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THE COMMISSION AND THE LAW OF CONTRACTS

*Robert Braucher**

I. INTRODUCTION

Contract law has long been a favorite subject for legislative reform and revision. Early in the nineteenth century, Jeremy Bentham drew up an elaborate scheme under which judges would submit proposals for legislation though a Justice Minister;¹ second among three classes of topics in relation to which he thought his scheme afforded "the best promise of being conducive to the melioration of the body of the law" were "topics related to the interpretation, authorization, and execution of contracts, as between individual and individual."²

Mercantile contracts, such as those embodied in negotiable instruments, had been greatly affected by statutes from far earlier times.³ In the latter part of the nineteenth century there was much effort to revise and codify such statutes. A pioneer effort was made in England by the Mercantile Law Commission; its Second Report, made in 1855, consists primarily of recommendations that contract rules in the different parts of the United Kingdom be "assimilated."⁴ In America the movement for codification led to the California Codes of 1872, following Field's Code proposed for New York. The California Codes and the English Bills of Exchange Act of 1882 and Sale of Goods Act, 1893, provided models for the codifying efforts of the National Conference of Commissioners on Uniform State Laws.⁵ The Negotiable Instruments Law and the Uniform Sales Act, promulgated by the Commissioners in 1896 and 1906, respectively, contain a great deal of contract law.

Judge Cardozo's plea for a "ministry of justice," an agency to mediate between legislature and courts, was made in 1921.⁶ That plea was a forceful restatement of Bentham's vision of a century before; and it was

* See Contributors' Section, Masthead, p. 764, for biographical data. Valuable help in the preparation of this Article was given by Max L. Gillam, a member of the second-year class, Harvard Law School.

¹ See 9 Bentham, Works 502-514, 597-598, 607 (Bowring ed. 1893).

² *Id.* at 507.

³ See Beutel's Brannan, *Negotiable Instruments Law Part I* (7th ed. 1948).

⁴ Mercantile Law Commission, Second Report (1855); cf. Mercantile Law Amendment Act, Scotland, 1856, 19 and 20 Vict. c. 60; Mercantile Law Amendment Act, 1856, 19 and 20 Vict. c. 97.

⁵ See Beutel's Brannan, *supra* note 3, at 61, 75.

⁶ See Cardozo, "A Ministry of Justice," 35 Harv. L. Rev. 113, 114 (1921); Note, 20 Cornell L.Q. 119 (1934); MacDonald and Rosenzweig, "The Law Revision Commission of the State of New York," 20 Cornell L.Q. 415 (1935); Shientag, "A Ministry of Justice in Action," 22 Cornell L.Q. 183 (1937).

the germ which led to the creation of the New York Law Revision Commission in 1934.⁷ Contract rules were prominent among Judge Cardozo's suggestions for revision of "outworn and unjust" rules. The Commission's charter does not single out contract law for special treatment, but it does make express provision for the Commission to receive and consider recommendations of the Commissioners on Uniform Laws.

It is hardly surprising, therefore, that perhaps a quarter of the Commission's work has been work on the law of contracts. Its initial calendar for "immediate study" listed 17 topics. Two dealt with amendments to uniform laws; and the two resulting bills, amending the Uniform Sales Act and the Uniform Bills of Lading Act, were among the nine Commission bills enacted at the 1935 session of the Legislature.⁸ A third project on the initial project list dealt with consideration and the seal; it produced a whole series of Commission bills, the first of which was enacted in 1936. Interestingly enough, the Lord Chancellor appointed a Law Revision Committee in England in the same year that the New York Commission was created, and the doctrine of consideration was placed on its agenda the same year.⁹ Thus two similar studies were begun independently at about the same time on opposite sides of the ocean, apparently without reference to each other.

A count of the communications from the Commission to the Legislature concerning substantive changes in the law discloses a total of 311, recommending 314 bills; 179 bills have been enacted. Some communications and bills are hard to classify, but I count 79 communications on contract law, recommending 72 bills of which 39 passed. The 39 bills enacted include 17 amending the Personal Property Law; they also include amendments to the Civil Practice Act, the Debtor and Creditor Law, the Insurance Law, the Lien Law, and the Real Property Law. These figures cover the nineteen years 1935-1953; early in 1953 the Commission laid aside all other work in order to study the Uniform Commercial Code, and no legislative recommendations were made in 1954 or 1955.¹⁰

⁷ Laws 1934, c. 597, N.Y. Legisl. Law, Art. 4-A, §§ 70-72.

⁸ Laws 1935, c. 337, amending N.Y. Pers. Prop. Law §§ 113, 119 (USA §§ 32, 38); Laws 1935, c. 455, amending N.Y. Pers. Prop. Law §§ 156(1), 239(1) (USA § 76, UBLA § 53); see Leg. Docs. No. 65(A), (B), Report of Law Rev. Com. 7-17, 19-36 (1935).

⁹ See Law Revision Committee, Sixth Interim Report, Cmd. No. 5449 (1937); Annual Survey of English Law 139 (1937); Hamson, "The Reform of Consideration," 54 L.Q. Rev. 233 (1938); The Law Revision Committee's Sixth Interim Report, 1 Mod. L. Rev. 97 (1937). Contract matters seem to have been less prominent in the work of the New Zealand Law Revision Committee, formed in 1937. See 13 N.Z.L.J. 224, 232, 306 (1937). But see note 46, *infra*.

¹⁰ See Leg. Doc. No. 65 (1954); Leg. Doc. No. 65 (1955). [At printing Report of Law Rev. Com. (1954, 1955) unbound. No page citations available—Ed.]

Examination of the Commission's report for 1953, containing its most recent legislative recommendations, might suggest that contract law would be less prominent in the future work of the Commission than in the past. Only three of 20 recommendations, and only two of the 15 bills enacted, dealt with the law of contracts.¹¹ Similarly, contractual topics for study included only two of 16 topics listed under "work in progress" and six of 40 topics "for future consideration." But the Uniform Commercial Code covers a great deal of contract law, and it will apparently occupy at least three full years of the Commission's time.

II. CONSIDERATION AND THE SEAL

The doctrine of consideration has long been a focus of controversy.¹² Consideration is perhaps the main rubric under which our law has placed the rules setting limits to the enforcement of informal agreements. Under the classical common-law doctrines, a promise is not enforceable unless it is under seal or is part of a bargain.¹³ If the requirement of seal or consideration is met, enforcement may still be denied on a host of other grounds. But the basic philosophy of our law of contracts, so far as there is one, seems to inhere in consideration and the seal:¹⁴ many of the other invalidating rules are commonly thought of as rules of domestic relations or of government regulation of business or some other branch of the law besides contracts; others are special to particular types of contracts.

The classical doctrines have considerable appeal to the modern mind.¹⁵ Denial of enforcement to informal promises often seems fair enough if the parties neglected to follow the standard formality. But trouble arises from the decay of the seal as a universal formality.¹⁶ In its medieval hey-day, the sealed instrument probably was impressive in part because of the rare, almost magic quality of a writing as well as because of the

¹¹ See Leg. Doc. No. 65(O) (1953) [At printing, Report of Law Rev. Com. (1953) unbound. No page citations available—Ed.] (Statute of Frauds), proposing amendments to N.Y. Pers. Prop. Law § 31, vetoed, see Leg. Doc. No. 65 (1954); Leg. Doc. No. 65(P) (1953), Laws 1953, c. 684, amending N.Y. Civ. Prac. Act § 1083-c (assumption of mortgage debt); Leg. Doc. No. 65(R) (1953), Laws 1953, c. 401, amending N.Y. Dec. Est. Law § 103-a (payment of debts owed to decedent).

¹² See 8 Holdsworth, *History of English Law* 1-48 (1926); "Symposium on Consideration," 41 *Colum. L. Rev.* 178 (1941); Havighurst, "Consideration, Ethics and Administration," 42 *Colum. L. Rev.* 1 (1942).

¹³ See Restatement, *Contracts* §§ 19, 75, 95 (1933); Gardner, "An Inquiry into the Principles of the Law of Contracts," 46 *Harv. L. Rev.* 1, 23, 25 (1932).

¹⁴ Cf. Williston, "Freedom of Contract," 6 *Cornell L.Q.* 365 (1921).

¹⁵ See, e.g., Havighurst, *op. cit. supra* note 12, at 30-31; Stelzenmuller, "Formation of Government Contracts—Application of Common Law Principles," 40 *Cornell L.Q.* 238, 239, 247-248 (1955).

¹⁶ See Crane, "The Magic of the Private Seal," 15 *Colum. L. Rev.* 24 (1915).

affixed wafer and the imprint of the promisor's signet ring. But as the seal lost its distinctive personal quality and became a mere scrawl or a printed word, it lost its capacity to warn the promisor and to provide reliable evidence in case of dispute. As more men became literate, the personal signature became the natural formality and the seal seemed more and more anachronistic.

Two proposals naturally resulted: first, that the seal should be denied legal significance; second, that a signed writing should provide a substitute for consideration. Both proposals were made by one member of the Mercantile Law Commission in 1855.¹⁷ He pointed out that the Scottish Parliament had legislated against unsigned sealed instruments as early as 1540, and that Lord Mansfield had thought the doctrine of consideration should not apply where a promise was in writing, or in commercial cases among merchants. No such proposals were adopted in England; in this country several states adopted them in whole or in part, though often in ambiguous and confusing terms.¹⁸

As stated above, the New York Law Revision Commission and the English Law Revision Committee both entered this arena in 1934. The products of their studies have been discussed at length elsewhere;¹⁹ here only the main outlines will be described. The Commission rendered its first report in 1936, an elaborate and comprehensive document of nearly 300 pages; it also recommended three statutes which were enacted the same year.²⁰ But those three statutes were not so much products of the study as they were attempts to rationalize and clarify policies which the Commission found in statutes enacted in 1934 and 1935;²¹ their thrust was to permit a sealed instrument to be modified by an unsealed instrument and to eliminate the requirement of consideration for unsealed written releases and modifying agreements. The Legislature inserted a

¹⁷ See Additional Note by Mr. Anderson, Mercantile Law Commission, Second Report 27-31 (1855).

¹⁸ See 1 Williston, Contracts § 219 (Williston & Thompson ed. 1936); 1 Corbin, Contracts § 254 (1950).

¹⁹ As to England, see note 9 *supra*. As to New York, see Shientag, *op. cit. supra* note 6, at 189-191; Thompson, "Some Current Economic and Political Impacts in the Law of Contracts," 26 Cornell L.Q. 4 (1940); Hays, "Formal Contracts and Consideration: A Legislative Program," 41 Colum. L. Rev. 849 (1941); Lloyd, "Consideration and the Seal in New York: An Unsatisfactory Legislative Program," 46 Colum. L. Rev. 1 (1946); Note, 26 Cornell L.Q. 692 (1941).

²⁰ Leg. Doc. No. 65(C), (D), Report of Law Rev. Com. 65-80, 81-374 (1936).

²¹ Laws 1934, c. 142, adding N.Y. Pers. Prop. Law § 33(2), amended by Laws 1936, c. 281 (modification); Laws 1934, c. 143, adding N.Y. Real Prop. Law § 279, amended by Laws 1934, c. 898, and Laws 1936, c. 281 (modification); Laws 1936, c. 222, adding N.Y. Debtor and Creditor Law § 243 (release); Laws 1935, c. 708, amending N.Y. Civ. Prac. Act § 342, further amended by Laws 1936, c. 685 (modification of sealed instrument).

provision concerning undisclosed principals in passing the sealed-instrument bill, and the Commission tidied up that amendment in 1937;²² it also obtained the enactment of a bill on executory accords which was entirely consistent with the 1936 statute on modifications.²³ But no general program with respect to consideration and the seal was recommended until 1941.

Between 1936 and 1941 several developments took place. In 1937 the English Law Revision Committee made its report on consideration, making eight recommendations with respect to consideration.²⁴ The most important of these would have made a promise enforceable without consideration if made in writing, including print or type, even though unsigned. In the same year the New York Court of Appeals issued the first of two opinions on sealed instruments executed before the 1935 statutes took effect, expressing the view that a gratuitous promise under seal should be enforceable and applying that view as the law before 1935;²⁵ and the 1937 Legislature passed a bill to abolish the doctrine of consideration which was vetoed by the Governor.²⁶ A later decision on the formal requisites of a seal led to a Commission recommendation in 1940;²⁷ but that recommendation was withdrawn after the recommended bill had been passed, and the bill was vetoed by the Governor.

In 1941 the Commission finally made a comprehensive recommendation, proposing four bills which were enacted.²⁸ In 1936 the Commission had interpreted New York cases from 1830 on as denying effect to a gratuitous promise under seal.²⁹ Forced to re-examine that interpretation and the policy it reflected by the 1937 decision of the Court of Appeals,

²² Laws 1937, c. 80, amending N.Y. Civ. Prac. Act § 342(2); see Leg. Doc. No. 65(H), Report of Law Rev. Com. 83-128 (1937).

²³ Laws 1937, c. 77, adding N.Y. Pers. Prop. Law §§ 33-a, 33-b, N.Y. Real Prop. Law §§ 280, 281; see Leg. Doc. No. 65(K), Report of Law Rev. Com. 201-248 (1937).

²⁴ See note 9 supra.

²⁵ *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937); cf. *United States Trust Co. v. Frelinghuysen*, 288 N.Y. 463, 43 N.E.2d 492, rehearing denied, 289 N.Y. 757, 46 N.E.2d 359 (1942).

²⁶ See Thompson, note 19 supra, at 7.

²⁷ *Transbel Investment Co. v. Venetos*, 279 N.Y. 207, 18 N.E.2d 129 (1938); cf. *Brick v. Cohn-Hall-Marx Co.*, 283 N.Y. 99, 27 N.E.2d 518 (1940); Leg. Doc. No. 65(F), Report of Law Rev. Com. 167-193 (1940).

²⁸ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 345-414 (1941); Laws 1941, c. 329, amending N.Y. Civ. Prac. Act § 342 (sealed instruments), adding N.Y. Real Prop. Law § 282 and N.Y. Pers. Prop. Law § 33-c (modification of written agreements), and amending statutes on corporate seals and on statutes of limitations; Laws 1941, c. 328, adding N.Y. Real Prop. Law § 279(4) and N.Y. Pers. Prop. Law § 33(5) (irrevocable offers); Laws 1941, c. 330, adding N.Y. Real Prop. Law § 279(3) and N.Y. Pers. Prop. Law § 33(4) (written assignments); Laws 1941, c. 331, adding N.Y. Real Prop. Law § 279(2) and N.Y. Pers. Prop. Law § 33(3) (past consideration).

²⁹ See Leg. Doc. No. 65(D) at 218, Report of Law Rev. Com. 288 (1936).

the Commission concluded that the seal should be abolished except as an authenticating device for public officials and corporations, and that no formality should be given effect as a universal substitute for consideration. In specific cases, however, a signed writing was made enforceable without regard to consideration: firm offers, written assignments, and promises expressly based on past consideration. To replace one feature of the sealed instrument, effect was given to provisions in written agreements forbidding oral modification.

Thus the Commission successfully advocated a program of narrow, specific provisions covering only part of the ground covered by the proposals of the English Committee and the New York Legislature and Court of Appeals. The Commission did not overlook the ground not covered: its study reflects an examination of the more general proposals and of the seven specific recommendations of the English Committee.³⁰ The law of New York, as modified by the Commission's bills in 1936 and 1941, seems to make provision for six of the seven specific situations in which the English Committee found the common law of consideration unsatisfactory: (1) past consideration, (2) discharge of a debt by partial payment, (3) compensation for performance of legal duty, (4) consideration moving from a third person, (5) irrevocable offers, (6) offers to be accepted by a performance. The seventh, the "promise made with knowledge that the promisee will act in reliance on it," seems to have been deliberately left to judicial development, in the expectation that cases on charitable subscriptions might be extended.³¹

Subsequent activities of the Commission in this field have not led to any major change of policy. In 1944 the Legislature enacted a Commission bill amending the various Commission statutes requiring signed writings; the amendments make it clear that an agent's signature is sufficient, except that where the transaction affects real property the agent must be authorized in writing.³² In 1948 the Commission re-examined the judicial decisions construing the statutes on releases and modification agreements, and concluded that there was no need for amendment;³³ in 1950 a complaint from the Comptroller led to a restoration of the 20-year statute of limitations for certain publicly-held bonds.³⁴

³⁰ See Leg. Doc. No. 65(M) at 32 et seq., Report of Law Rev. Com. 376-414 (1941).

³¹ *Id.* at 44, Report of Law Rev. Com. at 388; cf. *I. & I. Holding Corp. v. Gainsburg*, 276 N.Y. 427, 12 N.E.2d 532 (1938)

³² See Leg. Doc. No. 65(E), Report of Law Rev. Com. 103-129 (1944); Laws 1944, c. 588, amending N.Y. Real Prop. Law §§ 243, 278-282, and N.Y. Pers. Prop. Law §§ 33-33-c; cf. *Matter of Hyde*, 177 Misc. 666, 31 N.Y.S.2d 497 (Surr. Ct. N.Y. County 1941).

³³ See Leg. Doc. No. 65(R), Report of Law Rev. Com. 643-646 (1948).

³⁴ See Leg. Doc. No. 65(H), Report of Law Rev. Com. 193-219 (1950); Laws 1950, c. 783, adding N.Y. Civ. Prac. Act § 47-b; cf. note 28, *supra*.

The only real difficulty with the Commission's program came with the decision in *Green v. Doniger*,³⁵ which led to a Commission recommendation in 1951; that recommendation was vetoed, but a revised bill was enacted in 1952.³⁶

In *Green v. Doniger* a written contract of employment stipulated against oral change, but provided for termination on 30 days written notice by either party. The employee claimed that the contract had been orally abandoned and a new oral agreement made which was identical except for the addition of bonus payments. The Court of Appeals upheld the claim on the ground that the termination clause in the contract withdrew discharges, as distinguished from changes, from the operation of section 33-c of the Personal Property Law. That section, like section 282 of the Real Property Law, was part of the 1941 program of the Commission; it denied effect to "an executory agreement . . . to change or modify, or to discharge in whole or in part" a written agreement "which contains a provision to the effect that it cannot be changed orally," unless the executory agreement was in writing and signed.

The Commission apparently agreed with the dissenting judges that to give effect to a change by calling it an abandonment "would be to annul the statute and render its operation nugatory." A Commission bill to overrule the decision was criticized on the ground that oral termination should not be precluded unless the contract expressly forbids oral termination, and was vetoed in 1951. The Commission returned to the fray in 1952, and obtained enactment of a far more elaborate bill. As a result, the statute now makes separate provisions (1) against oral "change," (2) against oral "termination," (3) partially defining (a) "change" and (b) "termination" and (c) the effect of a contract which both forbids oral termination and permits termination on notice without specifying that the notice be in writing, (4) against oral "waiver" of provisions for termination on written notice, (5) for signature by an agent, and (6) setting three different effective dates. Even these elaborate provisions cannot resolve all possible questions, of course; questions remain, for example, as to the precise line between an ineffective "executory" agreement and a valid "executed accord and satisfaction other than the substitution of one executory contract for another."

Mention should also be made of the Commission's 1952 study, resulting in no legislative recommendation, on compensation for unsolicited dis-

³⁵ 300 N.Y. 238, 90 N.E.2d 56 (1949) (3 judges dissenting), noted 36 Cornell L.Q. 131 (1950).

³⁶ See Leg. Doc. No. 65(N), Report of Law Rev. Com. 659-678 (1951); Leg. Doc. No. 65(E), Report of Law Rev. Com. 135-145 (1952); Laws 1952, c. 831, amending N.Y. Real Prop. Law § 282 and N.Y. Pers. Prop. Law § 33-c.

closure of business ideas.³⁷ Much of that study relates to problems of property rights in ideas, mutual assent and acceptance by conduct, and unjust enrichment. The alleged agreements to pay compensation are commonly highly informal; insofar as the common law of consideration interposes an obstacle to the enforcement of written agreements of this sort, the Commission statute validating past consideration seems to permit it to be overcome.

This is not the place to attempt a detailed analysis of the merits and demerits of the Commission's program relating to consideration and the seal. The program has been conservative; many proposals have been made for more drastic reform. But the Commission has been very successful in the Legislature: all but one of the ten bills recommended were enacted, eight of them at the first session to which the recommendation was made. Contrast the more radical 1937 recommendation of the Law Revision Committee, which has not yet resulted in any English legislation on consideration. The policy of the Commission's program, so far as it goes, seems to be in harmony with professional thought outside New York. The proposed Uniform Commercial Code, in article 2—Sales, contains a number of provisions adopting parts of that policy for contracts for the sale of goods: section 2-203, Seals Inoperative; section 2-205, Firm Offers; section 2-209, Modification and Waiver.

III. THE STATUTE OF FRAUDS

The Commission program on consideration and the seal, substituting the signed writing for consideration in specific situations, bears some resemblance to the Statute of Frauds, which imposes a signed writing as a condition of enforcement of certain classes of contracts otherwise valid. Re-examination of the Statute of Frauds appeared on the Commission's calendar of proposals for future consideration in 1936, but no recommendation was made to the Legislature until 1944. In that year, on the Commission's recommendation, the Legislature amended section 259 of the Real Property Law to provide that land contracts must be signed by the "party to be charged" instead of by the "lessor or grantor";³⁸ it also included section 243 of the Real Property Law, relating to grants of fee or freehold, among the provisions amended to require that a signing agent be authorized in writing.³⁹

Other Commission proposals in this field have been less successful. In 1946 a Commission bill to repeal the Statute of Frauds affecting "a con-

³⁷ See Leg. Doc. No. 65(R), Report of Law Rev. Com. 555-573 (1952).

³⁸ See Leg. Doc. No. 65(D), Report of Law Rev. Com. 71-102 (1944); Laws 1944, c. 198.

³⁹ See note 32 *supra*.

tract to establish a trust" failed in the Legislature.⁴⁰ In 1947 and 1952 the Governor vetoed Commission bills designed to revise, elaborate, and tighten the New York version of Lord Tenterden's Act, which denies effect to a new promise or acknowledgment taking a case out of the statute of limitations unless in writing and signed.⁴¹ In 1949 the Commission recommended two bills to extend the Statute of Frauds to promises to compensate real estate brokers and business brokers.⁴² The business-broker bill was enacted; the real-estate-broker bill, much less strict in its provisions as to the form and contents of the required writing, failed. Finally, in 1953 the Governor vetoed a bill to relax the requirement of a signed writing in some cases of contracts not to be performed within one year.⁴³ Out of a total of ten Commission bills proposing changes in the traditional statutes requiring a signed writing, only three have been enacted.

The proposal vetoed in 1953 was presented as "a first proposal" in a general re-examination of the Statute of Frauds, dealing with a portion which was thought "sufficiently severable . . . to permit of separate treatment."⁴⁴ The Commission had before it a study listing some 41 different classes of contracts for which New York statutes required writings, but the suggestions for change received by the Commission and the concern of the Commission seem to have been directed primarily at what may be called the traditional Statute of Frauds, stemming from the English statute enacted in 1677. That statute had been a source of trouble since its enactment: the Mercantile Law Commission unsuccessfully recommended repeal of its sale-of-goods section in 1885;⁴⁵ and the Law Revision Committee recommended repeal of all but the provision for land contracts in 1937, four members dissenting as to contracts of guaranty.⁴⁶ The latter recommendation was renewed by the Law Reform Committee, except as to contracts of guaranty, in 1953; and in 1954 the recommendation was retroactively enacted by Parliament.⁴⁷

⁴⁰ See Leg. Doc. No. 65(I), Report of Law Rev. Com. 267 (1946); N.Y. Pers. Prop. Law § 31(8).

⁴¹ See Leg. Doc. No. 65(H), Report of Law Rev. Com. 133-166 (1947); Leg. Doc. No. 65(H), Report of Law Rev. Com. 187-258 (1952); N.Y. Civ. Prac. Act § 59.

⁴² See Leg. Doc. No. 65(G), Report of Law Rev. Com. 609-651 (1949); Laws 1949, c. 203, adding N.Y. Pers. Prop. Law § 31(10).

⁴³ See Leg. Doc. No. 65(O) (1953); N.Y. Pers. Prop. Law § 31.

⁴⁴ *Id.* at 5.

⁴⁵ See note 4 *supra*.

⁴⁶ See note 9 *supra*; cf. Williams, "Statute of Frauds, S. 4," 24 N.Z.L.J. 301 (1948); "The Work of the New Zealand Law Revision Committee, 1948," 25 N.Z.L.J. 49, 50 (1949).

⁴⁷ See Law Reform Committee, First Report, Cmd. No. 8809 (1953); Law Reform (Enforcement of Contracts) Act, 1954, 2 and 3 Eliz. 2, c. 34; 68 Harv. L. Rev. 383 (1954).

Having acted as a Commission consultant in connection with the Statute of Frauds, I am in no position to evaluate its work. The comparison with its work on consideration is curious: in both cases the Commission proposed revision while the English Committee proposals amounted to abolition. With respect to consideration, the less far-reaching proposals prevailed in New York, while the drastic proposals in England bore no fruit. As to the Statute of Frauds, the positions are reversed: thus far, at least, little progress has been made in New York, while repeal has been accomplished in England. Not all the reasons for these differences are apparent, but a cautious approach to the Statute of Frauds seems to be in harmony with American professional opinion.⁴⁸

Two factors may be noted which distinguish the situation in England from that in the United States. First, trial by jury in commercial cases is almost unknown in England.⁴⁹ Second, the rule that taxable costs include the fees of solicitor and counsel, together with a prohibition of contingent fees, reduces the incentive to litigate doubtful claims; and under the legal aid system inaugurated in 1949 the prospective plaintiff must show to a local committee reasonable grounds for asserting his claim.⁵⁰ Fear of groundless claims seems to be better founded and more widespread in New York; and an argument recently made on behalf of the Statute of Frauds provisions of the Uniform Commercial Code may have relevance: "the spread of literacy, the rise of metropolitan living, the drive toward internal records, and the Code's removal of those unwise misinterpretations which so largely influenced the English decision, leave reasonable room for some Statute of Frauds in the sales field."⁵¹ It seems likely that the Commission will return to other provisions of the Statute of Frauds after it has completed its work on the Code, and that its work will proceed in the spirit of the quoted passage.

IV. RIGHTS OF THIRD PARTIES

Assignments. The Commission has conducted comprehensive studies with respect to several features of the law governing the assignment of choses in action, and its resulting recommendations have been enacted. In 1944 it recommended that assignments of rent under existing leases of real property be brought within the real property recording acts, and

⁴⁸ See 2 Corbin, *Contracts* § 275 (1950); Llewellyn, "What Price Contract," 40 *Yale L.J.* 704, 748 (1931); cf. Stevens, "Ethics and the Statute of Frauds," 37 *Cornell L.Q.* 355, 381 (1952); 27 *So. Calif. L. Rev.* 471, 475 (1954).

⁴⁹ See Jackson, *Machinery of Justice in England* 64-65 (2d Ed. 1953).

⁵⁰ *Id.* at 258-278.

⁵¹ See *Uniform Commercial Code, Supp. No. 1*, p. 98 (1955).

its proposal was adopted;⁵² four years later the statute was amended to make it clear that it applied to present leases to begin at a future date.⁵³ In 1946 the Commission made an elaborate report on the assignment of accounts receivable, recommending no legislation.⁵⁴ And in 1950 the Commission obtained a thorough recodification of the law governing assignment of wages, first proposed in 1948 but withdrawn for further study.⁵⁵ Less ambitious but equally successful projects were the validation of gratuitous written assignments, referred to above,⁵⁶ and the overruling of a series of cases on bondholders' claims.⁵⁷ The result of the latter project was a statute providing that, unless expressly reserved in writing, claims related to bonds passed to transferees of the bonds.

The law of assignments is included in the Restatement of Contracts, and each of the assignment statutes just mentioned has an impact on contract law. But a little reflection reveals that transfer of intangible property inevitably raises many problems outside what is ordinarily referred to as the law of contracts. The wage-assignment statute, for example, is in part social legislation restricting creditors' rights; in part it is a filing statute for a particular type of secured transaction. The accounts-receivable study was touched off by developments in the federal bankruptcy law; it deals broadly with the law of chattel security and inventory financing. Professor Williston and the American Law Institute have striven mightily to unify the law of contracts, combatting its tendency to fall apart. The work of the Law Revision Commission on the law of assignments suggests that at least in this area subdivision may be inevitable.

Filing; Secured Transactions. Filing provisions relating to contracts have been the subject of a number of Commission studies besides those on assignments, but the Commission's proposals have had mixed success. The Commission has secured the enactment of many statutes affecting the real property recording system, but only the provisions for assign-

⁵² See Leg. Doc. No. 65(I), Report of Law Rev. Com. 221-289 (1944); Laws 1944, c. 262, adding N.Y. Real Prop. Law §§ 294-a and 321-a and amending N.Y. Real Prop. Law §§ 291, 294, 315, 316, and 329.

⁵³ See Leg. Doc. No. 65(J), Report of Law Rev. Com. 359-379 (1948); Laws 1948, c. 210, amending N.Y. Real Prop. Law §294-a.

⁵⁴ See Leg. Doc. No. 65(K), Report of Law Rev. Com. 351 (1946).

⁵⁵ See Leg. Doc. No. 65(D), Report of Law Rev. Com. 123-233 (1948); Leg. Doc. No. 65(A), Report of Law Rev. Com. 25-47 (1950); Laws 1950, c. 823, inserting N.Y. Pers. Prop. Law Art. 3-A.

⁵⁶ See note 28 *supra*.

⁵⁷ See Leg. Doc. No. 65(D), Report of Law Rev. Com. 67-94 (1950); Laws 1950, c. 812, adding N.Y. Pers. Prop. Law § 41(4); Corbin, "The Subsequent Bondholder and the Delinquent Trustee," 51 Colum. L. Rev. 813 (1951).

ments of rent and a provision giving effect to the recording of land contracts seem to be germane to the present discussion. The latter was first proposed in 1937 and was finally enacted the third time it was proposed, in 1940.⁵⁸ A 1942 report on conditional sales of fixtures included no recommendation for legislation.⁵⁹

The chattel-mortgage and conditional-sale statutes have been before the Commission many times. In 1936 and 1937 the Commission sought unsuccessfully to harmonize the refile provisions of the two statutes;⁶⁰ in 1938 and 1939 it tried to conform the provisions as to the persons who may take advantage of a failure to file, again without success.⁶¹ In 1941 it proposed to eliminate from the Uniform Conditional Sales Act modifications with respect to conditional sales for resale which had been made when the Act was adopted in New York; the Legislature adopted that proposal only in part, rejecting the part which would have subjected such transactions to a filing requirement.⁶² More recently, the Commission has secured the enactment of measures clarifying the place of filing and the duration of refile of chattel mortgages, and providing for the destruction of old files of both conditional sales and chattel mortgages.⁶³

Creditors' Rights. A number of other Commission projects affecting contracts show the same features which may be found in the fields of assignments and chattel security: first, they deal specifically with particular types of contracts; second, they deal with contract rights as part of the broader field of property rights or creditors' rights. One example is the Commission study of anticipatory breach of contract, reported in

⁵⁸ See Leg. Doc. No. 65(N), Report of Law Rev. Com. 387-398 (1937); Leg. Doc. No. 65(D), Report of Law Rev. Com. 37-45 (1938); Leg. Doc. No. 65(E), Report of Law Rev. Com. 157-166 (1940); Laws 1940, c. 745, amending N.Y. Real Prop. Law §§ 291, 294, 315, 316.

⁵⁹ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 671-726 (1942); N.Y. Pers. Prop. Law § 67.

⁶⁰ See Leg. Doc. No. 65(N), Report of Law Rev. Com. 781-794 (1936); Leg. Doc. No. 65(F), Report of Law Rev. Com. 61-66 (1937); compare N.Y. Pers. Prop. Law § 71 with N.Y. Lien Law § 235.

⁶¹ See Leg. Doc. No. 65(J), Report of Law Rev. Com. 163-199 (1938); Leg. Doc. No. 65(C), Report of Law Rev. Com. 67-74 (1939); compare N.Y. Pers. Prop. Law § 65 with N.Y. Lien Law § 230.

⁶² See Leg. Doc. No. 65(J), Report of Law Rev. Com. 237-275 (1941); Laws 1941, c. 851, amending N.Y. Pers. Prop. Law § 69; cf. *Tchlenoff v. Jacobs*, 267 App. Div. 908, 46 N.Y.S.2d 875 (2d Dep't), aff'd, 293 N.Y. 904, 60 N.E.2d 32 (1944); *First Nat. Bank of Binghamton v. Arthur Hermann Co.*, 275 App. Div. 415, 90 N.Y.S.2d 249 (3d Dep't 1949).

⁶³ See Leg. Doc. No. 65(G), Report of Law Rev. Com. 153-181 (1944); Laws 1944, c. 169, amending N.Y. Lien Law § 232 (place of filing); Leg. Doc. No. 65(G), Report of Law Rev. Com. 167-191 (1950); Laws 1950, c. 733, amending N.Y. Lien Law § 235 (duration of refile); Leg. Doc. No. 65(B) (1953), Laws 1953, c. 355, amending N.Y. Pers. Prop. Law §§ 70, 71, N.Y. Lien Law §§ 233, 235, and adding N.Y. Civ. Prac. Act § 383-b, N.Y. Public Officers Law § 65-b(5) (destruction of files).

1940.⁶⁴ That study dealt particularly with possible hardship resulting from failure to apply the doctrine of anticipatory breach to leases of real property; any such hardship was found to have been mitigated by amendments to the Bankruptcy Act, and no legislation was recommended. A second example is the elaborate Commission bill enacted in 1952 to provide for the levy of execution on debts and contract rights.⁶⁵

In 1950 the Commission made a comprehensive report on the history, law, and current utility of general assignments for the benefit of creditors, and its recommendations for a general revision of the New York statute governing such assignments was enacted.⁶⁶ The amendments were designed to make the general assignment a more useful alternative to bankruptcy as a device for the orderly administration of an insolvent estate. To that end, some of the statutory requirements were relaxed and procedure was modified to promote economy and efficiency; and the policy of the Bankruptcy Act was adopted with respect to such matters as claims for anticipatory breach of contracts and leases, definition of insolvency, setting aside preferential transfers, and preferred claims for wages.

Beneficiaries and Sureties. Since 1917 New York law has required that liability insurance policies contain a provision permitting the injured person to bring a direct action against the insurer in certain circumstances. Thus in effect the tort creditor becomes a statutory beneficiary of the insurance contract. In 1935, in connection with a study of the survival of tort actions, the Commission had occasion to propose an amendment to that insurance statute.⁶⁷ The following year the Commission studied the statute again and obtained a further amendment, permitting the tort creditor to sue the insurer when his tort judgment remained unsatisfied for thirty days and eliminating the previous requirement that execution be returned unsatisfied because of the insolvency or bankruptcy of the insured.⁶⁸ And in 1945 the Commission obtained a further amendment of the successor statute, extending the class of beneficiaries to include contribution and indemnity creditors and assignees of final judgments.⁶⁹

⁶⁴ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 385-404 (1940).

⁶⁵ See Leg. Doc. No. 65(L), Report of Law Rev. Com. 355-448 (1952); Laws 1952, c. 835, adding N.Y. Civ. Prac. Act § 687-a and amending N.Y. Civ. Prac. Act §§ 643, 679, and N.Y. Debtor and Creditor Law § 151.

⁶⁶ See Leg. Doc. No. 65(L), Report of Law Rev. Com. 285-360 (1950); Laws 1950, c. 758, amending N.Y. Debtor and Creditor Law Art. 2.

⁶⁷ See Leg. Doc. No. 60(E), Report of Law Rev. Com. 157-225 (1935); Laws 1935, c. 795, § 5, amending N.Y. Insurance Law § 109, now N.Y. Insurance Law § 167.

⁶⁸ See Leg. Doc. No. 65(P), Report of Law Rev. Com. 911-940 (1936); Laws 1936, c. 433.

⁶⁹ See Leg. Doc. No. 65(F), Report of Law Rev. Com. 177-212 (1945); Laws 1945, c. 409, amending N.Y. Insurance Law § 167.

Suretyship proposals have not been highly successful. One of Judge Cardozo's leading examples of outworn rules needing revision was the discharge of a surety by a change in the obligation of the principal.⁷⁰ The Commission made a proposal limiting discharge to the extent of prejudice in 1937 and again in 1938, without success.⁷¹ In the field of construction contracts, the Commission in 1942 obtained a general revision of the trust fund provisions of the mechanics' lien law, and in 1944 it amended that law to make clear its application to improvements undertaken by public corporations.⁷² But when in 1945 the Commission sought to clarify the rights of materialmen and laborers as beneficiaries under the contractor's surety bond, only a small part of its proposal was enacted; and a renewed proposal the following year also failed.⁷³

Beneficiaries and Decedents. Contract rights often extend beyond the life of the original parties, and attempts are often made to use contract provisions to do the job traditionally performed by a will. In 1939 the Commission recommended against statutory relaxation of the rule that agency powers terminate on the death of the principal, partly because agency powers continuing after death might conflict with the powers of the decedent's personal representative.⁷⁴ The same year the Court of Appeals had before it a mortgage extension agreement providing for the payment of interest to named persons after the mortgagee's death; the agreement was held invalid as an informal testamentary disposition.⁷⁵

But rigorous enforcement of a rule against the use of contracts to accomplish informal testamentary dispositions would force major changes in such pervasive institutions as life insurance, savings deposits, and the like. In 1943 the Commission acted with dispatch to prevent judicial interference with United States Savings Bonds "payable on death" to a named beneficiary.⁷⁶ In 1945 the Commission recognized the similarity

⁷⁰ See Cardozo, *supra* note 6, at 117.

⁷¹ See Leg. Doc. No. 65(Q), Report of Law Rev. Com. 871-952 (1937); Leg. Doc. No. 65(C), Report of Law Rev. Com. 31-36 (1938); cf. *Katz v. Leblang*, 243 App. Div. 421, 277 N.Y. Supp. 850 (1st Dep't 1935).

⁷² See Leg. Doc. No. 65(H), Report of Law Rev. Com. 271-336 (1942), Laws 1942, c. 808, amending N.Y. Lien Law Art. 2 and adding N.Y. Lien Law Art. 3-A; Leg. Doc. No. 65(N), Report of Law Rev. Com. 489-525 (1944), Laws 1944, c. 363, amending N.Y. Lien Law Arts. 1, 2, 3.

⁷³ See Leg. Doc. No. 65(L), Report of Law Rev. Com. 433-472 (1945), Laws 1945, c. 380, amending N.Y. State Finance Law § 137; Leg. Doc. No. 65(C), Report of Law Rev. Com. 79 (1946).

⁷⁴ See Leg. Doc. No. 65(L), Report of Law Rev. Com. 685-737 (1939).

⁷⁵ *McCarthy v. Pieret*, 281 N.Y. 407, 24 N.E.2d 102 (1939).

⁷⁶ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 521-545 (1943); Laws 1943, c. 632, adding N.Y. Pers. Prop. Law § 24, overruling *Deyo v. Adams*, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. Kings County 1942).

of insurance proceeds held for future distribution to the accumulation of trust income, and extended to insurance accumulations the statute permitting a destitute beneficiary to reach the funds.⁷⁷

In 1947 it was suggested that beneficiary rights under various types of transactions constituted a single subject, which should be unified by statute.⁷⁸ Included in the list were trust deposits in savings banks, insurance policies, annuity contracts, war savings bonds, social security benefits, and pension, retirement or profit-sharing plans. Savings-bank deposits in the name "A or B or survivor" are effective according to their terms by statute even though testamentary;⁷⁹ after an unsuccessful attempt to repeal that statute in 1950,⁸⁰ the Commission included them in a comprehensive recommendation made in 1951.⁸¹ Two bills were proposed: one would have validated testamentary designations of beneficiaries for "institutional debts" and defined their effect; the second would have permitted "institutional debtors" to pay small amounts to a wife, close relative or creditor of a deceased "institutional creditor."

Both bills failed in 1951; revised and resubmitted in 1952, both were enacted.⁸² As enacted, the bill validating testamentary designations of beneficiaries was limited to insurance agreements and pension, retirement or profit-sharing plans; both trust and survivorship accounts in savings banks and other institutions were excluded pending further study of the rights of a surviving spouse in the light of an intervening decision of the Court of Appeals.⁸³ The second bill permits payment without administration substantially as originally recommended, and gives effect to written designations of beneficiaries to the limited extent of preventing such payment. A Commission amendment in 1953 made it clear that payments to creditors of the decedent could not be made if either the debt or the aggregate payments exceeded \$500.⁸⁴

Bona Fide Purchasers. Among the Commission's first recommendations, made in 1935, were two relating to the rights of bona fide purchasers.⁸⁵ Those proposals brought the New York law into line with the

⁷⁷ See Leg. Doc. No. 65(J), Report of Law Rev. Com. 351-392 (1945); Laws 1945, c. 828, amending N.Y. Pers. Prop. Law § 17, overruling *Nires v. Equitable Life Ass. Soc.*, 290 N.Y. 78, 48 N.E.(2d) 268 (1943).

⁷⁸ See Leg. Doc. No. 65(M) at 24, Report of Law Rev. Com. 610 (1951).

⁷⁹ *Inda v. Inda*, 288 N.Y. 315, 43 N.E.2d 59 (1942).

⁸⁰ See Leg. Doc. No. 65(Q), Report of Law Rev. Com. 513-556 (1950).

⁸¹ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 587-657 (1951).

⁸² See Leg. Doc. No. 65(G), Report of Law Rev. Com. 163-185 (1952); Laws 1952, c. 820, adding N.Y. Pers. Prop. Law § 24-a; Laws 1952, c. 824, amending N.Y. Dec. Est. Law § 103-a and repealing seven other statutes.

⁸³ *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

⁸⁴ See Leg. Doc. No. 65(R) (1953); Laws 1953, c. 401.

⁸⁵ See note 8 supra.

law in other states by amending uniform laws, in both cases in accordance with the recommendations of the National Conference of Commissioners on Uniform State Laws. One bill adopted for the Uniform Sales Act and the Uniform Bills of Lading Act a definition of "value" to include pre-existing debts; the other amended the Uniform Sales Act to conform to the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act, making documents of title fully negotiable.

Other studies also related to bona fide purchasers under uniform laws. In 1941 the Legislature adopted a Commission bill amending the Uniform Bills of Lading Act to conform to the Federal Bills of Lading Act on certain aspects of the liability of carriers for non-receipt or misdescription.⁸⁶ The same year saw the partial enactment of the Commission proposal with respect to conditional sales for resale, already referred to:⁸⁷ the part enacted was designed to exclude mortgagees from the protection given "purchasers" in ordinary course from the conditional buyer. And the following year the Commission reported on "real" defenses, good against a holder in due course under the Negotiable Instruments Law; it found the law satisfactory and recommended no change.⁸⁸

The rights of bona fide purchasers are of course affected by the statutes governing the filing of assignments and secured transactions, discussed above. And one sad note must be added: the Commission failed in two attempts to eliminate from the law under the Factor's Act the capricious concept of larceny by trick.⁸⁹

V. MISCELLANEOUS

Infants. The Commission's first proposal to curtail the power of an infant to disaffirm his contracts was made in 1938; it would have eliminated the power with respect to minors over eighteen in three situations: (1) reasonable and provident contracts for education, (2) reasonable and provident contracts in connection with a business in which the infant was engaged, (3) contracts where the other party reasonably relied on a written misrepresentation of age made by the infant.⁹⁰ A much reduced

⁸⁶ See Leg. Doc. No. 65(F), Report of Law Rev. Com. 123-140 (1941); Laws 1941, c. 316, amending N.Y. Pers. Prop. Law § 209 (UBLA § 23).

⁸⁷ See note 62 *supra*.

⁸⁸ See Leg. Doc. No. 65(K), Report of Law Rev. Com. 565-646 (1942).

⁸⁹ See Leg. Doc. No. 65(A), Report of Law Rev. Com. 19-39 (1940); Leg. Doc. No. 65(C), Report of Law Rev. Com. 49-54 (1941); *L.W. Sweet and Co. v. Provident Loan Soc.*, 279 N.Y. 540, 18 N.E.2d 847 (1939).

⁹⁰ See Leg. Doc. No. 65(I), Report of Law Rev. Com. 95-161 (1938); Leg. Doc. No. 65(B), Report of Law Rev. Com. 59-66 (1939); Leg. Doc. No. 65(B), Report of Law Rev. Com. 43-48 (1941); Laws 1941, c. 327, adding N.Y. Debtor and Creditor Law § 260; see Miller, "Fraudulent Misrepresentation of Age as Affecting the Infant's Contract," 15

proposal was finally enacted in 1941, limited to the second situation only. In 1948 the Commission made a very minor additional contribution in this area.⁹¹ In 1946 a statute denied power to disaffirm to an infant veteran or his infant spouse, in connection with loans under title three of the Servicemen's Readjustment Act of 1944; by relocating that provision the Commission made it clear that it applied to loans by insurance companies and national banks as well as by state banks.

Land Contracts. Contracts relating to real property have of course been affected by the Commission statutes on consideration and the seal, by its amendments to the Statute of Frauds, and by its statutes dealing with the recording system. To the statutes already referred to in these connections should be added an act making enforceable without consideration promises and warranties contained in formal conveyances,⁹² and an act extending the protection of grantees against claims that they orally assumed pre-existing mortgage indebtedness.⁹³

The Commission has made comprehensive studies of two other aspects of contracts for the sale of land. The first, relating to the risk of loss in executory contracts, resulted in the adoption, with amendments, of the Uniform Vendor and Purchaser Risk Act, together with a provision saving the vendor's right to fire insurance protection.⁹⁴ The second was an attempt, twice unsuccessful, to mitigate the forfeiture imposed on a defaulting purchaser under an installment contract.⁹⁵

Negotiable Instruments. The Commission has made two studies of the law of negotiable instruments; neither produced a recommendation for legislation. One, relating to "real" defenses, has been mentioned.⁹⁶ The other, a 1952 study of notice of dishonor, produced a suggestion that some of the provisions of the Negotiable Instruments Law might be anachronistic; but the Commission made no recommendation because of

U. Pitt. L. Rev. 73 (1953); Notes, 16 St. John's L. Rev. 154 (1941), 34 Va. L. Rev. 829 (1948).

⁹¹ See Leg. Doc. No. 65(Q), Report of Law Rev. Com. 631-641 (1948); Laws 1948, c. 122, adding N.Y. Debtor and Creditor Law § 261 and repealing N.Y. Banking Law § 5(4).

⁹² See Leg. Doc. No. 65(K), Report of Law Rev. Com. 483-516 (1943); Leg. Doc. No. 65(C), Report of Law Rev. Com. 65-70 (1944); Laws 1944, c. 250, adding N.Y. Real Prop. Law § 283.

⁹³ See Leg. Doc. No. 65(P) (1953); Laws 1953, c. 684, amending N.Y. Civ. Prac. Act § 1083-c.

⁹⁴ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 755-780 (1936); Laws 1936, c. 731, adding N.Y. Real Prop. Law §240-a; Laws 1936, c. 252, adding N.Y. Insurance Law §121-b; Notes, 51 Harv. L. Rev. 1276 (1938), 5 U. Chi. L. Rev. 260 (1938), 36 Calif. L. Rev. 476 (1948).

⁹⁵ See Leg. Doc. No. 65(M), Report of Law Rev. Com. 343-386 (1937); Leg. Doc. No. 65(E), Report of Law Rev. Com. 47-55 (1938); Note, 52 Harv. L. Rev. 129 (1938).

⁹⁶ See note 88 supra.

the enactment of the statute in all the states and the desirability of uniformity.⁹⁷

Sale of Goods. Two amendments to the Uniform Sales Act have been described above.⁹⁸ In 1943 and again in 1945 the Commission failed in attempts to amend the provisions of the Act relating to warranty of fitness for a particular purpose; the amendments would have extended the benefit of the warranty to the buyer's employees and to members of his household.⁹⁹

The Commission had more success with two proposals to expand the buyer's remedies. A bill enacted in 1948 eliminated the requirement that a buyer elect between the remedies of damages and rescission when a warranty is broken.¹⁰⁰ And in 1952 the Commission finally obtained enactment of a ten-year-old proposal to permit a defaulting buyer to recover benefits conferred on the seller in excess of twenty per cent of the price.¹⁰¹ The original proposal was considerably broader, and would have affected many other types of contracts as well.

Bailments. Amendments to the Uniform Bills of Lading Act have been mentioned.¹⁰² In 1949 a Commission statute invalidated contract provisions exempting operators of garages and parking lots from liability for negligence.¹⁰³

Restitution; Election of Remedies. The Commission has obtained the enactment of a number of statutes to liberalize the remedy of restitution and the doctrine of election of remedies. Two such statutes have been mentioned as amendments to the Uniform Sales Act.¹⁰⁴ Restitution is a standard remedy for breach of contract, and a complete treatment of the Commission's work on the law of contracts would include such statutes. Since the law of restitution is the subject of another article in this Symposium, however, the statutes affecting the law of contracts are merely listed in a note.¹⁰⁵

⁹⁷ See Leg. Doc. No. 65(S), Report of Law Rev. Com. 575-597 (1952).

⁹⁸ See notes 8, 85 supra.

⁹⁹ See Leg. Doc. No. 65(J), Report of Law Rev. Com. 409-482 (1943); Leg. Doc. No. 65(A), Report of Law Rev. Com. 19-25 (1945).

¹⁰⁰ See Leg. Doc. No. 65(F), Report of Law Rev. Com. 271-288 (1948); Laws 1948, c. 276, amending N.Y. Pers. Prop. Law § 150(1) (d) (USLA § 69(1) (d)); cf. N.Y. Civ. Prac. Act § 112-e, note 105, infra.

¹⁰¹ See Leg. Doc. No. 65(F), Report of Law Rev. Com. 179-243 (1942); Leg. Doc. No. 65(A), Report of Law Rev. Com. 19-32 (1943); Leg. Doc. No. 65(C), Report of Law Rev. Com. 83-101 (1952); Laws 1952, c. 823, adding N.Y. Pers. Prop. Law § 145-a.

¹⁰² See notes 8, 85, 86 supra.

¹⁰³ Leg. Doc. No. 65(M), Report of Law Rev. Com. 801-815 (1949); Laws 1949, c. 332, adding N.Y. Gen. Bus. Law § 89-b.

¹⁰⁴ See notes 100, 101 supra.

¹⁰⁵ See Leg. Doc. No. 65(F), Report of Law Rev. Com. 205-299 (1939); Laws 1939,

VI. UNIFORM LAWS; THE UNIFORM COMMERCIAL CODE

It is perfectly clear from the foregoing that the Commission has had a large experience with uniform laws. And the Commission has shown itself fully responsive to the goal of uniformity. Three of the uniform laws have been enacted by all 48 states: the Negotiable Instruments Law, the Uniform Warehouse Receipts Act, and the Uniform Stock Transfer Act; none of those three has been the subject of an amendment proposed by the Commission.¹⁰⁶ The Uniform Sales Act and the Uniform Bills of Lading Act, each enacted in thirty-odd states, have been amended several times. Two of the USA and UBLA amendments followed recommendations of the National Conference;¹⁰⁷ one sacrificed interstate uniformity to achieve conformity to federal law.¹⁰⁸ Two of the USA proposals were to insert provisions on points not expressly covered by the uniform act.¹⁰⁹ Only in the case of election of remedies did the Commission tamper with a uniform provision of the USA; and there the new proposal was justified by conformity with another New York statute and with the new Uniform Commercial Code.¹¹⁰

But neither the Commission nor the Legislature has been a slave to uniformity. The policy of uniformity is at its weakest in the field of real property, and the Commission proposed amendments to the Uniform Vendor and Purchaser Risk Act with "the less hesitancy" because the act had "not yet been enacted in any state."¹¹¹ In seeking to restore substantive uniformity with respect to conditional sales for resale,¹¹² the Commission felt free to introduce non-uniform language to make its

cs. 126, 127, 128, 147, adding N.Y. Civ. Prac. Act §§ 112-a, 112-b, 112-c, 112-d (election of remedies); Leg. Doc. No. 65(L), Report of Law Rev. Com. 283-344 (1941); Laws 1941, c. 315, adding N.Y. Civ. Prac. Act § 112-e (damages in addition to rescission for misrepresentation); Leg. Doc. No. 65(B), Report of Law Rev. Com. 27-67 (1942); Laws 1942, c. 558, adding N.Y. Civ. Prac. Act § 112-f (money paid under mistake of law); Leg. Doc. No. 65(B), Report of Law Rev. Com. 31-78 (1946); Laws 1946, c. 683, adding N.Y. Civ. Prac. Act § 112-g (tender of benefits by rescinding party); Leg. Doc. No. 65(K), Report of Law Rev. Com. 249-270 (1947); Laws 1947, c. 97, adding N.Y. Civ. Prac. Act § 112-h (vendee's lien to secure restitution or damages); Leg. Doc. No. 65(K), Report of Law Rev. Com. 339-354 (1952); Laws 1952, c. 487, amending N.Y. Civ. Prac. Act § 112-g (adjustment of equities on rescission).

¹⁰⁶ See notes 88, 97 *supra*. The Stock Transfer Act was amended in matters of form only. Laws 1939, c. 76; see Leg. Doc. No. 65(N), Report of Law Rev. Com. 765-767 (1939).

¹⁰⁷ See notes 8, 85, 98, 102 *supra*.

¹⁰⁸ See note 86 *supra*.

¹⁰⁹ See notes 99, 101 *supra*.

¹¹⁰ See Leg. Doc. No. 65(F) at 5, Report of Law Rev. Com. 275 (1948), note 100 *supra*, at 5; cf. UCC §§ 2-608 and Comment 1, 2-711 (1952).

¹¹¹ See Leg. Doc. No. 65(M) at 6, Report of Law Rev. Com. 780 (1936), note 94 *supra*, at 6.

¹¹² See notes 62, 87 *supra*.

meaning clear. Again, in its attempts to harmonize the filing provisions for conditional sales and chattel mortgages, the Commission at first thought the Uniform Conditional Sales Act should prevail; later it rejected some of the UCSA policies.¹¹³ Its attitude is disclosed in the following quotation:

The prepossession of the Commission is in general against recommending changes in a uniform statute. In this instance the Commission feels differently, and for the following reasons: because the Uniform Conditional Sales Act has been adopted in only a fraction of the states; because New York made some change in the uniform statute at the time of enactment; and especially because experience shows the superiority of New York's own chattel mortgage legislation.¹¹⁴

During the ten years since the Uniform Commercial Code was made a joint project of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, the reports of the Law Revision Commission have repeatedly shown an awareness of the progress of the Code on the part of the Commission and its consultants.¹¹⁵ References to the Code are not confined to the studies of proposed amendments to the uniform laws referred to above, for the Code touches on many other matters which have been studied by the Commission. For example, the Code sweeps up the whole field of chattel security and assignments of contract rights. Again, the Code covers a good deal more of the law relating to the formation and readjustment of sales contracts than does the Uniform Sales Act; hence the overlap with the Commission statutes on consideration and the seal.

On the face of it, then, the Commission is supremely qualified to execute the Governor's directive of February 1953 to undertake a thorough legal analysis of the Code. It has had a good deal of experience with the uniform laws, and has demonstrated a sympathetic understanding of the movement for uniform commercial legislation. At the same time, its own reports contain a vast wealth of information with respect to those matters which the Code newly brings within the field of uniform legislation. As to some of those matters, the Commission itself has been a pioneer, and its efforts seem to follow lines of policy similar to those of the Code.

A word of caution may be added, however. The Commission has itself made large proposals as well as small, though none nearly so comprehensive as the Code. But its work on uniform laws has related primarily to specific details; the most comprehensive uniform laws originally

¹¹³ See notes 60, 61, 63 *supra*.

¹¹⁴ See Leg. Doc. No. 65(J) at 6, Report of Law Rev. Com. 168, note 61 *supra*, at 6 (1938).

¹¹⁵ See, e.g., note 110 *supra*; Leg. Doc. No. 65(D) at 22, Report of Law Rev. Com. 88 (1950) (cf. UCC §§ 2-318, 3-417); Leg. Doc. No. 65(G) 22-174 (1950) (cf. UCC § 9-403); Leg. Doc. No. 65(C) (1952), *supra* note 101, at 16 (cf. UCC § 2-718); Leg. Doc. No. 65(O) at 17 (1953) (cf. UCC §§ 2-201, 8-319).

enacted on its recommendation seem to be the Uniform Criminal Extradition Act¹¹⁶ and the Uniform Vendor and Purchaser Risk Act.¹¹⁷ The former fills ten pages of the Commission's reports, and is set out and annotated in 25 pages; the latter covers one page and is thoroughly discussed in 18. In contrast the Code contains some 390 sections; as introduced in the Massachusetts legislature the statutory text filled 253 pages; it is printed with Official Comments by the sponsors in 816 pages. Annotations prepared in Massachusetts and Pennsylvania run to 201 and 170 pages, respectively. No single project in the Commission's history adequately prepares it for a study of the Code.

Such a study, if it is to be useful, must steer a course between superficiality on the one hand and supererogation on the other. The Massachusetts and Pennsylvania annotations, prepared on short notice by groups of volunteers, probably err on the superficial side; there seems to be little danger that the Commission will follow their example. But the Commission's tradition of exhaustive research and precise drafting suggests the opposite danger that its study may bog down in endless detail. The Code was twelve years in preparation, at a cost of more than \$350,000, before it was enacted in Pennsylvania in 1953, effective July 1, 1954.¹¹⁸ Exhaustive annotation alone could occupy the full time of the Commission for years; detailed rewriting may well be a project for the ages.

Moreover, the Code reflects a long process of adjustment and compromise of the conflicting views of innumerable judges, law teachers, and practicing lawyers, including representatives of a wide variety of affected industries. Discussion has been plenary; a bibliography of articles in legal periodicals occupies 16 pages.¹¹⁹ Most of the troublesome points have long since been argued and reargued; revision has followed revision. During the last two years the joint Editorial Board of the sponsoring organizations has continued to receive and sift criticisms and suggestions, and has recommended numerous changes.¹²⁰ It is too late now to make a fresh start in order to achieve greater linguistic artistry. Blunders can be caught; particularly important policies can be re-examined; but in the main the time has come to accept or reject the whole.

The Commission's published reports on two years of study of the

¹¹⁶ See Leg. Doc. No. 60(D), Report of Law Rev. Com. 91-156 (1935); Leg. Doc. No. 65(A), Report of Law Rev. Com. 27-58 (1936); Laws 1936, c. 892, adding N.Y. Code Crim. Proc. §§ 827-859.

¹¹⁷ See notes 94, 111 *supra*.

¹¹⁸ See Handbook of the Nat. Conf. of Commrs. on Uniform State Laws 126-150 (1954).

¹¹⁹ Wypyski, *The Uniform Commercial Code—A Bibliography of Legal Articles and Publications* (American Law Institute 1954); cf. Leg. Doc. No. 65(A) (1954).

¹²⁰ See Uniform Commercial Code, Supp. No. 1 (1955).

Code, presumably reflecting the expenditure of most of its \$250,000 of appropriations for that period, show an awareness of the problem of bulk.¹²¹ The Commission has adopted measures which may be used to narrow the issues and bring them into focus: it divided the Code into segments and retained a consultant for each segment, and it held a series of public hearings. The 1955 report outlines in manageable compass a series of pervasive problems. But that report merely raises questions; it answers none.

There are disturbing hints of an erroneous assumption that time, paper, and human energy are inexhaustible resources. For example, the energies of the Commission seem to have been expended in part in the preparation of "wholly tentative" redrafts of parts of the Code, apparently intended "as discussional merely." It is to be hoped that this means that the Commission is nearing the end of its annotation and research on those parts of the Code, and that it has identified a series of important blunders or policy issues. If not, the Commission may be in danger of being overpowered by the sheer bulk of its own product. It is too early to judge; at this stage it can only be said that the Commission is facing the greatest challenge in its history.

VII. CONCLUSION

Others have often praised the work of the Commission, commonly in connection with proposals that similar commissions be established elsewhere.¹²² I fully concur both in the praise and in the proposals. But a twentieth anniversary should be an occasion for critical review as well as a time to congratulate and commemorate. The New York Law Revision Commission is so well established that adverse comment on specific points carries no implication of general hostility. Now is the time to point out possibilities of improvement rather than merely to recommend emulation.

Unfortunately, aside from the doubts expressed above in connection with the Uniform Commercial Code, I have no adverse comment to make. Inquiry reveals some dissatisfaction among students of contracts on specific details of particular Commission statutes, but it would be surprising if this were not so. The general criticisms I have heard are two: (1) the Commission has confined itself to *elegantia juris*, to reviewing specific judicial decisions on fine points of law; (2) the statutes are

¹²¹ See note 10 supra.

¹²² See Stone and Pette, "Revision of Private Law," 54 Harv. L. Rev. 221 (1940); Heineman, "A Law Revision Commission for Illinois," 42 Ill. L. Rev. 697 (1948); Cross, "Law Revision in the State of Washington," 27 Wash. L. Rev. 193 (1952); Sands, "Prospectus for a Program of Legal Research Aimed at Substantive Law Revision in Alabama," 4 Ala. L. Rev. 232 (1952).

directions to judges in intricate detail, giving little guidance to the citizens of New York on how to behave outside a courtroom.

The two complaints are obviously related, and both are false. This survey has outlined the range and scope of the Commission's work; it has dealt with large issues and small. The validation of contract clauses which deny effect to oral modifications cannot compete for headlines with an increase in tax rates, but the Commission was not established to deal with highly-charged political issues. That particular statute has a pervasive effect, primarily because it is a guide to conduct in uncounted cases never litigated. The importance of the Commission's work is attested by the interest it has aroused among editors of law school casebooks and in legal periodicals.

Some projects have been narrow, and have produced legislation rather elaborately wrought. The 1952 amendment to the same statute on oral modifications may serve as an example.¹²³ But even here criticism of the Commission is misplaced; the criticism should instead be directed in part at Jeremy Bentham and Judge Cardozo and in part at the legal community in which the Commission operates. Bentham and Cardozo meant their ministers of justice to deal with specific cases, though in somewhat different ways. Bentham postulated a comprehensive code, which the judges were to follow literally; if the code forbade blood-letting in the streets, it was up to the minister to recommend a retroactive bill to excuse the surgeon who broke the law in an emergency. Cardozo thought rather of legislation, "not to imprison in particulars," but "to set the judges free" to develop sound law.¹²⁴

The Commission has tried to follow Cardozo's injunction. Its statutes on consideration are negative, excising traditional doctrine without substituting new. And it has tried to "speak the language of general principles." But it cannot remake entirely the society of which it is a part. In a world where lawyers gain influence and power by the close reading of corporate bond indentures or the monstrous grammar of the federal tax laws, the art of plain talk is sometimes reserved for the short and simple annals of the poor. And when judges read as Jeremy Bentham said they should, it may become necessary to write with particularity anything it is important for them to read. The Commission is not responsible for the conflict between discretion and rule, which arose before there was a State of New York or a Commission. Men will be trying to be both simple and precise, and critics will complain of their failure, long after both are gone. If the Commission has sometimes erred on the side of complexity, the same may be said of the State of New York.

¹²³ See text p. 702 following note 36 supra.

¹²⁴ Cardozo, note 6 supra, at 117.