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Effect of an Unsuccessful Attempt to Amend a Statute

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THE EFFECT OF AN UNSUCCESSFUL ATTEMPT TO AMEND A STATUTE

A CORRESPONDENCE BETWEEN CHARLES H. WILLARD AND JOHN W. MacDONALD†

November 18, 1958

JOHN W. MACDONALD, ESQ.
Law Revision Commission
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Dear John:

We have been giving some thought here to the effect of an unsuccessful attempt to amend a statute. Can any inferences be drawn from the failure of the Legislature to pass the amending bill?

I am enclosing a Memorandum of Law, dated August 13, 1958, which one of the young men in the office has prepared on this subject. I think it will interest you.

The view generally expressed in the enclosed memorandum, with which I concur, is that probably no inferences should be drawn from the failure of the amending bill, but most of the courts seem to go the other way.

I wonder if this has been a problem with the Law Revision Commission. Has the point ever been raised that the failure of a bill recommended by the Commission may have some effect on the courts' interpretation of the statute sought to be amended? It has occurred to me that perhaps a provision might be added to the General Construction Law, to provide, in substance, that no inferences are to be drawn in such a case.

It is difficult for me to see how the failure of the Legislature to legislate can prove anything. Once a bill has been enacted by the Legislature is it not thereafter the sole duty of the courts to interpret it? Suppose for example that the Legislature passes a bill in 1959. Two or three years later, Senator X makes a statement on the floor of the Legislature, not addressed to any pending bill, explaining the meaning of the 1959 statute. Even if Senator X had been one of the sponsors of the 1959 statute, I should not think that his subsequent interpretation of the statute would have any weight at all.

There is, also, I think, a sound reason of policy for not giving any

† See Contributors' Section, Masthead, p. 394, for biographical data.

effect to unsuccessful attempts to amend a statute. There is an analogy here to the rule that evidence of repairs after the accident are inadmissible in evidence, one reason for that rule being to encourage people to make repairs. Is there not a similar policy in favor of encouraging people to revise and improve the statutes of this State?

I will be interested in hearing whatever views you may have on the subject.

With all best regards,

Sincerely,
CHARLES H. WILLARD

MEMORANDUM
FOR
MR. WILLARD

August 13, 1958

Re: Effect of Unsuccessful Attempts to Amend a Statute.

NATURE OF THE PROBLEM

The purpose of this memorandum is to discuss the effect of unsuccessful attempts to amend a statute. A brief memorandum on this subject, written in the summer of 1957, took as its point of departure the case of *Travis v. American Cities Co.*, 192 App. Div. 16, 182 N.Y. Supp. 394 (1st Dept. 1920), *affirmed without opinion,* 233 N.Y. 510, 135 N.E. 896 (1922). The controversy there concerned the applicability of the tax imposed by the New York Tax Law, section 270, to transfers of stock to trustees as collateral for an issue of securities. In its interpretation of the statute, the court examined its legislative history and noted that there had been attempts to amend it in such a way as to make the transfers in issue taxable. The legislature rejected these amendments, thus showing, said the court, its intention to exempt the transfer from tax.

As the following quotation will show it is not clear whether the court was aware that these amendments had been offered in a session of the legislature subsequent to the one which enacted the original statute.

> It seems to me that the history of the legislation as revealed by the letter to the comptroller, his advice to the Legislature [that it reject the proposed amendments], and the latter's acceptance thereof, indicate clearly that the Legislature did not intend that mere transfers of stock as collateral security should be subject to tax. The law is well settled that in

> interpreting a statute the history of its enactment is of importance . . . , and that all the facts and circumstances concerning the enactment of the statute and its attempted amendment are properly to be considered in its interpretation. 192 App. Div. at 27, 182 N.Y. Supp. at 401.

If the court was treating the rejected amendments as a part of the history of the statute's *enactment*, the inference it drew would not seem startling. The implications of the other possibility, that it considered the fate of subsequent amendments a controlling expression of legislative intent, are, however, very serious. These implications can be seen, in a particularly dramatic light, in the dissenting opinion in *Girouard v. United States*, 328 U.S. 61 (1946). In that case the majority held (per Douglas, J.) that an alien's refusal to bear arms in the defense of the United States did not bar him from citizenship. Mr. Chief Justice Stone dissented. He pointed out that in three cases decided by a divided Court over a period of fifteen years similarly situated applicants had been denied citizenship. It is worthy of note that the Chief Justice had dissented in two of these cases. Each case had been followed by attempts to amend the naturalization law to overcome the Court's construction. "Thus," said the Chief Justice,

> for six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question. Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change. . . . In the meantime the decisions of this Court had been followed in *Clarke's Case*, 301 Pa. 321, 152 Atl. 92; *Beale v. United States*, 71 F.2d 737; *In re Warkentin*, 93 F.2d 42. In *Beale v. United States, supra*, the court pointed out that the proposed amendments affecting the provisions of the statutes relating to admission to citizenship had failed, saying: "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have congressional sanction and approval." 328 U.S. 74-75.

Furthermore, the Chief Justice noted that the oath required of previously unsuccessful applicants had been reenacted without change in the Nationality Act of 1940, "a comprehensive, slowly matured" revision of the laws. 328 U.S. at 75. This fact was entitled to additional weight as an expression of Congressional "acquiescence" in what the Court had done:

> It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make

such an assumption is to discourage, if not to deny, legislative responsibility. 328 U.S. at 76.

In terms of practical consequences the attitude revealed in the *Girouard* dissent, and perhaps in the *Travis* case, means that if a legislative attempt to clarify a statute fails, this very failure may serve to confirm previous erroneous judicial constructions. Conceivably, the failure of the amendment might lead a court to reconsider and reject previous correct judicial interpretations of the statute which the proposed amendment was designed to enact. The undesirability of a rule of construction pregnant with such results is too plain to require discussion.

The theoretical problems posed by such a rule are indeed perplexing. Resort to legislative history is usually justified on the ground that it is important to know what task the lawmakers had set for themselves. Knowledge of this "intent" is helpful in construing difficult or ambiguous provisions. Under certain circumstances, it may seem quite proper to consider the defeat of an amendment, offered in the course of the enactment of a bill, as a means of ascertaining intent as valid, for example, as a committee report.

However, once a statute has been enacted, the legislature's intent has been formally and completely expressed, and its connection with the statute ceases. If a member were to change his mind about its merits, he could not ordinarily retract his vote.

Suppose, then, that five years later an amendment to the law is proposed and fails. It is certainly clear that by rejecting a proposed amendment, the legislature does not thereby enact a binding law which negates the intent of the proposed amendment. Such a result would be inconceivable under our federal and state constitutions. But has the failure to amend had the effect of clarifying the "intent" of the enacting legislature? Hardly. The members voting on the amendment, in all probability, are not the same as those who originally enacted the bill; therefore, the "intent" of the two legislatures cannot be identical. And if the amending legislature's intent cannot itself be identical with an expression of the enacting legislature's intent, at best, it can only interpret or reflect the original intent on the very same basis as a court would, and not by some more direct process of representation.

An interesting gloss on the problem of the failure of subsequent amendments, as well as on the other theories relied on by Mr. Chief Justice Stone in *Girouard,* may be found in the concurring opinion by Mr. Justice Rutledge in *Cleveland v. United States,* 329 U.S. 14. That case involved the prosecution, under the Mann Act, of a group of funda-

mentalist Mormons who had transported their multiple wives in "interstate commerce." The majority upheld the conviction on the authority of *Caminetti v. United States,* 242 U.S. 470 (1917), in which the Act had been held applicable to the travels of the defendant's mistress. Mr. Justice Rutledge concurred specially in order to make it clear that his only reason for approving this extension of the Act was the principle of *stare decisis.* He pointed out that the government had urged adherence to *Caminetti* on another ground, that of congressional acquiescence, and went on to deal with that argument as follows:

> Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See *Girouard v. United States,* 328 U.S. 61, 69. It is perhaps too late now to deny that, legislatively speaking as in ordinary life, silence in some instances may give consent.[4] But it would be going even farther beyond reason and common experience to maintain, as there are signs we may be by way of doing, that in legislation any more than in other affairs silence or nonaction always is acquiescence equivalent to action.
>
> There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated[5] and in the clarity and certainty of the expression of its will. 329 U.S. at 22.*

A view contrary to that taken by Mr. Justice Rutledge in *Caminetti* is to be found in Professor Horack's article, *Congressional Silence: A Tool of Judicial Supremacy,* 25 Texas L. Rev. 247 (1947). It is Professor Horack's thesis that legislative silence is binding on the courts. Thus he says,

> Uuless Congress has acted, neither the Court nor anyone else can determine whether or not its interpretation was inconsistent with the intent of Congress. When the second case arises the question is whether the Court made a mistake in the first instance. And if it did, the question is whether a subsequent Congress has concurred in the change of policy erroneously made by the Court. If in these circumstances the Court reverses its prior decision it assumes the complete responsibility for establishing a new and changed rule of law. It is exercising a legislative function. And to this extent is asserting supremacy in the legislative field subject only to the power of Congress to change the judge-made law by statutory enactment. 25 Texas L. Rev. at 252.

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* Footnotes 4 and 5 of Justice Rutledge's opinion are as follows:

[4] As an original matter, in view of the specific and constitutional procedures required for the enactment of legislation, it would seem hardly justifiable to treat as having legislative effect any action or nonaction not taken in accordance with the prescribed procedures.

[5] See note 4. Legislative intent derived from nonaction or "silence" lacks all the supporting evidences of legislation enacted pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, and reduction to final written form, as well as voting records and executive approval. Necessarily also the intent must be derived by a form of negative inference, a process lending itself to much guesswork. 329 U.S. at 22.

THE CASE LAW

It is settled doctrine that the rejection of amendments offered in the course of enactment is entitled to great weight as an expression of legislative intent. *Norwegian Nitrogen Co. v. United States,* 288 U.S. 294 (1933) (Cardozo, J.); *United States v. Pfitsch,* 256 U.S. 547 (1921) (Brandeis, J.); *Matter of Moore,* 125 Misc. 607, 211 N.Y. Supp. 655 (N.Y. County Ct. 1925), *aff'd without opinion,* 215 App. Div. 655, 212 N.Y. Supp. 876 (1st Dept. 1925). The principal difficulty here, as with all use of legislative history, is

> . . . the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye [Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 529 (1947)].

Practically all courts will also give weight to the failure of subsequent amendments. What sets certain courts apart from others is the relative sophistication and skepticism of their approach. Courts do not seem troubled by theoretical objections to weighing a failure to amend. Their critical comments, if any, are directed rather to the degree of probability that the failure to amend was politically significant. See *Note,* 59 Harv. L. Rev. 1277, 1280-81 (1946).

The following excerpts represent a fairly complete sampling of judicial pronouncements on the subject. The first cases cited are those in which it was flatly said that failure to amend was of controlling significance.

In *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470 (1952), one of the issues before the Court was the ability of the Commission to obtain enforcement of a cease-and-desist order under the Clayton Act without showing an actual or threatened violation. The Court denied the Commission's contentions. It pointed out that while the Federal Trade Commission Act (52 Stat. 113 (1938), 15 U.S.C. § 45(c) (1952)) had been amended to give the Commission this power:

> The Commission has repeatedly sought similar amendment of the Clayton Act provisions involved in this case. We will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it. 343 U.S. at 478-79.

In *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940), Mr. Justice Stone rejected the suggestion that Congress had intended wholly to exclude labor organizations from the operation of the Sherman Act. He said that over a period of thirty-two years the Court had held that labor unions were not so exempt, and that in that time "Congress, although often asked to do so, has passed no act purporting to exclude labor unions

wholly from the operation of the Act." 310 U.S. at 487-88. And in footnote 7: "Eleven bills introduced in Congress shortly after the passage of the Sherman Act providing, among other things, for the exemption of labor from the provisions of the Act, failed of enactment." *Ibid.*

In *Electric Battery Co. v. Shimadzu,* 307 U.S. 5 (1939), the Court interpreted certain provisions of the Patent Act. Mr. Justice Roberts said that the relevant sections

> . . . have repeatedly been amended and other portions of the patent act have been revised and amended from time to time since the decisions pointing out that § 4886 did not prevent the foreign inventor from carrying back his date of invention beyond the date of his application. Congress has not seen fit to amend the statute in this respect and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts. 307 U.S. at 14.

The opinion does not make clear whether it is the rejection of proposed amendments or failure to take any action which is thought conclusive. It is to be noted, however, that these aspects of a statute's history appear to be treated alike. To the same effect, see Mr. Justice Sutherland in *Missouri v. Ross,* 299 U.S. 72 (1936).

Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52 (8th Cir. 1940), was a suit brought to enjoin alleged violations of the Fair Labor Standards Act. Defendants argued that their employees were exempted by virtue of sections dealing with certain marine industries. Holding against them, the court said:

> While we do not think it necessary to refer to the legislative history of the Act, we think it worthy of note that an amendment providing for the exemption of employees engaged in the "manufacture of fishery products" was rejected. The refusal of Congress to thus broaden the Act to include the manufacture of fishery products clearly shows its intention to omit the manufacture of such products. This is a circumstance which should be weighed with others. 113 F.2d at 58.

To the same effect is *Madden v. Brotherhood and Union of Transit Employees,* 147 F.2d 439 (4th Cir. 1945). There, Judge Parker, without discussing the point, said that he was confirmed in his interpretation of the National Labor Relations Act, 29 U.S.C. § 159(c) (1956), by the fact that Congress had rejected several proposed amendments which would have incorporated the appellant's construction.

A New York case following this line is *Sylvan Mortgage Co. v. Stadler,* 113 Misc. 659, 185 N.Y. Supp. 293 (N.Y. Munic. Ct. 1920). The question there was whether Chapter 136 of Laws of 1920, permitting the defense of unreasonableness in suits for rent, was retroactive. Holding that it was not, the court said:

> If there was any doubt as to the correctness of these rulings it has been set at rest by the failure of the legislature in the extraordinary session of September, 1920, to make the necessary amendments and its failure to do so may be accepted as an adoption of the judicial construction. 113 Misc. at 661, 185 N.Y. Supp. at 295.

It is interesting to compare this case with *American Laundry Mach. Co. v. Union Trust,* 153 Misc. 55, 274 N.Y. Supp. 898 (Sup. Ct. Monroe County 1934), where the court said that the *passage* of an amendment to a statute meant that as originally enacted it had not had the effect now specifically provided for.

A particularly horrible example of the "rejected amendment" rule of construction may be found in *People v. Puritan Ice Co.,* 24 Cal. 2d 645, 151 P.2d 1 (1944). The issue there was whether sales of ice by factory to packers were subject to retail sales tax. The court held that they were, and said:

> Finally, it is of some significance that in 1943, after decision in the *Monterey* case holding that ice sold to packers of vegetables is not a sale for resale, the Legislature passed a bill amending the Retail Sales tax . . . [exempting such sales from the tax]. . . . Although that bill was vetoed by the Governor, still its passage by the Legislature indicates an impression on its part that it was necessary to specifically exempt ice sold for such purpose. 24 Cal. 2d at 652-53, 151 P.2d at 5.

The only unqualified refusal to attach weight to the failure of an amendment which I have found is in *Commonwealth v. Quaker City Cab Co.,* 287 Pa. 161, 134 Atl. 404 (1926), *rev'd on other grounds,* 277 U.S. 389 (1928). The issue there was applicability of the income tax to taxicab companies. The court said:

> That the Legislature in 1923 refused to amend the act of 1889 so as to expressly include taxicabs is of no moment, nor is the fact that in 1925 it struck out taxicabs when amending the earlier statute. We are construing the act of 1889, not that of 1925. 287 Pa. at 168, 134 Atl. at 407.

This is also the only mention of the incongruity of interpreting statutes in the light of action of subsequent legislatures.

There are cases, however, in which an attempt is made to express standards by which the weight of a legislature's rejection of an amendment is to be measured. Thus in *Moore v. Cleveland Ry.,* 108 F.2d 656 (6th Cir. 1940) the court refused to draw any inference from the failure of an amendment to the Internal Revenue Code because, in the years in question (1938-40), Congress had been faced with many more grave concerns.

It is fairly usual for courts to notice how far the amendment had gone before it was defeated. For instance, in *Order of Ry. Conductors v.*

Swan, 329 U.S. 520 (1947), Mr. Justice Murphy dealt with unsuccessful amendments as follows:

> Finally, petitioners point out that Congress has failed to amend § 3, First (h), so as specifically to exclude "yardmasters and other subordinate officers" from the jurisdiction of the First Division, despite the introduction of two bills to that effect in the Senate in 1940 and 1941. These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the statute is without meaning for purposes of statutory interpretation. 329 U.S. at 529.

A New York case containing similar language is *Ross v. Arbury,* 206 Misc. 74, 133 N.Y.S.2d 62 (Sup. Ct. N.Y. County 1954). That was an action against the State Commission Against Discrimination asking for a declaratory judgment to the effect that the Commission was without power to require by regulation that employers post notices advising employees of their rights. The plaintiff relied on the failure of a bill sponsored by the Commission, which would have expressly given it this power. The court said:

> The plaintiff argues that the Legislature, by not acting, intended to deny the commission such power or authority. The rules of statutory construction on implications from legislative inaction must be applied cautiously, particularly in instances where bills have not been reported to the floor, or where there is no record indicating the reasons for the disposition of them. 206 Misc. at 77, 133 N.Y.S.2d at 64.

A more elaborate discussion was given in *Kneeland v. Administrator, Unemployment Compensation Act,* 138 Conn. 630, 88 A.2d 376 (1952). The issue was whether receipt of a retirement pension disqualified one from unemployment compensation. The court said:

> The plaintiff also points to the fact that there was introduced at the 1951 session of the General Assembly a bill amending the statute in question by inserting an express provision to the effect that the receipt of retirement pay or a pension would disqualify an individual for unemployment compensation, with certain limitations; Sub. for H.B. 1182, 1951 Sess., § 12; and that this bill failed of passage. That this bill was rejected might mean either that the General Assembly felt, as contended by the plaintiff, that the receipt of a pension ought not to disqualify for unemployment compensation or that it believed that receipt of a pension should disqualify but that the proposed amendment was unnecessary because the act as it stood was adequate to provide for disqualification for that reason. Since the considerations which moved the General Assembly to reject the bill are so uncertain, its action in so doing is of no material assistance in interpreting the statute. 138 Conn. at 634-35, 88 A.2d at 378.

See also *United Milk Producers of California,* 47 Cal. App. 2d 758, 118 P.2d 830 (3rd Dist. Ct. App. 1941).

Stronger expressions of doubt may be found in the following two cases. In *City of Vanceburg v. Plummer*, 275 Ky. 713, 122 S.W.2d 772 (1938), the issue was whether a city had to obtain a certificate of convenience and necessity before constructing an electric power plant. It was shown that an attempt to amend the statute to require this specifically failed. The court said:

> It is argued that this shows the Legislature intended that a city should not be required to obtain from the Public Service Commission a certificate of convenience and necessity before beginning the construction of a light, heat and power plant, but that is mere conjecture. The rejection of the amendment is entitled to little weight, since the court can have no means of knowing the reasons that influenced the Legislature in such rejection. It could have felt, and perhaps did feel, that the Act of 1934 . . . was clear without the additional amendment, and that to add language to make certain that which was already without doubt was wholly unnecessary. Where the language of a statute is doubtful or ambiguous, resort may be had to the journals or to the legislative records showing the legislative history of the act in question in order to ascertain the intention of the Legislature, but this rule does not apply where the language of the statute is plain and unambiguous. Rejection by the Legislature of a proposed amendment to an act is, at most, only a circumstance to be weighed along with others when choice is nicely balanced. 275 Ky. at 720-21, 122 S.W.2d at 776.

A recent federal case, *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), construing the Tariff Act of 1930, contains this language:

> The defendants press the legislative history of § 526 negatively. In 1954, certain proposals of the Treasury Department were introduced in Congress to prevent affiliated concerns from invoking the import prohibitions. From the fact that the amendments were not enacted into law, the defendants argue that they, embodying substantially the Government's position in these cases, were "rejected" by Congress. But actually the proposals were withdrawn, and from this situation I am able to derive no ulterior significance. The reasons for the withdrawal are not clear, and nothing appears to prevent a re-introduction and possible future enactment. If the failure of enactment of every amendment offered for the consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless. 155 F. Supp. at 82.

Conclusion

The likelihood is very great that in New York, and in other jurisdictions, the failure of an amendment to a statute would be thought a significant part of its legislative history. However, in the absence of a New York Court of Appeals decision, one cannot predict with certainty how such history would be handled in New York. It seems fair to suppose, however, that the recent opinion, *Ross v. Arbury*, 206 Misc. at 77, 133

N.Y.S.2d at 64, decided in 1954, would be influential. The court there seemed concerned about the reasons for the Legislature's action, and expressed doubt that the failure of amendments which do not reach the floor is significant.

Unfortunately, not enough legislative history of New York laws is available to make it possible to explain away the rejection of an amendment which has reached the floor. It might be wise, therefore, to offer technical amendments to statutes singly, or at least isolated from controversial measures, to reduce the incidence of potentially embarrassing failures.

There is a rule of evidence that proof of repairs undertaken after an accident cannot be used to show prior negligence. The reasons for the rule are: first, that the inference is not the most probable one and second, that it would be against public policy to discourage owners from making improvements on their property. Annot., 170 A.L.R. 7, 10 (1942). It is anomalous that those who undertake to repair a statute should run greater risks.

L. B.†

November 24, 1958

CHARLES H. WILLARD, ESQ.
Davis, Polk, Wardwell, Sunderland & Kiendl
15 Broad Street
New York 5, N. Y.

Dear Charlie:

Your letter of November 18, 1958 raises a problem with which I have long been concerned. I must say that I myself, as a lawyer, have used the principle—if it is a principle—for my own purposes. I was counsel in a case and argued it in the Court of Appeals some years ago in which the failure of the Legislature to enact a rule was at least of collateral interest. Respondent argued that the plaintiff's attorney at the trial should have asked the question "What caused you to fall?" in a broken rope case, *Betzag v. Gulf Oil Company*, 298 N.Y. 358, 83 N.E.2d 833 (1949); 300 N.Y. 576, 89 N.E.2d 528 (1949); 301 N.Y. 576, 93 N.E.2d 489 (1950). Arguing as appellant that the authorities are conclusive that such a question would be objectionable, I wrote in my brief as follows:

† Begley, See Contributors' Section, Masthead, p. 394, for biographical data.

> Although it is obviously difficult enough to predict construction of statutes even with the statute enacted, and case law developing, it would seem that under the procedures proposed in 1934 by the Commission on the Administration of Justice (Proposed Rule 37) and in 1940-46 by the Judicial Council (Proposed Civil Practice Act, § 345-a) the question, "What caused you to fall," would definitely, in the exercise of a sound discretion, be deemed objectionable. For example: The Council proposal originally provided "Testimony of a non-expert witness shall not be excluded from evidence on the ground that it is in the nature of an *inference or an opinion,* provided that *the facts upon which such inference or opinion is based have been personally observed by the witness* and are stated by him, if, in the opinion of the court, they are capable of being stated." (Emphasis added.)
>
> [T]he Legislature refused to enact this bill. Indeed the bill was modified to meet objections in 1943 and following years, emphasizing discretion in the court, and setting forth various provisos. Still the bill was not enacted. The Council study, urging the change, emphasized the need is most pressing in New York "where as this study shows, *the rule has been most strictly enforced*" (p. 633). See the following Reports of the Judicial Council, 1940, pp. 52, 331-66; 1941, p. 13; 1942, 10-13; 1943, 11, 56; 1944, 11, 47; 1945, 11, 53. Bills were introduced as follows: 1940 Sen. Int. No. 527, Pr. No. 538, Unreported by Codes; 1943 Sen. Int. No. 755, Pr. No. 860, Unreported by Codes; Ass. Int. No. 1018, Reported March 3, 3rd reading March 4, Recommitted March 9; 1944 Sen. Int. No. 35, Pr. No. 35, Unreported by Codes; Ass. Int. No. 68, Pr. No. 68, Unreported by Judiciary; 1946 Sen. Int. 449, Pr. No. 450, Unreported by Codes; Ass. Int. No. 560, Pr. No. 569, Unreported by Judiciary. (Emphasis added.)
>
> This is emphatic testimony of the satisfaction of the Legislature with the manner in which the "rule has been most strictly enforced" in New York . . . .

My memory of the various opinions—there were three arguments and one submission in the case—does not indicate that the Court, in reversing, took up the question and did not therefore specifically rely on the failure of the Legislature to adopt the rule originally proposed by the Commission on the Administration of Justice and later recommended, in several modified forms, by the Judicial Council.

Of course, it depends on whose foot is being pinched and by what shoe. I know that many times I have been influenced in my attitude toward the desirability of proposing legislation by the fate which I feared the proposal might meet in the Legislature. Let us take a few situations. Suppose there is a general rule of law, with respect to which one has serious doubts. Then let us suppose that on a study of the topic, one finds that the courts are gradually working out, through exceptions or distinctions, a more satisfactory trend. One might easily fear that a bill which codifies in part and reforms in part might fail to pass. In the Legislature, a bill meets all sorts of pressures. Should one be influenced by a fear that the reforming legislation, if it fails to pass, might interrupt

the trend of judicial decision? I will give you three illustrations, in two of which legislation was proposed and failed, and in one of which legislation was not even proposed at all.

In 1936 the Law Revision Commission made a recommendation relating to liability for injuries resulting from fright or shock, with which a bill was introduced to provide that "in an action to recover for bodily injury or wrongful death hereafter caused, recovery shall not be denied merely because such bodily injury or wrongful death was brought about through fright or shock without physical contact or impact." The purpose, of course, was to overrule *Mitchell v. Rochester Railway Co.,* 151 N.Y. 107, 45 N.E. 354 (1896). The Court of Appeals, itself, having sanctioned a great many exceptions to the rule, had discarded all but one of the reasons given in the *Mitchell* case in *Comstock v. Wilson,* 257 N.Y. 231, 177 N.E. 431 (1931). This bill (which I think was the first occasion that the New York Legislature had to look at the *Mitchell* rule since 1896), was not reported out of Committee in the Assembly and was lost and tabled in the Senate on April 21, 1936, upon a vote. Did the failure to pass indicate a dissatisfaction with the process of judicial decision evidenced in *Comstock v. Wilson,* or an affection for the original *Mitchell* rule? See Leg. Doc. (1936) No. 65 (E); 1936 Report, Recommendations and Studies of the Law Revision Commission, pages 375-454, 1026. I have not followed in detail the subsequent history of liability for fright and shock in the non-contact cases in New York. *Cf. Ferrara v. Galluchio,* 5 N.Y.2d 16, 152 N.E.2d 249 (1958).

In 1943 and again in 1945 the Commission recommended an amendment of the Sales Act as enacted in New York which would have modified the privity rule in actions for breach of warranty of quality or fitness for purpose, so as to extend the warranty to the buyer's employees and to the members of his household. Leg. Doc. (1943) No. 65 (J); Leg. Doc. (1945) No. 65 (A). The 1943 bill was not reported in either house of the Legislature. The 1945 bill was reported in both houses, but recommitted in the Assembly. (Here, by the way, is a good example of how opposition to a particular proposal can be pinpointed and centered, whereas, in a general proposal, opposition is either dissipated or dispersed. The Uniform Commercial Code treatment of this problem you know. Uniform Commercial Code, section 2-318.) A comparable bill introduced on the recommendation of the Commission is before the Legislature this year. (1959 Sen. Int. 863 Pr. 863, Ass. Int. 1732 Pr. 1740. Leg. Doc. (1959) No. 65 (B).)

Notwithstanding the failure of the amendments recommended by the

Commission, the decisions have gone ahead in chipping away at the doctrine of privity, and there has been some discussion in the opinions as to the effect of the Legislature's failure to act. See, *e.g.*, the majority and dissenting opinion in *Bowman v. Great Atlantic & Pacific Tea Co.*, 284 App. Div. 663, 133 N.Y.S.2d 904 (4th Dep't 1954). The *Bowman* case was affirmed, 308 N.Y. 780, 125 N.E.2d 165 (1955). See also *Greenberg v. Lorenz*, 12 Misc. 2d 883, 178 N.Y.S.2d 407 (Sup. Ct. 1st Dep't 1958), where the court said:

> Doubtless the Legislature has refrained from intruding amendatory legislation in the area we have been considering, because it has had these considerations in mind—it believes that a change in a principle originated by a judicial decision can safely be left to and effectuated by decisional law to achieve the most salutory advance. . . . We are not impressed, therefore, by the defendants-appellants' argument concerning the Legislature's failure to pass remedial legislation. 12 Misc. 2d at 888-90, 178 N.Y.S.2d at 412.

The court declined to attribute its decision to any theory other than the erosion of the doctrine of privity.

On the distinction between case law rules and statute law suggested in this quotation, see also the language in *Woods v. Lancet*, 303 N.Y. 349 at 355-56, 102 N.E.2d 691 at 694 (1951). That case concerned liability for pre-natal injuries. Judge Desmond referred to the Commission's study in 1935, which was submitted without a recommendation for legislation and said "[T]hat apparently was because the Commission felt that it was for the courts to deal with this common law question."

It may also be that where the proposed legislation which the legislature refuses to enact is legislation to overcome a previous judicial construction of existing statutes, the attention paid to the definite rejection of the legislation is related to the principle upon which the "practical" or "administrative" construction of a statute has been considered. See, *e.g.*, *Armitage v. Board of Education*, 122 Misc. 586, 203 N.Y. Supp. 325 (1924), *affirmed*, 210 App. Div. 812, 205 N.Y. Supp. 910, *affirmed*, 240 N.Y. 548, 148 N.E. 699 (1925); *Matter of Flaherty v. Craig*, 226 N.Y. 76, 123 N.E. 157 (1919). Compare *Matter of Broderick v. City of New York*, 295 N.Y. 363, 67 N.E.2d 737 (1946).

In 1939 the Commission studied the question of the liability of a principal for negligent injuries inflicted by independent contractors. (This was one of our best studies.) We made no recommendation for legislation in this instance. We wrote: "The Commission's further conclusion is that in particular instances where the unqualified application to the rule would work injustice, the courts of this state, and especially the higher courts, have created exceptions to the rule and have gone far

to obviate the injustice in particular cases." We further stated that we were of the opinion "that an attempt to change the independent contractor rule by legislation, while obviating some objections would give rise to others, equally, if not more, serious." See Leg. Doc. (1939) No. 65 (K); Report, Recommendations and Studies of the Law Revision Commission, pages 409-684.

My recollection of our discussions is not too clear after 20 years. I know that one of the considerations that led to the decision against recommending a statute was that if we did propose a statute we would be attempting to codify affirmatively a large segment of the law of torts, and furthermore, attempting to do so in a pattern of statute law in which there is no place for it. This would be a difficult task at best. However, I am also sure that some of the doubts as to the desirability of legislation arose by virtue of the fact that the study had indicated a trend in the courts with which we were perfectly satisfied, although there might be aberrations here and there. A failure to pass a statute might interrupt the trend. This of course we would consider to be undesirable. Where legislation attempting to deal with a segment of tort law is proposed and defeated, I think it is quite possible that the Legislature is moved by similar considerations.

I could give many other instances. It is very difficult to identify the reason for failure of a statute to pass the Legislature. Sometimes failure means absolutely nothing in a given year; sometimes the amount of legislation in a particular area of law just seems to be enough, and Abbot Moffat once wrote some pretty good stuff with regard to this particular subject. See Moffat, 24 Cornell L. Q. 223, 228-33 (1939). "The second important factor is the almost universal attitude that the burden of proof is on the plaintiff." Or, as I myself have phrased it, "The law is as it has been for a long time. A few years' wait will not make the stars fall." But this is said with the idea that the courts are always there, that the possibility of judicial relief by techniques of distinguishing and even overruling earlier decisions is one factor that plays a part in legislative failure to act.

I was surprised at the rather definitive conclusion to which your research memorandum came. It was not my impression that the tendency of the courts to rely on failure of amendments to pass as indicating legislative satisfaction with the rule, was so marked, and I do not think that, in New York at least, the principle is as well established as the memorandum indicates. We hear of the cases in which the courts cite failure of a bill in the Legislature because in those cases the court wants us to

hear of them. Let us take an opposite case: In 1937 the Law Revision Commission recommended a bill modifying somewhat the doctrine of *strictissimi juris* in the law of suretyship. Leg. Doc. (1937) No. 65 (Q), Report, Recommendation and Studies of the Law Revision Commission, pages 871, 952, 989. This bill was reported out of Committee in the Senate, went to third reading, but was not voted upon. It was not reported out of Committee in the Assembly. Now, if there is one principle of law that was fairly well established by judicial decision in 1937, it was this one. The ameliorative legislation did not pass; yet this did not prevent the Court of Appeals from deciding as they did in *Becker v. Faber,* 280 N.Y. 146, 19 N.E.2d 997 (1939). See 39 Colum. L. Rev. 1254. I took a quick look at the briefs in that case. Although one argues "Let us not have a slavish adherence to *stare decisis*" and the other argues strictly on the basis of *stare decisis* and the necessity for corrective legislation if the rule should be lifted, I do not think the brief referred to the 1937 bill, nor on a quick reading of the case, did Judge Lehman refer to it.

However, there was another case in which the Court of Appeals definitely mentioned our recommendation in arriving at the very result that would have been provided for in our bill that had failed of enactment. This was *People v. Samuels,* 284 N.Y. 410, 31 N.E.2d 753 (1940), in which the opinion sets forth a construction of the amendments of the perjury statute as enacted in 1935 on the Commission's Recommendation that was completely in line with the construction that would have been stated explicitly by a 1939 Recommendation that failed of enactment. Leg. Doc. (1939) No. 65 (G); 1939 Report, Recommendations and Studies, pages 301-26. The Second Department had construed the statute as making the degrees of perjury mutually exclusive, so that Special Sessions was without jurisdiction if the court determined that the perjury related to a material matter, and, in stating this construction, had cited our 1939 study, noting also that the Commission in 1939 had recommended a rephrasing of the statute, but the recommendation was not enacted. The Court of Appeals in disagreeing with the Appellate Division's construction, in effect concluded that the Commission was in error as to the construction that would be given to the language under the 1935 amendment, and failure of the Legislature to enact the bill did not foreclose a correct interpretation.

I do not know whether or not I could provide as many illustrations of cases where the courts have felt free to go on a path which they have taken, despite the failure of the Legislature to pass corrective statutes,

as the number of cases which your memorandum shows of situations where they have refused. I believe that when the courts do proceed notwithstanding the fact that the Legislature has refused to enact the rule they are about to announce judicially, they do not very often refer to the bill which failed. I believe that when they do refer to the bill which failed, and treat the non-enactment as indicating legislative policy, they do it to buttress a conclusion which they have already reached.

This leads up to the possibility of a provision in the General Construction Law. I have a somewhat general question as to the effectiveness of the General Construction Law in any event. *Quaere:* how much can one Legislature bind a subsequent Legislature, even in the area of construction of statutes? See, *e.g., Matter of Bronson,* 150 N.Y. 1, 44 N.E. 707 (1896), and, more explicitly, *Davidson v. Witthaus,* 106 App. Div. 182, 185, 94 N.Y. Supp. 428, 431 (2d Dep't 1905). However, we ourselves, have attempted to use the General Construction Law in several instances, notably Leg. Doc. (1947) No. 65 (N), the proposed bills being disapproved by the Governor; Leg. Doc. (1948) No. 65 (H), becoming Laws of 1948, c. 202; Leg. Doc. (1952) No. 65 (D), becoming Laws of 1952, c. 821.

An interesting case with respect to an attempt by a Legislature to tell a court what previous legislation meant is *Greenough v. Greenough,* 11 Pa. 489 (1849), with respect to Pennsylvania Laws, 1833 No. 28, section 6, and Pennsylvania Laws, 1848 No. 18. Any attempt to tell a court what it can and cannot use in the way of legislative history reminds me somewhat of the original form of the Uniform Commercial Code, Section 1-102(3)(g), "Prior drafts of Text and Comments may not be used to ascertain legislative intent." The comments of our research consultant on this provision may be found in Leg. Doc. (1955) No. 65 (B), pp. 37-40, 1955, Report, Recommendations and Studies of the Law Revision Commission, 163-66.

To summarize all this, I am reminded somewhat of Mr. Justice Jackson's opinion in *Western Union Telegraph Co. v. Lenroot,* 323 U.S. 490 (1944), and see Max Radin, *A Case Study in Statutory Interpretation,* 33 Calif. L. Rev. 218 (1945), especially at 222-25, where, "the successive stages of the bill, the deletions here, the striking out there, the failure to strike out somewhere else," show to Mr. Radin "precisely that the bill had several stages, that some things were stricken out and others were not," and that "so far as legislative history is concerned, Justice Jackson examines it in detail for the majority and finds that it adds up to zero,"

whereas, "for the minority Justice Murphy scarcely mentions it. I think we may properly say that Justice Jackson's brilliant presentation amply justifies the deliberate neglect by Justice Murphy."

All I can say in closing is, that the problem has long bothered me. I think that hardly a year goes by, in the debates between the Commission and the New York State Bar Association committee which cooperates with us, that I do not inject the caveat: we must keep in mind that the ideal which the Committee proposes may not pass and that by virtue of a failure to pass, the old law may have become crystallized. I wish it were otherwise.

I would be glad to get your further ideas, especially with regard to the possibility and efficacy of a statutory change in the rule of construction. We surely could receive it as a suggestion for future study by the Commission. Whether the Legislature would accept the proposition, itself may be doubtful, and then by virtue of the principle so well developed in your memorandum, maybe we would have confusion confounded.

With personal regards, I am

Sincerely yours,

JOHN W. MACDONALD

February 4, 1959

JOHN W. MACDONALD, ESQ.
Chairman, Law Revision Commission
Myron Taylor Hall
Ithaca, New York

Dear John:

I have been remiss in not replying to your comprehensive letter of November 24, 1958, about the problem of unsuccessful attempts to amend a statute. From what you have written, it appears that the New York courts have, at least on some occasions, given weight to the failure of the Legislature to act.

As I indicated in my first letter of November 18, 1958, and as is more fully developed in the Memorandum of Law of August 13, 1958, which I sent you, I feel quite strongly that it is dangerous to attach any importance to what the Legislature fails to do after it has passed a statute.

I suppose the chief architect of what has been referred to in some

texts as the doctrine of the "silence of the Legislature" was Mr. Justice Stone, in other respects a fine jurist. You may remember the amusing article "An Imaginary Judicial Opinion," 44 Harv. L. Rev. 889 (1931), that Reed Powell wrote in the Harvard Law Review at least twenty years ago, making fun of Stone's intricate reasoning about the effect of Congressional amendments to the tax laws on certain disputed regulations of the Commissioner.

As I recall Stone said in one case that it is part of the function of a legislature to fail or refuse to act; therefore its failure or refusal to act has significance. I think this is nonsense, but if the Supreme Court has said so, it may be effective nonsense. Is there any other material, judicial or otherwise, that supports or rebuts what Stone said?

You have been very close to the legislative process, and I have not been too far away from it. We both know that the failure to legislate can come at any one of a number of stages in the legislative process, and can be the result of any one of a thousand different reasons.

There is a strange charm in legislative history. It always gives the appearance of deep scholarship to an opinion, a brief or a law review article.*

The drift of the more recent cases seems to be more sensible; they show an increasing skepticism to pick out legislative accidents as a basis for decision. A stern warning to the same effect from a man of your authority might do a great deal of good.

So far as I know, no one has ever considered the policy point which I mentioned in my letter to you of November 18, 1958. Is there any real analogy between the rule that evidence of repairs after the accident

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* *Editorial Note*: The scanty and haphazard nature of "legislative history" in New York (and presumably in most other States) is described in an article entitled *Background Materials for Statutory Interpretation in New York* by A. Fairfield Dana, Esq., Editor of the New York State Legislative Annual, 14 The Record of the Association of the Bar of the City of New York 80 (February 1959). Mr. Dana comments as follows on the effect of an unsuccessful amendment at 99-100:

> The amendment of a bill, during the course of its passage through the legislature, can bear upon the proper interpretation of the bill as finally enacted. There is even recent authority to the effect that, when a bill seeking to amend an existing statute fails altogether to pass the Legislature, some inference can be drawn from such failure as to the intended meaning of the existing statute. However, in my own view, it is somewhat hard to understand how the failure of a particular bill to pass the Legislature can be considered directly relevant to the interpretation of the statute sought to be changed, at least when such bill was not reported out of committee or when there is no clear record of the reasons why the bill was not enacted. Everyone knows that in a session of the Legislature many meritorious bills may be buried without full consideration in the last minute rush. There is also authority indicating that an appellate court should be reluctant to overrule lower court interpretations of a statute when bills designed to change that interpretation have been vetoed by the Governor. But this seems to me to rest on the questionable assumption that the Governor's veto at a later session of the Legislature sheds light on the intent of the Legislature which in an earlier year passed the statute so interpreted by the lower courts.

is inadmissible and evidence of attempted repairs to statutes that need repair?**

With all best regards,

Sincerely,
CHARLES H. WILLARD

** *Editorial Note*: See Mr. Justice Jackson's language in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950). The Immigration Service had introduced bills in Congress for certain exempting legislation; the bills were reported favorably in both Houses, but failed of passage. Mr. Justice Jackson said:

> On the other hand, we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations.