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Foreword to the Symposium

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The New York Law Revision Commission held its organization meeting July 31, 1934. From the start it has had its headquarters in Myron Taylor Hall, the seat of this Law School. It is appropriate that the QUARTERLY, in its fortieth volume, should mark the twentieth anniversary of this research and law reform agency so closely associated with Cornell.

The Commission consists of five members appointed by the Governor and four ex-officio members of the Legislature, chairmen of the important Senate and Assembly committees on the Judiciary and on the Codes. Since the organization of the Commission there have been four Governors of the State. Yet in twenty-one years there have been only six additional appointments since the appointment of the original five members who attended the meeting of July 31, 1934. Of these six, two were caused by death of sitting members of the Commission, one by a resignation, and three by replacement at the expiration of terms. There have been only three Chairmen: Charles K. Burdick, formerly Dean of this Law School, Warnick J. Kernan, and Young B. Smith, the incumbent, until 1953 Dean of the Columbia Law School. Each of these Chairmen was a member of the Commission by original appointment of Governor Lehman. I have been Executive Secretary and Director of Research since the organization of the Commission and Mrs. Laura T. Mulvaney, Assistant to the Director of Research, has been on its staff since 1935.

This unusual continunity of service and concentration of personnel has caused a unified development of practice, method and tradition. In the formulation of a philosophy and of a point of view the influence of Judge Cardozo's address to the Association of the Bar of the City of

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

New York in 1921, "A Ministry of Justice," cannot be over-estimated. Each of the original members of the Commission was thoroughly acquainted with this paper, its general ideas and its specific guide-posts. Dean Burdick, who guided the proposal for a Law Revision Commission through the sponsoring legislative agency, the temporary Commission on the Administration of Justice, drafted the statute establishing the Law Revision Commission along the specific lines outlined in the Cardozo proposal. Successive members of the Commission have had this article as their first suggested homework. Experience has done the rest.

From the experience of these two decades certain basic principles can be stated. Perhaps they are of interest to the bar. Perhaps also they may indicate reasons for various recommendations in the past—or for the absence of recommendations in some instances—as well as chart courses of action to be taken in the future. Perhaps also they may indicate what may be expected from the Commission even in unusual assigunents such as its present study of the Uniform Commercial Code.

1. The Commission, a salaried group, is a working agency. It acts as such a body, with breakdown into Committees who report to the full Commission which *alone* makes recommendations or rejects them. It does not delegate its work to its executive officer, to its committees, to its staff or to its consultants. It alone speaks through its Recommendations or Communications. Although it publishes materials submitted to it by its staff or by its consultants, it does not publish them as authoritative statements of its intent; it publishes them only as materials before it, as it would likewise publish the transcript of one of its hearings. The intent of the Commission is expressed only through its formal Recommendation or Communication which is the culmination of every study it completes.

2. The Commission considers itself to be a messenger to the Legislature, a mediator between courts and legislature, no more, no less. It will not lobby for one of its bills. It will not force reconsideration of an identical bill on a legislature which has definitely rejected a predecessor bill. Here it must make delicate judgments. Was it principle which caused a bill to fail, or detail? Can detail be changed without affecting principle? For the Commission respects its own principle quite as much as it respects the right of the Legislature to have an opposite one. Was a proposal really rejected, or merely held up for further study or to obtain further reaction, public or otherwise? These honest questions demand honest answers, and the degree of honesty used in answering will ultimately determine success and prestige of the agency, which is of

course the creature of the legislature to which it is reporting. Every law reform agency such as the New York Law Revision Commission starts out with the bogey of the "third house" threat influencing both it and the legislature it serves. "See to it you don't seek to become a third house of the legislature. Remember that the legislature gives and the legislature can take away"—thus spoke one of our original and wisest ex-officio members. We remembered, and we have not heard anything about this since 1940, because we ourselves killed this bogey, and it was right that we did. Hence, we keep no "batting average" between bills proposed and statutes adopted. Our work is done when we report; we are protecting both the doctrine of judicial precedent, and the doctrine of legislative supremacy under the constitution. Our accomplished record is found in those chapters of the Consolidated Laws dealing primarily with private substantive law, but it is also found in our own bound volumes where we have expressed satisfaction with existing law or the trend of judicial decision, and in the various appendices to our bound volumes indicating where we ourselves have withdrawn recommendations or where the legislature, against our recommendation, has expressed satisfaction with existing law.

3. As a legislative agency, the Commission first reports its conclusions to the legislature before it will announce them to any other body. There is no publication of a conclusion, of a report, of a recommendation, or of a rejection, until the statutory function of reporting to the legislature has been performed. This is our construction of our charter-statute. In study of a project, groups may be consulted. Particularly the interest of one quasi-public group is recognized and encouraged, the organized bar of the state itself. Thus, there is a valued committee of the New York State Bar Association to cooperate with the Law Revision Commission which annually hears our very tentative conclusions and which counsels and advises. But final action is taken later and is first communicated to the legislature itself.

4. The proper area of the Commission's activity is that of private substantive law. Here are needs that are not articulate, voices, no matter how many, that are not heard. The authority granted by the creating statute is broad enough to cover procedure. Up to now there have been others specially charged to speak in that field. We have recommended on procedural matters only incidentally to the creation or modification of substantive rights, thus construing (or limiting) the broad grant of authority in the statute. As would be expected, there have been borderline areas, *e.g.*, the statute of limitations, which we have considered to be primarily and fully within our sphere.

Then we have excluded the questions that are primarily of policy. We have believed that lawyers could contribute most within their own special skill and competence. To take an extreme, no one would expect us to recommend the construction of a new road or of a new state building. Yet one might wonder why we could not concern ourselves with an examination of the grounds for divorce in New York. All questions of law obviously also concern in some measure questions of policy. The retention, modification or rejection of the two-life rule with respect to suspension of the power of alienation involves important policy considerations. In one area we act, in another we do not. The weighing of policy aspects against legal aspects is never completely conclusive: the real question is whether lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.

Nor will we study a question when it is one primarily within the delegated authority of another state department, especially when that department is represented by its own counsel. There are practical reasons for this position, but there are also theoretical ones justifying it. Of course there are close questions: the rights of an injured party to sue on the public liability policy of the wrongdoer after non-payment of a judgment is a product of the Insurance Law, yet we would consider the problem one of private substantive law rather than one in which counsel for the Insurance Department was primarily and originally interested. So also with the question of the statute of limitations on liens for unpaid estate taxes.

All of these questions involve neat classifications of judgment. The most that can here be presented is to indicate the road signs.

Thus has the Commission operated. Now for nearly three years it has been occupied with a single task: the study of and report on the proposed Uniform Commercial Code, promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Without specific assignment, this task would not be one which the Commission would have assumed on its own motion. Yet the assignment was a natural one in view of the mandate of the creating statute to consider the work specifically of the American Law Institute and of the Commissioners on Uniform State Laws. Here, however, the mandate is not to create legislation, or to rewrite it, but instead to report on a proposal, of great magnitude, made by others. Already on February 1, 1955, an interim report was submitted. Prayerfully, we hope to

have our final report submitted in 1955. Then we will go back to the work carried on since 1934, the work reviewed in this symposium.

The limits of the symposium are bounded only by the limits of private substantive law, for such has been our area of work and of reform. Within the specific topics here presented, our record will be charted. There could be more, limited only by space and by the availability of generous and authoritative contributors. There has been a record made in torts, in secured transactions, in implementing the abolition of distinctions between law and equity and distinctions between the forms of action. There is the question of future codification, more and more important as the private law of obligations becomes statutory rather than decisional. Where to put a section is often the last, but not the least important question which must be decided under the present New York Consolidated Laws, which often offer only the Real Property Law, the Personal Property Law, the Debtor and Creditor Law, or—more shame —the Civil Practice Act.

One who has lived with this work since 1934 might well hope that the idea of a permanent ministry of justice was shown to be sound by twenty-one years of experience. This symposium will serve to review the record of the past, organized and classified, and thus perhaps to chart the future. In my dual capacity, as executive officer of the Commission and faculty member of the School which is its host, I am grateful to our contributors for the present examination of the record.