniformity among recording officers throughout the state with respect to discharging mortgages of record in cases where ownership of the mortgage was divided. For example, where an assignment of a mortgage indicated that it had been assigned as collateral security, County *A*'s practice might have been to discharge the mortgage of record only if the certificate of discharge were signed both by the assignor and the assignee; County *B*, on the other hand, might have required the assignee's signature alone. By the same token, the two counties might have pursued different recordation policies in the case of plural mortgagees or assignees—one requiring the discharge to be signed by only one of the co-owners, the other county insisting on the signatures of all the co-owners. It was little wonder that the county clerks had varied recording practices. Section 321 as it then read required a recording officer to discharge a mortgage of record upon receipt of a certificate "signed by the mortgagee, his personal representative or assignee"—hardly an adequate guide in cases of divided ownership. In any event, remedial legislation was called for and was forthcoming in the form of a new section 321 which now provides a uniform rule for the guidance of recording officers in these cases.

The Commission's most recent action in the field of real property mortgages came in 1953 and related to the assumption of a mortgage indebtedness by a grantee of the mortgaged premises.²⁵ In 1938 section 1083-c was added to the Civil Practice Act and it required that the assumption of a mortgage debt be in writing. It was designed to protect the grantee of mortgaged premises who might otherwise incur liability for a mortgage indebtedness by the mere acceptance of a deed containing an assumption clause or even by a parol assumption. It became evident, however, the section 1083-c by its express terms did not apply to two substantial groups of grantees: (1) those who bought property sub-

²³ See Leg. Doc. No. 65(H), Report of Law Rev. Com. 239-299 (1945).

²⁴ See Leg. Doc. No. 65(A), Report of Law Rev. Com. 23-30 (1951); Leg. Doc. No. 65(P), Report of Law Rev. Com. 507-512 (1950); Leg. Doc. No. 65(N), Report of Law Rev. Com. 817-839 (1949); Leg. Doc. No. 65(C), Report of Law Rev. Com. 65-122 (1948); Leg. Doc. No. 65(N), Report of Law Rev. Com. 789-855 (1946).

²⁵ See Leg. Doc. No. 65 (P) (1953) [At printing, Report of Law Rev. Com. (1953) unbound. No page citations available —Ed.]

ject to a mortgage executed before April 6, 1938, the effective date of the statute, and (2) those who bought property subject to a mortgage debt which did not originate simultaneously with and was not secured solely by the mortgage. These persons could still become bound under the old rule permitting unwritten assumptions. There seemed to be no sound reason why these particular grantees should be denied the protection offered by section 1083-c; indeed, there was every reason to bring them within its terms, and this was accomplished by an amendment to the section enacted upon the Commission's recommendation and effective September 1, 1953.

An upstate practitioner had written the Commission about section 1083-c (before its amendment in 1953) as follows:

First: The section became effective April 6, 1938. If the conveyance takes place after that date, does the section mean that the mortgage must have been executed after that date, or does the section relate to mortgages executed before or after that date, if executed prior to the conveyance? The language seems capable of either construction.

Second: Leaving purchase money mortgages out of consideration, and in case of a mortgage executed many years ago, and which has been repeatedly assigned, how is anyone supposed to know, or find out, whether "the indebtedness originated simultaneously with . . . such mortgage"?

Here, as in so many cases, the Commission's initial interest in the problem stemmed from a comment—or a question—from a member of the Bar. The practicing lawyers throughout the state have been a rich source of helpful ideas and suggestions upon which the Commission has drawn heavily these past twenty years.

II. THE RECORDING ACTS

The New York recording acts are designed to prevent fraud and facilitate the conveyancing of real property. These laws are able to accomplish their purposes far more effectively today than was the case in 1940, because in that interval the Legislature has provided for the recording of three major types of instruments affecting real property: (1) land contracts, (2) assignments of rents, and (3) judgments, final orders or decrees affecting the title to or possession, use or enjoyment of real property. In each instance the impetus came from the Law Revision Commission.

The legislative action concerning land contracts occurred in 1940 at a time when these instruments were outside the protection of the recording acts. Under the New York statutes, the recording of a deed or mortgage constituted constructive notice to subsequent purchasers and incumbrancers, and the holder who thus recorded his interest was thereby

protected against their claims. If, however, he failed to record, his interest was void as against a subsequent bona fide purchaser or incumbrancer who did record. Although section 294 of the Real Property Law specifically authorized the recording of an executory contract for the sale, purchase or exchange of real property, it was well established that such a recording did not constitute notice to subsequent purchasers or incumbrancers so as to protect the contract vendee. The Court of Appeals had said in *Washburn v. Burnham*:²⁶

The instrument in question was a mere contract for the sale of lands. . . . The record of it in no way added to its force or validity. The only effect of the statutory provisions for the recording of contracts for the sale of lands is to preserve evidence and facilitate proof thereof, and the record is not constructive notice to subsequent purchasers or incumbrancers. . . .²⁷

By amendments to relevant sections of the Real Property Law, executory land contracts were in 1948 brought within the protection of the recording acts.²⁸ An unrecorded conveyance is now void as against a subsequent bona fide contract vendee who first records his contract.²⁹ An unrecorded executory land contract is void against a subsequent bona fide purchaser or contract vendee whose conveyance or contract is first recorded; a memorandum of the contract may be recorded in lieu of the contract itself; the recording is effective up to the time fixed by the contract for the conveyance of title, with provision for an extension agreement.³⁰

In 1952 in *Matter of Downtown Athletic Club v. State Tax Commission*,³¹ the Third Department of the Appellate Division was faced with an interesting tax question related to the recording of land contracts. Under a contract which gave the purchaser the right to possession of the property, the vendee, already in possession, continued its occupation of the premises. This contract was not recorded. The vendee assigned its interest in the contract, and the conditions of the contract having been met, a deed was delivered to the assignee. The recording officer of New York County refused to record this deed without payment of the mortgage recording tax, and the State Tax Commission confirmed this decision.

²⁶ 63 N.Y. 132 (1875).

²⁷ *Id.* at 134-135.

²⁸ See Leg. Doc. No. 65(E), Report of Law Rev. Com. 157-166 (1940); Leg. Doc. No. 65(D), Report of Law Rev. Com. 37-45 (1938); Leg. Doc. No. 65(N), Report of Law Rev. Com. 387-398 (1937).

²⁹ N.Y. Real Prop. Law § 291.

³⁰ N.Y. Real Prop. Law § 294.

³¹ 280 App. Div. 363, 113 N.Y.S.2d 485 (3d Dep't 1952).

Under section 250 of the Tax Law, executory contracts for the sale of real property under which the vendee has or is entitled to possession are deemed to be mortgages for the purpose of the recording tax imposed on mortgages by section 253 of the same law.

The Appellate Division annulled the Tax Commission's determination, saying, in part:

The Tax Commission, however, took the different view that the tax was imposed on the recording of the contract and that the deed should not be recorded until the contract also had been recorded and the tax paid. . . .

But at the time the deed was offered for recording, the contract of sale was no longer an executory contract. It had been fully executed as far as it related to the transfer of real property, by the giving and taking of the deed. There was then no statutory or other legal requirement on the vendee to record the contract, nor was there any such obligation during the executory period of the contract. It was only if the benefit of the protection of the recording act, whatever it might be, was sought by the vendee that recording was necessary. . . .

The crucial point in this proceeding, therefore, is whether the Tax Commission was right in imposing the recording of the contract of sale and the payment of the tax thereon as a condition for the recording of the deed of conveyance. The deed is absolute on its face and makes no reference to the contract of sale or to any indebtedness. It would require very explicit language in a tax statute to sustain such a requirement, and we do not find that kind of language.³²

In the statutory note to section 294-a of the Real Property Law, specific mention is made of *Conley v. Fine*³³ and *Rolandelli v. Stanton*.³⁴ These cases did effectively point up the need for legislative action concerning the assignment of future rents.

In *Conley v. Fine*, the Appellate Division granted the plaintiff-assignee of future rents a priority over the defendant, a mortgagee to whom the rents had been subsequently assigned, saying:

The circumstance that the assignment of the rents to plaintiff was not recorded . . . is of no consequence because an assignment of rents was not a conveyance of, nor an incumbrance upon real property and was, therefore, not within the Recording Act.³⁵

And in the *Rolandelli* case, in protecting an assignee of rents against subsequent grantees of the property, the court pointed out:

While the assignment of rents had been recorded, thus giving ground for argument that the defendants Schreiber and Costa had notice of same,

³² Id. at 366, 113 N.Y.S.2d at 487-488.

³³ 181 App. Div. 675, 169 N.Y. Supp. 162 (1st Dep't 1918).

³⁴ 129 Misc. 270, 220 N.Y. Supp. 502 (N.Y. Munic. Ct. 1927).

³⁵ *Conley v. Fine*, 181 App. Div. 675, 678, 169 N.Y. Supp. 162, 164 (1st Dep't 1918).

³⁶ *Rolandelli v. Stanton*, 129 Misc. 270, 273, 220 N.Y. Supp. 502, 504-505 (N.Y. Munic. Ct. 1927).

such recordation of the assignment was not necessary, as the defendants Schreiber and Costa were bound by the assignment, irrespective of notice.³⁶

Under pre-1944 New York law, then, assignments of future rent under existing leases were outside the scope of the recording acts. This meant possible—and substantial—injustice: to a bona fide purchaser of property who, in taking subject to a prior unrecorded rent assignment, might thereby lose future rents representing a significant part of the value of the land; to an assignee of future rents unable by recording to protect his interest against prior unrecorded deeds, executory agreements to purchase and assignments of the same rent. In 1944, therefore, upon the Commission's recommendation, assignments of rent to accrue under existing leases were brought within the recording statutes. This was accomplished by the enactment of a new section 294-a of the Real Property Law, together with amendment to sections 291 and 294.³⁷

1949 saw the enactment of section 297-b of the Real Property Law providing for the first time in this state for the recording of judgments, final orders and decrees affecting the title to real property.³⁸ The statute authorizes, but does not make mandatory, the recording of these documents. This statute had the approval of the organized Bar as a method of facilitating the examination of titles. Although favoring the legislation in general, the Committee on State Legislation of the Association of the Bar of the City of New York did raise two questions that are worth noting. The first related to that part of section 297-b which provides: "For purposes of recording and indexing such judgment, order or decree, the prevailing party or parties named therein shall be deemed grantees and all other persons named therein shall be deemed grantors." The Bar Association commented:

The bill has also been criticized on the ground that it puts the burden of determining who was the successful party on the recording officer and may lead to confusion in cases where neither party was completely successful or both were partially successful. This objection is not unsubstantial, but does not in itself seem to justify a disapproval of the measure.³⁹

Experience under section 297-b does not seem to have substantiated this objection.

In the second place, the Association of the Bar questioned the permissive character of the new legislation:

³⁷ See Leg. Doc. No. 65(I), Report of Law Rev. Com. 221-289 (1944). In 1948 N.Y. Real Prop. Law § 294-a was amended to make clear that it included assignments of rent to accrue from existing leases regardless of whether the lessee's occupancy had begun at the date of the assignment. See Leg. Doc. No. 65(J), Report of Law Rev. Com. 359-379 (1948).

³⁸ See Leg. Doc. No. 65(E), Report of Law Rev. Com. 365-414 (1949).

³⁹ See the 1949 Report of the Committee on State Legislation of the Association of the Bar of the City of New York, Memorandum No. 73, p. 224.

The remedy would seem to be a mandatory recording statute providing that the judgment shall be void as against a bona fide purchaser for value unless recorded in the proper recording office in the county in which the property is located.⁴⁰

To this writer the reasons which caused the Commission to reject a compulsory recording act seem sound: (1) that mandatory recording would call into question—and perhaps unconstitutionally—“long-standing principles of *res judicata* that matters litigated to judgment shall be deemed finally and conclusively settled as between the parties and those in privity with them,” (2) that “it would be exceedingly difficult to apply such a statute to *in rem* proceedings binding unidentified parties,” and (3) that the result of compulsory recording would be “to flood the record books with immaterial items and to impede the work of title searchers.”⁴¹

The new enactments with respect to the recording of land contracts, rent assignments, and judgments affecting real property do not exhaust the Commission's efforts in this field. In addition there has been new legislation relative to the filing of federal tax liens,⁴² as well as concerning the preservation of existing judgment liens where a judgment discharged in bankruptcy is cancelled of record pursuant to court order.⁴³ Today this state's recordation policies and procedures are more useful and effective as a result of the Commission's work during the past twenty years.

III. WILLS, TRUSTS AND FUTURE INTERESTS

It should be recognized at the outset that many of the Commission's projects which might be classified under this heading are by no means limited to real property, but often involve personal property as much if not more. The classification of the material into separate sections labelled “Wills,” “Accumulations,” “Trusts” and “Trusts and the Rule Against Perpetuities” is concededly artificial and unrealistic in view of the overlapping and interrelationship among these topics. The classification is useful, however, if it is kept in mind that its purpose is merely to aid in the orderly presentation of the material.

A. *Wills*

The Commission's initial study addressed specifically to the subject of wills illustrates its policy of recommending against statutory revision

⁴⁰ *Id.* at 223.

⁴¹ Leg. Doc. No. 65(E) at 5-6, Report of Law Rev. Com. 369-370 (1949).

⁴² See Leg. Doc. No. 65(H), Report of Law Rev. Com. 183-219 (1944).

⁴³ See Leg. Doc. No. 65(A) (1953).

where analysis of existing law indicates that new legislation is unnecessary and would be unwise. The study considered the doctrine of incorporation by reference as applied to wills.⁴⁴

The doctrine of incorporation by reference has been phrased as follows:

If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such.⁴⁵

In a number of cases prior to 1881, the New York courts gave effect to this rule,⁴⁶ but after that date a series of decisions, while purporting to distinguish the earlier cases, indicated that the rule had fallen from judicial favor and was greatly restricted in its applicability.⁴⁷ The Commission's study showed that incorporation by reference is allowable where a codicil refers to a validly executed will of the testator previously revoked; or where a will refers to the dispositive clauses of the validly executed will of another person, which will is in existence at the time of the reference; or where the reference is to the testator's own existing, identified, and irrevocable deed of trust.⁴⁸ It is not allowable where the reference is to a purported prior will ineffective for defective execution, or to an instrument which has no independent legal significance, as, for example, a letter of instructions. The effectiveness of other types of references, not within these classes, remains uncertain.⁴⁹ The consultant to the Commission expressed the view that neither complete abolition nor complete revival of the doctrine would be wise, and that the better course would be to leave the problem to a case-by-case development in the courts.⁵⁰ The Commission agreed that legislative action would be inadvisable.⁵¹

⁴⁴ Leg. Doc. No. 60(G), Report of Law Rev. Com. 345-448 (1935).

⁴⁵ *Newton v. Seaman's Friend Society*, 130 Mass. 91, 93 (1881).

⁴⁶ *Brown v. Clark*, 77 N.Y. 369 (1879) (prior will revoked by marriage); *Tonnele v. Hall*, 4 N.Y. 140 (1850) (reference to a filed map); *Jackson dem. Herrick v. Babcock*, 12 Johns. R. 388 (1815) (antenuptial agreement).

⁴⁷ See, e.g., *Matter of Whitney*, 153 N.Y. 259, 247 N.E. 272 (1897); *Matter of O'Neil*, 91 N.Y. 516 (1883).

⁴⁸ As to incorporation by reference of a revocable and amendable trust, see *President and Directors of Manhattan Co. v. Janowitz*, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940), noted in 26 Cornell L.Q. 172 (1940).

⁴⁹ See Leg. Doc. No. 60(G) at 103-104, Report of Law Rev. Com. 447-448 (1935).

⁵⁰ *Id.* at 104, Report of Law Rev. Com. 448 (1935).

⁵¹ *Id.* at 5-6, Report of Law Rev. Com. 349-350 (1935), wherein the Commission states: The Commission has caused a study to be made on the subject of the Doctrine of In-

A later study illustrates the responsiveness of the Commission to statements contained in judicial opinions pointing out inadequacies in the law. In a 1931 case⁵² involving a bequest to the unincorporated "Brooklyn Society for Parks and Playgrounds for Children," the surrogate was confronted by the common law rule that an unincorporated association cannot acquire ownership to property⁵³ unless specifically authorized by statute.⁵⁴ Under the law as it then was, a devise or bequest to a non-profit unincorporated association, other than one specifically authorized to take property by statute, could be effectuated only by one of several devices employed by the courts to save such attempted gifts. These including finding that the donee was misnamed, and substituting as donee an incorporated organization with a similar name,⁵⁵ or making the incorporated parent the donee, rather than the unincorporated subsidiary named in the will,⁵⁶ or ascribing a general religious, educational, charitable or benevolent character to the gift, which might then be received and administered by the testamentary trustee or by a judicially appointed trustee.⁵⁷ In the opinion in the 1931 case, after finding a general charitable purpose in order to effectuate the intent of the testatrix, the court deplored the fact "that courts should be compelled to resort to such substantial circumvention of outworn rules of law," but recognized that "[t]he remedy . . . is beyond the power of a court of first impression and lies with the Court of Appeals or the Legislature."⁵⁸

Not only were such devices used to carry out the terms of a will unnecessarily cumbersome, but in many instances they failed to allow for perfectly reasonable gifts to non-charitable associations such as labor

corporation by Reference as Applied to Wills, which it herewith submits. It believes this study to be a valuable contribution on the subject and is in agreement with the conclusion therein reached that no change should be made in the present law.

⁵² Matter of Patterson, 139 Misc. 872, 249 N.Y. Supp. 441 (Surr. Ct. Kings County 1931).

⁵³ See, e.g., *Downing v. Marshall*, 23 N.Y. 366 (1861); *Owens v. Missionary Society*, 14 N.Y. 380 (1856).

⁵⁴ N.Y. Benevolent Orders Law § 3-a; N.Y. Agriculture & Markets Law § 290; N.Y. Real Prop. Law § 113(1); N.Y. Pers. Prop. Law § 12(1).

⁵⁵ *In re Stymus' Will*, 64 N.Y.S.2d 304 (Surr. Ct. Westchester County 1946) (not officially reported); Matter of Howland, 120 Misc. 224, 198 N.Y. Supp. 894 (Surr. Ct. N.Y. County 1923).

⁵⁶ See Leg. Doc. No. 65(J) and cases cited 49-52, Report of Law Rev. Com. 325-499, cases cited at 373-376 (1951).

⁵⁷ Matter of Howells, 145 Misc. 557, 260 N.Y. Supp. 598 (Surr. Ct. Kings County 1932), modified, 146 Misc. 169, 261 N.Y. Supp. 859 (Surr. Ct. Kings County 1933); Matter of Winburn, 130 Misc. 5, 247 N.Y. Supp. 584 (Surr. Ct. Westchester County 1931); N.Y. Real Prop. Law § 113(1); N.Y. Pers. Prop. Law § 12(1).

⁵⁸ Matter of Patterson, 139 Misc. 872, 876, 249 N.Y. Supp. 441, 445 (Surr. Ct. Kings County 1931).

unions, political parties and the like. On the other hand, strong policy considerations favored the preservation of the requirement that associations subject themselves to the statutory regulation incident to incorporation.⁵⁹ A workable solution would appear to be to postpone vesting of the devise or bequest pending incorporation by the donee, should the latter elect to take such a step. Under the existing law, however, the gift would have to be construed as contingent upon future incorporation⁶⁰ within the permissible period of postponement of vesting, *i.e.*, two lives in being at the death of the testator.⁶¹ Thus a direct testamentary gift to the association, without an intervening period of sufficient duration to permit incorporation, would fail. The Commission therefore recommended adoption of the present section 47-e of the Decedent Estate Law which allows a minimum period in gross of one year from the probate of the will in which the donee may incorporate, the property to be administered in trust for the intervening period.⁶² Enacted in 1952, the section provides an additional method for effectuating the intention of testators to benefit unincorporated associations.⁶³

Upon the recommendation of the Commission, the Legislature in 1953 amended section 113 of the Real Property Law and section 12 of the Personal Property Law so as to extend the *cy pres* power of the surrogate's court and the supreme court to include absolute gifts for charitable purposes to donees which have ceased to exist or never existed.⁶⁴ Prior to these amendments, the *cy pres* power of the court

⁵⁹ Leg. Doc. No. 65(J) at 10, Report of Law Rev. Com. 334 (1951):

The policy of the present law denying power to hold property to unincorporated associations generally is substantial. The corporate form furnishes certainty to members of the public dealing with the organization as to the identity and power of its officers to deal with property. It provides, moreover, a mode of internal management of the affairs of the organization which is regulated by statute, and subject to supervision by the courts under established doctrine, so as to afford protection to the interest of the members

⁶⁰ *Shipman v. Rollins*, 98 N.Y. 311 (1885); *Philson v. Moore*, 23 Hun 152 (N.Y. Sup. Ct., Gen. T. 2d Dep't 1880).

⁶¹ N.Y. Real Prop. Law §§ 42, 50; see *Burrill v. Boardman*, 43 N.Y. 254 (1871) (period to obtain act of incorporation measured by two year term in gross provided two designated persons should live that long).

⁶² Enacted in Laws 1952, c. 832 (see Leg. Doc. No. 65(F), Report of Law Rev. Com. 147-161 (1952)). An earlier recommended statute (1951 Sen. Int. No. 125, Pr. Nos. 125, 2940; Assembly Int. No. 156, Pr. Nos. 156, 3415; see Leg. Doc. No. 65(J), Report of Law Rev. Com. 325-499 (1951)) was disapproved by the Governor on the ground that the proposed statute did not make it sufficiently clear that the courts retained authority to validate gifts to unincorporated associations by exercise of the *cy pres* power or other rules of construction referred to above.

⁶³ See *In re Smith's Will*, 121 N.Y.S.2d 617 (Surr. Ct. Monroe County 1953) (not officially reported), indicating the variety of devices available to the court to effectuate the primary purpose of the devise.

⁶⁴ See Leg. Doc. No. 65(S) (1953).

extended to absolute gifts to existing corporations for charitable purposes, whether such purpose was manifested by the terms of the gift or by the purpose of the donee's incorporation as expressed in its charter.⁶⁵ Thus, if the donee corporation should dissolve or cease to carry on the purposes for which the property was given, the court would have jurisdiction to dispose of the subject matter of the bequest or devise in such a way as to accomplish the purpose of the testamentary instrument. But where an absolute gift for a charitable purpose were made to a donee which had ceased to exist, or which had never existed, the gift would fail.⁶⁶ On the other hand, a gift in trust for charitable purposes could be administered *cy pres* by the testamentary trustee or the court if the donee were unable to take.⁶⁷ The reason for this difference in treatment between a gift in trust and an absolute gift to a charitable corporation was largely historical,⁶⁸ and had been partially abolished by specific statutory enactments under which the successors to the property of religious and membership corporations benefit from later bequests to the former corporation.⁶⁹ It was against this background that the Real and Personal Property Laws were amended to extend the *cy pres* doctrine to this class of cases.⁷⁰

In these, as in other testamentary projects, the tenor of the Commission's approach has been one of moderation, an effort to facilitate the carrying out of reasonable testamentary dispositions without sacrificing other valued ends, such as certainty in the designation of beneficiaries, and the public regulation of donees of charitable gifts.

B. Accumulations

Under New York statutory law, the accumulation of trust income is allowed only "for the benefit" of a designated minor and may not continue for a period exceeding his minority.⁷¹ If a settlor creates a

⁶⁵ N.Y. Real Prop. Law § 113; N.Y. Pers. Prop. Law § 12; *Sherman v. Richmond Hose Co.*, 230 N.Y. 462, 130 N.E. 613 (1921).

⁶⁶ See, e.g., *Wright v. Wright*, 225 N.Y. 329, 122 N.E. 213 (1919).

⁶⁷ See *Prudential Ins. Co. v. Guild for the Jewish Blind*, 252 App. Div. 493, 299 N.Y. Supp. 911 (1st Dep't 1937); *Kernochan v. Farmers Loan & T. Co.*, 187 App. Div. 668, 175 N.Y. Supp. 831 (1st Dep't 1919). If a trust may be implied or is expressed, there is no lapse, but where an absolute gift is bequeathed to a non-existent donee *cy pres* cannot save it. *Matter of Walker*, 185 Misc. 1046, 53 N.Y.S.2d 106 (Surr. Ct. N.Y. County 1944) (under the authority of *Wright v. Wright*, *supra*).

⁶⁸ Leg. Doc. No. 65(S) at 17-19 (1953).

⁶⁹ N.Y. Membership Corp. Law §§ 51, 56(5); N.Y. Religious Corp. Law § 209.

⁷⁰ The former rule still obtains in cases where the testator died before September 1, 1953, and hence remains of considerable importance. See *In re Alsop's Will*, 127 N.Y.S.2d 551 (Surr. Ct. Kings County 1953) (not officially reported).

⁷¹ N.Y. Real Prop. Law § 61; N.Y. Pers. Prop. Law § 16.

gift over of accumulated income in the event his beneficiary dies during his minority, is such a provision "for the benefit" of the minor and is the gift over valid? Prior to 1945 the answer to this question was not completely clear. There would seem to be no sound objection to such a gift over, for the death of the infant precludes the possibility of his receiving any personal benefit from the accumulations. A gift over of the corpus would be good.⁷² Although the decisions generally sustained the validity of a gift over of accumulated income if the minor died under twenty-one,⁷³ the language in some cases, emphasizing that the accumulation must be for the exclusive benefit of the minor,⁷⁴ made clarifying legislation desirable. In 1945, therefore, new sections 61-a of the Real Property Law and 16-a of the Personal Property Law were enacted at the Commission's suggestion, thereby removing any doubt as to the validity of a gift over in such circumstances.⁷⁵

C. Trusts

The reluctance of the Commission to recommend sweeping changes in the law in order to achieve limited although important objectives is typified by its recommendations resulting in the 1951 amendments to section 118 of the Real Property Law and section 23 of the Personal Property Law.⁷⁶ Before the amendments, these sections provided for the revocation of trusts, where no power to revoke had been reserved by the creator of the trust, with the written consent of "all the persons beneficially interested" therein.⁷⁷ In *Engel v. Guaranty Trust Co.*,⁷⁸ the grantor attempted to revoke a trust which directed the trustee to pay the principal of the trust, on the death of the grantor, to those persons who would be distributees if the grantor had died intestate while owning the corpus, if the grantor's wife were then dead and the grantor had in the meantime made no other testamentary disposition. Although the grantor had the consent of his wife and his only next of kin, the

⁷² See Leg. Doc. No. 65(I) at 14, Report of Law Rev. Com. 314 (1945) and cases cited therein.

⁷³ *Willits v. Titus*, 14 Hun 554 (N.Y. Sup. Ct., Gen. T. 2d Dep't 1878); *Matter of Levy*, 238 App. Div. 489, 264 N.Y. Supp. 795 (1st Dep't 1933). See *Roe v. Vingert*, 117 N.Y. 204, 217, 22 N.E. 933, 936 (1889). *Contra*, *Harris v. Clark*, 7 N.Y. 242 (1852).

⁷⁴ See *Matter of Murphy*, 213 App. Div. 319, 322, 210 N.Y. Supp. 531, 533-534 (2d Dep't 1925); *Matter of Kirby*, 133 Misc. 152, 154, 231 N.Y. Supp. 408, 412 (Surr. Ct. Westchester County 1928).

⁷⁵ See Leg. Doc. No. 65(I), Report of Law Rev. Com. 301-307 (1945).

⁷⁶ See Leg. Doc. No. 65(D), Report of Law Rev. Com. 79-132 (1951).

⁷⁷ Under the common law, a trust could not be revoked by the settlor unless he had reserved a power to revoke. See Leg. Doc. No. 65(D) at 13, Report of Law Rev. Com. 91 (1951).

⁷⁸ 280 N.Y. 43, 19 N.E.2d 673 (1939).

court refused to allow the revocation on the ground that the gift over to the heirs was intended as a remainder, and consequently that the class of persons "beneficially interested" could not be determined until the death of the grantor. In short, the trust was irrevocable in view of the maxim "*nemo est haeres viventis*," or "no one is the heir of a living person." Of course, if the gift over to the grantor's heirs had been construed as a reservation of a reversionary interest, the revocation would have been permitted.

Under the ancient doctrine of worthier title, property was presumed to pass by descent rather than through purchase in order to preserve the incidents of feudal tenure.⁷⁹ An earlier tendency in the New York law to find a reversion⁸⁰ had been limited in later decisions purporting to find "clear expression" of an intent to create a remainder.⁸¹ The rule of construction, however, is a difficult one to apply, and both the majority and dissenting opinions in *Matter of Burchell*⁸² urged clarifying legislation.

The Commission did not attempt to solve the problem of worthier title generally, but confined itself to recommending the exclusion of the "heirs" or "next of kin" or "distributees" of the settlor from the class of persons "beneficially interested," but for purposes of revocation only.⁸³ Although the revision has been criticized as being too narrow in scope,⁸⁴ it should be noted that it preserves the policy favoring revocation without embracing the somewhat discredited doctrine of worthier title and without adoption of the rather drastic remedy of making trusts revocable unless irrevocability is expressly provided.⁸⁵

On the recommendation of the Commission a bill was submitted to the Legislature in 1950 to impose a time limitation on actions to impress

⁷⁹ See *Matter of Burchell*, 299 N.Y. 351, 358, 87 N.E.2d 293, 296 (1949), discussing the origin of the doctrine.

⁸⁰ See *Doctor v. Hughes*, 225 N.Y. 305, 122 N.E. 221 (1919).

⁸¹ See, e.g., *Richardson v. Richardson*, 298 N.Y. 135, 81 N.E.2d 54 (1948); *Matter of Burchell*, supra note 79.

⁸² *Matter of Burchell*, 299 N.Y. 351, 360, 362, 87 N.E.2d 293, 297, 298 (1949).

⁸³ Where the class of remaindermen is ascertained but subject to increase by admission of after-born members, as a gift over to the "issue" or "children" of a named person, a revocation is permitted with the consent of living remaindermen, notwithstanding the possibility of future members. *Smith v. Title Guarantee and Trust Co.*, 287 N.Y. 500, 41 N.E.2d 72 (1942).

⁸⁴ See, e.g., Comment, "Trusts—Revocation Under Section 23 of the N.Y. Personal Property Law," 26 N.Y.U.L. Rev. 678, 684 (1951).

⁸⁵ Such an amendment, which was adopted in California (Calif. Civ. Code § 2280 (1949)), would be contrary to the policy favoring indestructibility of income beneficiary trusts. N.Y. Pers. Prop. Law § 15; N.Y. Real Prop. Law §§ 103-105.

a trust on real property conveyed by a trustee in breach of trust.⁸⁶ The bill, which would have added a new section 43-a to the Civil Practice Act, was disapproved by the Governor. Where the existence of a trust of real property is expressed in the instrument creating the estate of the trustee, as by such words as "to X, trustee," or "to X, as trustee,"⁸⁷ a conveyance by the trustee in breach of trust is void.⁸⁸ Thus a prospective purchaser at his peril must ascertain the powers of such trustee, or refuse to deal with property that has once been "trust" property. In cases where, for various reasons, the terms of the trust are kept secret,⁸⁹ there is an almost insuperable obstacle to the alienation of the trust res. The Commission declined to recommend such solutions to this problem as making the transfers voidable instead of void,⁹⁰ or making the words "as trustee" mere *descriptio personae*, not imparting notice.⁹¹ What was recommended was a proposal to limit the time in which beneficiaries could bring an action to impress a trust to twenty years from the recording of the trustee's conveyance, with no provision for tolling. Limited to the situation where the only indication of the trust on record is the expression "as trustee" or the like, the proposal would provide a reasonable time in which to discover the breach and take action, but would at the same time correct the present situation where the title to the property may remain unmarketable indefinitely.⁹² As indicated previously, however, this proposed solution was not followed.

D. Trusts and the Rule Against Perpetuities

One of the outstanding contributions made by the Commission to the literature of trusts is the study and recommendation relating to the Rule Against Perpetuities as applied to spendthrift trusts.⁹³ This study is too detailed and too well known to make it either feasible or necessary to

⁸⁶ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 361-387 (1950).

⁸⁷ Matter of Muratori, 183 Misc. 967, 52 N.Y.S.2d 350 (Sup. Ct. Queens County 1944).

⁸⁸ N.Y. Real Prop. Law § 105.

⁸⁹ Secrecy is often insisted upon where the trust is part of a family settlement and its terms would reveal intimate details of family history. See Leg. Doc. No. 65(M) at 24, Report of Law Rev. Com. 384 (1950).

⁹⁰ This might encourage breach of trust through the use of "straw men." See Leg. Doc. No. 65(M) at 26, Report of Law Rev. Com. 386 (1950).

⁹¹ Such an amendment would substantially diminish the protection of the beneficiary's interest.

⁹² Different statutes of limitation presently apply to actions by the beneficiary, depending upon whether an action for ejectment or an equitable action to impress a trust is involved, and the limitation may be extended by tolling provisions. See N.Y. Civ. Prac. Act §§ 34, 43, 53, and 60.

⁹³ Leg. Doc. No. 65(M), Report of Law Rev. Com. 281-361 (1938).

discuss it at length. At the heart of the problem in New York is the statutory system developed by the Revisers of 1830 to permit indestructible, inalienable trusts for beneficiaries already under some disability.⁹⁴ Virtually all private express trusts where the income from the res is applied for the use of or paid over to the beneficiary are required to be indestructible spendthrift trusts,⁹⁵ inalienable by beneficiary and trustee alike.⁹⁶ As a consequence, practically every express income-beneficiary trust, whether of real property or personal property, suspends the power of alienation and is void unless its duration is measured by one or two designated lives in being at the creation of the trust.⁹⁷ The Commission recognized that spendthrift trusts should be permitted, but not required; that they should be regulated as to size (in terms of the beneficiaries' requirements for education and support) and duration (lives of beneficiaries in being at time of creation); and that contravention of these limitations should not make the trust void, but merely ineffective as to that portion of trust property or period of time in excess of such limitations.⁹⁸ The Commission's recommendations, however, were not accepted. They have, nevertheless, received much favorable comment.⁹⁹

The two-life rule is applied to measure the duration of income-beneficiary trusts, not because there is any necessary connection between the Rule Against Perpetuities (in the sense of remote vesting of future interests) and trusts, but simply because trusts of the income-beneficiary type by statute necessarily suspend the power of alienation, and no other statutory regulation of their duration exists.¹⁰⁰ Under spendthrift trusts where the entire income may be unnecessary for the education and support of the beneficiary, excessively large holdings of property may become inalienable; and by measuring the duration of such trusts by any two designated lives, the trust res may remain tied up for a period having no relationship to the needs of the beneficiary. At the same time, a violation of the rule limiting suspension of the power of alienation to two designated lives in being makes the trust entirely void, and many spendthrift trusts are thus completely nullified because of a violation of this complex

⁹⁴ *Id.* at 44, Report of Law Rev. Com. 324 (1938). An indestructible trust was unknown in English law.

⁹⁵ N.Y. Real Prop. Law § 96(3). Such trusts are commonly called income-beneficiary trusts and constitute by far the most numerous class.

⁹⁶ N.Y. Real Prop. Law §§ 103, 105; N.Y. Pers. Prop. Law § 15.

⁹⁷ N.Y. Real Prop. Law § 42; N.Y. Pers. Prop. Law § 11.

⁹⁸ Leg. Doc. No. 65(M) at 20, 25, Report of Law Rev. Com. 300, 305 (1938).

⁹⁹ See, e.g., Munson, "Recent Changes in Statutory Rules Against Perpetuities," 38 *Coruell L.Q.* 543, 564, 568-569 (1953).

¹⁰⁰ The rule against restraints on alienation does not apply to spendthrift trusts. See Leg. Doc. No. 65(M) at 19, 77, Report of Law Rev. Com. 299, 357 (1938).

rule. These considerations argue for a thorough revision of the New York law on this point, and for another attempt by the Commission to bring it about.

Attempts to "do something" about the New York Rule Against Perpetuities have become an annual event in Albany.¹⁰¹ The Law Revision Commission first turned its attention to the problem in 1936.¹⁰² The Rule Against Perpetuities prohibits the suspension of the absolute power of alienation for a period exceeding two lives in being at the creation of the estate or interest.¹⁰³ The rule is extremely complex. Uncertainty and difficulty in its application have resulted in part from the efforts of the courts to save dispositions of property by forced construction of limitations,¹⁰⁴ excision of illegal provisions¹⁰⁵ and other devices. After a careful analysis of the New York rule, the consultants who made the 1936 study reported:

In the judgment of those who made the foregoing study, the present law of New York concerning perpetuities and related matters lacks clarity, frustrates reasonable desires of citizens of the State and is more complex than is reasonably necessary. . . .¹⁰⁶

Although the Commission then pointed out the need for a revision of the statutes governing perpetuities, and included a tentative draft of a proposed statute, it made no recommendation as to legislation at that time, preferring further study and discussion of the problem by all interested persons. The study of the Rule Against Perpetuities, however, played an important role in the Commission's subsequent recommendations relating to spendthrift trusts.¹⁰⁷ But as indicated above, these recommendations were not followed, and John Chipman Gray's statement is, therefore, still true:

In no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York.¹⁰⁸

¹⁰¹ The most recent attempt at amendment (1955 Assembly Int. No. 454, Pr. No. 454) passed the Assembly but died in the Senate Judiciary Committee. N.Y. State Bar Ass'n Cir. No. 95 (May 9, 1955).

¹⁰² See Leg. Doc. No. 65(H), Report of Law Rev. Com. 473-608 (1936).

¹⁰³ Suspension of the power of alienation occurs through the creation of future interests in unascertained persons, by creation or exercise of a power over property and by creation of income-beneficiary trusts. See Leg. Doc. No. 65(H) at 59-73, Report of Law Rev. Com. 531-545 (1936).

¹⁰⁴ See *Kahn v. Tierney*, 135 App. Div. 897, 120 N.Y. Supp. 663 (2d Dep't 1909) as an illustration.

¹⁰⁵ See, e.g., *Matter of Norner*, 237 N.Y. 489, 143 N.E. 655 (1924).

¹⁰⁶ Leg. Doc. No. 65(H) at 135, Report of Law Rev. Com. 607 (1936).

¹⁰⁷ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 281-361 (1938).

¹⁰⁸ Gray, *Rule Against Perpetuities* § 750 (1915 ed.).

The Law Revision Commission, then, failed in its objective of a new statutory pattern. But by its studies and recommendations, which are recognized as the authoritative literature on this subject, the Commission has put in its lasting debt countless New York lawyers who must still practice under the present system, and to these must be added hundreds of law students throughout the state who each year must still study and be examined upon it!

IV. MISCELLANEOUS

This final classification is labelled "Miscellaneous" for lack of any particular common thread running through the many and diverse real property problems that have received the Law Revision Commission's attention these past twenty years.

A few illustrative topics, selected at random, will serve to indicate the considerable range of the Commission's interests.

In 1942 section 539 of the Real Property Law was enacted upon the Commission's recommendation:¹⁰⁹

§ 539. Action for the removal of encroaching structures

1. An action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land. Nothing herein contained shall be construed as limiting the power of the court in such an action to award damages in an appropriate case in lieu of an injunction or to render such other judgment as the facts may justify.

2. This section shall not be deemed to repeal or modify any existing statute or local law relating to encroaching structures. Added L. 1942, c. 321, eff. April 3, 1942.

Section 539 was largely an outgrowth of *City of Syracuse v. Hogan*,¹¹⁰ in which the Court of Appeals held that an action for a mandatory injunction to compel the removal of an encroaching structure was essentially an action in ejectment to recover the possession of real property, and as such there was a right to trial by jury. The majority opinion suggested that an ejectment action would satisfactorily protect the plaintiff's interest since the judgment could include damages for withholding the property as well as expenses of removing the encroachment; further, if the judgment could not be enforced by execution ("The sheriff might not regard it as his duty to deliver possession by taking down the wall, which would burden him with the risk of injury to other portions of defendant's building, not included within the nine inches"¹¹¹),

¹⁰⁹ See Leg. Doc. No. 65(C), Report of Law Rev. Com. 69-94 (1936).

¹¹⁰ 234 N.Y. 457, 138 N.E. 406 (1923).

¹¹¹ *Baron v. Korn*, 127 N.Y. 224, 228, 27 N.E. 804, 805 (1891).

then the defendant could be punished for contempt. The following year the Appellate Division in *Johnson v. Purpura*¹¹² construed the *Hogan* decision as precluding injunctive relief in an encroachment case.

As between the innocent land owner and the wrongful encroacher, it seemed clear that the risk and cost of removing the encroachment should be borne by the latter. To accomplish this result, section 539 was enacted to make the equitable remedy of injunction available in such a case.

To this writer's mind, one quite telling question has been raised with respect to the effect of section 539, and it relates to the matter of a jury trial where title to real property is involved. Is there a right to trial by jury under section 539? The section itself gives no clear answer. The Civil Practice Act provides for a jury trial in an ejectment action unless waived;¹¹³ and a waiver results from "moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial."¹¹⁴ The New York Constitution, in addition, now includes a guarantee of trial by jury, unless waived, in "all cases in which it has heretofore been guaranteed by constitutional provision;" until changed in 1938 to the present provision, the guarantee of jury trial covered "all cases in which it has been heretofore used."¹¹⁵

Is a jury trial under section 539 required by Practice Act or Constitution? The study in support of the Commission's recommendation of the new section concluded that "the Court of Appeals has repeatedly affirmed judgments which granted injunctive relief directing the removal of an encroachment in equity suits where all issues of fact, including that of title, were determined by the court without a jury."¹¹⁶ On the other hand, a thoughtful appraisal of the new legislation made shortly after its enactment suggested the real possibility of an opposite answer to the basic question:

Assuming that there is a constitutional right to a jury trial in cases under the new law—and whether there is depends, in the final analysis, upon whether the Court of Appeals examines what courts of equity did over a century and a half ago, or what some modern writers suggest courts of equity might then have done—what has been accomplished by the recent enactment? . . . The total effect of the new statute is to make available to the owner of any legal estate in land equitable relief, in the form of a

¹¹² 208 App. Div. 505, 203 N.Y. Supp. 581 (3d Dep't 1924).

¹¹³ N.Y. Civ. Prac. Act § 425.

¹¹⁴ N.Y. Civ. Prac. Act § 426(4).

¹¹⁵ N.Y. Const., Art. I, § 2.

¹¹⁶ Leg. Doc. No. 65(C) at 23, Report of Law Rev. Com. 83 (1942).

mandatory injunction or in lieu thereof damages, as an alternative to ejectment regardless of the adequacy of that or any other legal remedy.

It is submitted that, aside from making this relief available to the owner of a future estate, the same result accomplished by the recent enactment might better have been achieved by amending Section 405 of the Civil Practice Act to authorize contempt proceedings where it is not practicable to enforce by execution a judgment for the plaintiff in an action of ejectment. Such an amendment would have made the statute read as the Court of Appeals in *City of Syracuse v. Hogan* thought it read; it would have avoided any question of jury trial since its effect would have been limited to the enforcement of a judgment after a trial in ejectment, in which both Constitution and statute clearly require a trial by jury.¹¹⁷

There have been two reported cases under section 539.¹¹⁸ It is interesting to note that in one of them, *Schoenfeld v. Chapman*,¹¹⁹ the court determined the question of title without a jury. The significance of this case on the question of the defendant's right to trial by jury is not clear, however, because of the lack of evidence on whether the defendant in fact asked for a jury trial. The basic question, then, of the right to trial by jury under section 539 still awaits a definitive answer.

Early in its history the Commission undertook a study of problems related to the risk of loss in executory contracts for the sale of real property. The result was the enactment in 1936 of new section 240-a of the Real Property Law, known as the Uniform Vendor and Purchaser Risk Act.¹²⁰ Under New York law at that time, the risk of loss shifted to the vendee when the contract was made, and yet the vendee was denied recourse to the vendor's existing fire insurance policies. The situation was one of possible substantial injustice to a vendee whose contract did not expressly cover the contingency of destruction or damage to the premises at any time after the contract had been entered into. Section 240-a changes the rule which placed the risk of loss upon the purchaser at the time of making the contract. It delays the shifting of such risk of loss to the vendee until there has been a transfer of title or of possession to him, either of which events should alert the purchaser to the necessity of arranging for his own insurance coverage.

Section 121-b of the Insurance Law (now, in substance, section 170) was recommended and enacted in 1936 as a companion bill to section

¹¹⁷ Note, 28 Cornell L.Q. 110, 116-117 (1942).

¹¹⁸ *Schoenfeld v. Chapman*, 200 Misc. 444, 102 N.Y.S.2d 235 (Sup. Ct. Suffolk County 1950), modified, 280 App. Div. 464, 115 N.Y.S.2d 1 (2d Dep't 1952), appeal dismissed, 305 N.Y. 698, 112 N.E.2d 779 (1953); and *Natale v. Mazzuki*, 198 Misc. 494, 98 N.Y.S.2d 692 (Sup. Ct. Richmond County 1950), modified, 278 App. Div. 591, 102 N.Y.S.2d 259 (2d Dep't 1951).

¹¹⁹ See note 118 supra.

¹²⁰ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 755-780 (1936).

240-a of the Real Property Law. The New York standard fire insurance policy at that time included a provision that the policy should be void "if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants, without increase of hazard)" without the consent of the insurer.¹²¹ There was authority in this state indicating that a contract of sale, even without a transfer of possession to the vendee, might invalidate the vendor's insurance under such a "change of interest" provision.¹²² In view of the fact, therefore, that section 240-a would postpone the shift of risk of loss to the vendee beyond the time of making the contract, it became increasingly important to protect the vendor against the impairment of his insurance rights. Section 121-b (now, in substance, section 170) was designed to afford that protection.

Section 170 now provides:

The making of a contract to sell or to exchange real property shall not constitute a change in the interest, title or possession, within the meaning of the applicable provisions of any contract of fire insurance, including any contract supplemental thereto, hereafter made covering property located in this state.

It is interesting to note that while section 121-b (170) of the Insurance Law was enacted in 1936 because of the "change of interest" provision of the then New York standard fire insurance policy, this same provision was omitted from the standard fire policy adopted in 1943 and presently in use.¹²³ *Quaere*, as to whether section 170 should be retained as serving any useful purpose.

At common law the action of ejectment was the only method available to recover the possession of real property.¹²⁴ So lengthy and expensive was this action, that a summary proceeding to dispossess was developed to eliminate some of the delay and cost. The New York statutes which provide this remedy,¹²⁵ being in derogation of the common law, are strictly construed. Upon the Commission's recommendation, sections 1411 and 1414 of the Civil Practice Act were amended in 1951 in order to fill in a gap in the availability of these summary proceedings.¹²⁶

Under section 1410 of the Practice Act summary proceedings are

¹²¹ See lines 20 et seq. of New York standard fire insurance policy in effect under provisions of Laws 1917, c. 440, § 3. See also Laws 1939, c. 882, § 168.

¹²² See *Germond v. Home Insurance Co.*, 2 Hun 540 (N.Y. Sup. Ct., Gen. T. 3d Dep't 1874); *Sewell v. Underhill*, 127 App. Div. 92, 111 N.Y. Supp. 85 (2d Dep't 1908), aff'd, 197 N.Y. 168, 90 N.E. 430 (1910). But see *Tiemann v. Citizens' Insurance Co.*, 76 App. Div. 5, 78 N.Y. Supp. 620 (1st Dep't 1902).

¹²³ N.Y. Insurance Law § 168.

¹²⁴ The New York equivalent is contained in Art. 63 N.Y. Civ. Prac. Act §§ 990 et seq.

¹²⁵ Art. 83, N.Y. Civ. Prac. Act §§ 1410 et seq.

¹²⁶ See Leg. Doc. No. 65(C), Report of Law Rev. Com. 43-78 (1951).

available in cases where a landlord-tenant relationship exists. Section 1411 expands the remedy to cover certain situations where that relationship is lacking. Prior to 1951, however, the only provision for removal of a "squatter" was limited to the case where both the entry and the possession of the "squatter" were unlawful.¹²⁷ Thus, where there was no landlord-tenant relationship, and where the entry was with the permission of the person entitled to possession, an action of ejectment was necessary to recover possession of the premises. For example, a guest (*i.e.*, licensee) who refused to vacate his host's apartment on demand could not be dispossessed summarily.¹²⁸ Nor could the lessee of a deceased life tenant be summarily removed.¹²⁹

The Court of Appeals, in *Williams v. Alt*,¹³⁰ said:

The court has no power or authority to sustain a proceeding not within the statutory provisions. It is a case where the legislature might with good reason add another subdivision to said section 2232 [now § 1411] to include a case where persons like the respondents who come rightfully into the possession of real property remain therein without right after the death of a life tenant and the termination of their rightful possession thereof.¹³¹

The Commission's amendments have operated to make these summary proceedings available to reversioners and remaindermen against the lessees of deceased life tenants, and to persons entitled to possession against licensees who remain in possession without permission.

Another problem considered by the Commission is the recovery of damages for injury by a third person to land divided into possessory and future interests. By statute, the owner of a vested remainder or reversion has a right of action in such a case.¹³² The Court of Appeals held, however, that his action might be barred by a recovery of the total damages by the owner of the possessory estate, the court then having an obligation to protect the interest of the remainderman or reversioner in such a recovery.¹³³ To make certain the enforcement of the wrongdoer's full liability without prejudice to the rights of the owner of a future interest, and, at the same time, to protect the wrongdoer from a multiplicity of actions, a new section 538 of the Real Property Law was passed in 1935 upon the Commission's recommendation, providing that the owner of a possessory estate for life or for years may recover full fee

¹²⁷ N.Y. Civ. Prac. Act § 1411(4).

¹²⁸ *Rosenzweig v. Portnoy*, 117 Misc. 136, 191 N.Y. Supp. 900 (N.Y. Munic. Ct. 1921).

¹²⁹ *Williams v. Alt*, 226 N.Y. 283, 123 N.E. 499 (1919).

¹³⁰ See note 129 *supra*.

¹³¹ 226 N.Y. 283, 291, 123 N.E. 499, 501 (1919).

¹³² N.Y. Real Prop. Law § 531.

¹³³ *Rogers v. Atlantic, Gulf & Pacific Co.*, 213 N.Y. 246, 107 N.E. 661 (1915).

damages only if all living persons having possessory or future interests are also joined as parties.¹³⁴ In 1947 the Commission successfully sponsored an amendment to section 538 to provide certain rules to govern the allocation of the recovery among the parties entitled to it.¹³⁵

The list of additional topics which have been the subject matter of the Commission's studies and recommendations is an impressive one. It includes warranties in conveyances made without consideration;¹³⁶ jurisdiction of the court in a separation action to give directions with respect to the occupancy of real property held by the parties as tenants by the entirety;¹³⁷ adverse possession by tenants in common;¹³⁸ acts which constitute waste;¹³⁹ recovery of treble damages for injuries to property and for waste by guardian;¹⁴⁰ judicially authorized mortgages, leases and sales of real property;¹⁴¹ application to deeds of the doctrine of implication of cross remainder;¹⁴² disability of alien enemies with respect to real property;¹⁴³ extinguishment of inchoate right of dower;¹⁴⁴ conveyance of land out of possession;¹⁴⁵ scope of the term "public improvement" in the Lien Law;¹⁴⁶ holding over after the expiration of a tenancy;¹⁴⁷ termination of tenancies;¹⁴⁸ security for damages caused

¹³⁴ See Leg. Doc. No. 60(G), Report of Law Rev. Com. 345-448 (1935).

¹³⁵ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 289-437 (1947). Section 538 of the N.Y. Real Prop. Law was amended to refer specifically to N.Y. Civ. Prac. Act § 1053-a, which provides the distribution method in a partition action (i.e., the court elects whether compensation shall be by a sum in gross or by the income from the proceeds invested for the duration of the interest which has been injured unless all interested persons agree on the form of settlement). The pertinent provisions on the valuation of the interests in real property are contained in N.Y. Civ. Prac. Act, Art. 80-a, §§ 1330-1335, added by Laws 1947, c. 848 on the recommendation of the Commission. See Leg. Doc. No. 65(M), Report of Law Rev. Com. 289-437 (1947).

¹³⁶ Leg. Doc. No. 65(C), Report of Law Rev. Com. 65-70 (1944); Leg. Doc. No. 65(K) Report of Law Rev. Com. 483-516 (1943).

¹³⁷ Leg. Doc. No. 65(L) (1953).

¹³⁸ Leg. Doc. No. 65(J), Report of Law Rev. Com. 707-729 (1949).

¹³⁹ Leg. Doc. No. 65(D), Report of Law Rev. Com. 41-46 (1937); Leg. Doc. No. 65(F), Report of Law Rev. Com. 455-460 (1936); Leg. Doc. No. 60(G), Report of Law Rev. Com. 345-448 (1935).

¹⁴⁰ Leg. Doc. No. 65(J), Report of Law Rev. Com. 291-347 (1944).

¹⁴¹ Leg. Doc. No. 65(E), Report of Law Rev. Com. 47-60 (1937); Leg. Doc. No. 65(G), Report of Law Rev. Com. 461-472 (1936); Leg. Doc. No. 60(G), Report of Law Rev. Com. 345-448 (1935).

¹⁴² Leg. Doc. No. 65(C), Report of Law Rev. Com. 35-40 (1937); Leg. Doc. No. 65(B), Report of Law Rev. Com. 59-64 (1936); Leg. Doc. No. 60(G), Report of Law Rev. Com. 345-448 (1935).

¹⁴³ Leg. Doc. No. 65(M), Report of Law Rev. Com. 451-488 (1944).

¹⁴⁴ Leg. Doc. No. 65(L), Report of Law Rev. Com. 229-280 (1938).

¹⁴⁵ Leg. Doc. No. 65(G), Report of Law Rev. Com. 141-188 (1941).

¹⁴⁶ Leg. Doc. No. 65(N), Report of Law Rev. Com. 489-525 (1944).

¹⁴⁷ Leg. Doc. No. 65(P), Report of Law Rev. Com. 405-421 (1938).

¹⁴⁸ Leg. Doc. No. 65(O), Report of Law Rev. Com. 371-403 (1938).

by the filing of a *lis pendens*;¹⁴⁹ limitation of the duration of restrictions voluntarily imposed on the use of land;¹⁵⁰ the Statute of Frauds applying to executory agreements;¹⁵¹ attornment by a tenant of mortgaged property upon foreclosure of the mortgage;¹⁵² installment land contracts;¹⁵³ the vendee's lien on land to secure restitution or damages;¹⁵⁴ and the procedure followed in discharging an ancient mortgage.¹⁵⁵

CONCLUSION

As would be expected, some of the Commission's projects have been of more importance than others. A great majority of its recommendations in the real property field have resulted in the enactment of new legislation. Some proposals, on the other hand, have not—at least as yet—found their way to the statute books. But these latter have not been without significance, for the studies have enriched legal literature, and it is important to point the way to improvement and reform even though acceptance may come only later on if at all.

Writing in 1937 on *A Ministry of Justice in Action*, the late Justice Bernard L. Shientag surveyed the first two years of the Commission's life:

The Commission is to be congratulated on the constructive achievements accomplished in the first two years of its existence. It is a happy augury of what may be expected in the future.¹⁵⁶

Justice Shientag was prophet as well as judge, for fourteen years later, in his 1951 Hughes Memorial Lecture on *The Stream of Progress in the Law*, he brought down to date his appraisal of the Commission's work in these words:

The work of the Law Revision Commission has been especially valuable . . . its recommendations supported by thorough, expert research studies, have brought about important reforms in the law, too numerous even for mention here. In the neighborhood of one hundred and fifty laws of varying degrees of importance have been enacted as the result of its recommendations.¹⁵⁷

Today, in 1955, this writer joins his associates in this symposium in a salute to the New York Law Revision Commission on twenty years of distinguished service!

¹⁴⁹ Leg. Doc. No. 65(F), Report of Law Rev. Com. 203-226 (1951).

¹⁵⁰ Leg. Doc. No. 65(P), Report of Law Rev. Com. 689-780 (1951). See also, Farnham, "Building Restrictions—Is Legislation Necessary?" 23 N.Y. State Bar Ass'n Bulletin 411 (1951).

¹⁵¹ Leg. Doc. No. 65(D), Report of Law Rev. Com. 71-102 (1944).

¹⁵² Leg. Doc. No. 65(H), Report of Law Rev. Com. 189-207 (1941).

¹⁵³ Leg. Doc. No. 65(E), Report of Law Rev. Com. 47-55 (1938); Leg. Doc. No. 65(M), Report of Law Rev. Com. 343-386 (1937).

¹⁵⁴ Leg. Doc. No. 65(K), Report of Law Rev. Com. 249-270 (1947).

¹⁵⁵ Leg. Doc. No. 65(O), Report of Law Rev. Com. 601-605 (1948).

¹⁵⁶ Shientag, "A Ministry of Justice in Action," 22 Cornell L.Q. 183, 194 (1937).

¹⁵⁷ Shientag, "Stream of Progress in the Law," 21 Fordham L. Rev. 1, 40 (1952).