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A MINISTRY OF JUSTICE IN ACTION

The Work of the New York State Law Revision Commission

BERNARD L. SHIENTAG

While the Lord Chancellor, in Gilbertian fashion, still sings that "the law is the true embodiment of everything that's excellent" and that "it has no kind of fault or flaw," we have long abandoned any attempt to maintain the position so complacently taken by Coke in the second part of the *Institutes* that the "Common Law . . . is the absolute perfection of reason."

The pattern of the law and its administration have, especially since the eighteenth century, been subjected to constant criticism. "A system that is never censured," said Bentham, "will never be improved."¹ And this criticism, often uninformed, haphazard, and unscientific in character, has resulted in notable improvement. We have come to understand that the law is a constant growth, adapting itself to new conditions and to the varying needs of successive generations. Like all human institutions it has its elements of strength and weakness, its virtues and its faults. For us in this country Mr. Justice Holmes "with penetrating insight . . . saw and revealed the processes by which the Common Law, when it fulfills its mission, is always adopting new principles from life though never quite succeeding in discarding the débris of outworn doctrines,—a consummation which could be attained only if growth were to cease."²

By the interaction of the judicial process and express legislation the continuous growth and development of the law are accomplished. It is true, as Mr. Justice Holmes boldly proclaimed decades ago, that the judge is a legislator, that he enlarges and supplements the law, that he not only discovers but often makes the law. Limits there are, however, often disappointingly narrow, to this exercise of the judicial function. Respect for precedent, particularly in the domain of private relations, is the necessary foundation of judge-made law. Relief from oppressive rules in this field must generally be sought from the legislative branch of the government.

Our progress in connection with the reform of the substance of the law has been slow. Anachronisms and outmoded legal rules have been permitted

¹Quoted in CLAUD MULLINS, *IN QUEST OF JUSTICE* (1931) 2.

²Justice Harlan Fiske Stone, Introduction to JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS (1936) xii.

to remain although they have outlived their usefulness and in some instances operate unjustly. This condition has been ascribed by some to the conservatism of the majority of the bench and bar, manifesting itself in indifference and even, at times, in active opposition to progressive legal innovations. There is some basis for this criticism.

But there was a more fundamental and compelling reason for our slow progress in the reform of the law in this state. There was no permanent state agency whose function it was to undertake this task. What was everybody's business tended, except on sporadic occasions, to be nobody's business. In England, Bentham, Lord Westbury, and Lord Haldane pointed out this deficiency. There the criticism was not so significant because the Lord Chancellor, in addition to his judicial duties, had important administrative functions, and was looked upon as the responsible leader in matters pertaining to the reform of the law.³

In this state, the need for a permanent governmental law reform agency was forcefully urged in 1921 by Mr. Justice Cardozo, then Associate Judge of the Court of Appeals. In an address on *A Ministry of Justice*, he said:

"Today courts and legislature work in separation and aloofness. The penalty is paid both in the wasted effort of production and in the lowered quality of the product. On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend. Legislature and courts move on in proud and silent isolation. Some agency must be found to mediate between them. This task of mediation is that of a ministry of justice. The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged In the end, of course, the recommendations of the ministry will be recommendations and nothing more But at least the lines of communication will be open. The long silence will be broken. The spaces between the planets will at last be bridged."⁴

Inspired by this eloquent plea, various steps were taken, culminating in 1934 in the appointment of two permanent state agencies—a Law Revision Commission to deal primarily with matters of substantive law, and a Judicial Council to deal with procedural administration and the business of the courts. No more far reaching or fundamental action was ever taken in this or any

³In 1933 the Lord Chancellor appointed a Standing Committee to determine whether such legal rules as he may refer to it require revision in the light of modern conditions. See ANNUAL SURVEY OF ENGLISH LAW (1933) 141.

⁴Justice Benjamin N. Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113, 125, reprinted in LAW AND LITERATURE AND OTHER ESSAYS (1931) 41, 42, 68.

other state, looking towards the more efficient administration of justice. It is with the work of the first of these agencies, the Law Revision Commission, that this paper is concerned.

The Commission was charged with the following duties:

"1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

"2. To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.

"3. To receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law.

"4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions."⁵

The statute creating the Commission provided that it was to consist of the Chairmen of the Committees on the Judiciary of the Senate and the Assembly as members *ex officio*, and five additional members, to be appointed by the Governor, four of whom were to be attorneys and at least two of whom were to be professors of law.⁶ The appointed members are Charles K. Burdick, Dean of the Cornell Law School, Chairman; Warnick J. Kernan, of Utica, member of the law firm of Kernan & Kernan; Walter H. Pollak, a practicing attorney of New York City; Bruce Smith, staff member of the Institute of Public Administration; Young B. Smith, Dean of the Columbia Law School. The Commission was organized on July 31, 1934. It selected as Executive Secretary and Director of Research, Professor John W. MacDonald, of the faculty of the Cornell Law School, and appointed a staff of research assistants.

All proposals for revision made to the Commission or which its own research reveals are referred to a committee on projects, which in turn makes recommendations to the Commission with regard to the disposition of the suggestions.⁷ Once a subject is listed for immediate study, a subcommittee

⁵Laws 1934, c. 597.

⁶See Ames, *The Vocation of the Law Professor*, LECTURES ON LEGAL HISTORY (1913) 366, 367, 368.

⁷The Commission has used the following formula to indicate the place of a project on its calendar: I. *Immediate Study*: Projects being studied by Commission; II. *Preferred List*: Subjects suggested to the Commission which are thought suitable for future study; III. *Reserved List*: Subjects suggested to the Commission on which no action negative or affirmative has been taken.

is appointed by the Chairman, which acts with the Director of Research in supervising the project. One or more members of the research staff are assigned to assist each subcommittee and, in special fields, experts may be called to consult with the subcommittee. The subcommittee meets periodically and reports its recommendations to the Commission.

In its first Report,⁸ the Commission advised that it had commenced a study of necessary revisions in the Penal Law. This study is still in process of completion, and it will probably be some years before it is ready for presentation to the Legislature. The Commission recommended a Uniform Criminal Extradition Act, which was vetoed by the Governor, later revised to meet his objections, and enacted into law the following year.⁹ Thirteen bills were introduced in the 1935 Legislature on the Commission's recommendation. All passed the Senate, eleven passed the Assembly, and nine became law after signature by the Governor. Among the notable enactments,^{9a} based upon the studies and recommendations of the Commission, were those providing for the survival of tort actions¹⁰ and that the contributory negligence of parents or custodians should not be imputed to infants.¹¹ The Commission also presented several studies without any recommendation for legislation, among them a study of the New York rule with regard to liability for prenatal injuries.¹²

Its second Report,^{12a} that for 1936, marks a further advance in the work of the Commission. The scientific, scholarly, and painstaking character of the research studies conducted, their importance and utility, the resultant substantial reforms accomplished by way of remedial legislation, combine to make the report extremely valuable to active practitioners and to students of the law generally. The studies formulate the problems under consideration clearly, trace the history of the various legal rules involved and the forces that work upon them, point out how they operate in practice and their present social utility, and indicate how other states and foreign countries deal with the same subject. The Commission has set about to avail itself of the legal improvements made by our neighbors, in this respect bringing legal science in closer harmony with physical science. No longer need we labor under the reproach that the lawyer is "perhaps the only man of science who does not look beyond his own commonwealth," and to whom the legal systems of other countries are closed doors.¹³

⁸*Report, Recommendations, Studies of the Law Revision Commission*, N. Y. LEG. DOC. (1935) No. 60, at 12.

⁹Laws 1936, c. 892.

^{9a}For general discussion of the organization of the Commission and its work in 1935, see MacDonal and Rosenzweig, *The Law Revision Commission of the State of New York &c.* (1935) 20 CORNELL L. Q. 415.

¹⁰Laws 1935, c. 795.

¹¹Laws 1935, c. 796.

¹²*Supra* note 8, at 449.

^{12a}*Infra* note 15.

¹³1 SPEECHES, ARGUMENTS, ETC., OF DAVID DUDLEY FIELD, 491.

The arrangement and paging of the volume make it easy for any lawyer interested in a particular subject to obtain a separate reprint thereof from the state printer at nominal expense. The bar will be shortsighted, indeed, if it fails to avail itself widely of this opportunity.

In 1936 ten bills recommended by the Commissioner were enacted into law.¹⁴ This legislation represents but a small portion of the work of the Commission for this period. Among the subjects still being studied, and in connection with which no recommendation was made to the Legislature in the 1936 Report, are the revision of the Penal Law, state and municipal liability in tort (the recommendation made in 1936 dealing only with certain aspects of highway liability and procedural requirements under the Court of Claims Act),¹⁵ and the subject of the Statute of Limitations.¹⁶

From among the research studies submitted to the Legislature in 1936 the following may be singled out for special mention:

1. *Liability for injuries resulting from fright or shock.* This study was very carefully prepared. It traces the history of the rule laid down for this State in *Mitchell v. Rochester Ry. Co.*,¹⁷ which denied recovery for injuries brought about through the internal effects of fright or shock. The study shows that the English courts and the majority of American jurisdictions have either repudiated the rule denying recovery or have undermined it by numerous exceptions. The American Law Institute in its *Restatement of the Law of Torts* has adopted the rule permitting recovery.¹⁸ The study indicates that there is little basis for fear that by allowing recovery a flood of non-meritorious litigation and successful prosecution of fraudulent claims will result. After posing the problem, the study presents the state of the law in Great Britain, on the Continent, and in the United States, enunciates and evaluates the reasons against recovery, and goes into a detailed consideration of how the rule denying recovery works in practice in different situations. The bill recommended by the Commission provides as follows:

“In an action to recover damages for bodily injury or wrongful death hereafter caused, recovery shall not be denied merely because such bodi-

¹⁴Laws 1936, c. 892 (Criminal Extradition Act); Laws 1936, c. 685 (sealed instruments); Laws 1936, c. 222 (releases); Laws 1936, c. 281 (written agreements without consideration); Laws 1936, c. 731 (risk of loss in executing contract for sale of land); Laws 1936, c. 252, *infra* note 24; Laws 1936, c. 433 (insolvency of insured as condition to suit against insurer); Laws 1936, c. 189 (fourth offenders); Laws 1936, c. 385 (discharge of public improvement lien); Laws 1936, c. 330 (partnership law corrections).

¹⁵*Report, Recommendations, Studies of the Law Revision Commission*, N. Y. LEG. DOC. (1936) No. 65, at 941.

¹⁶*Supra* note 15, at 20.

¹⁷151 N. Y. 107, 45 N. E. 354 (1896).

¹⁸§ 436.

ly injury or wrongful death was brought about through fright or shock without physical contact or impact."¹⁹

It failed to pass the Legislature. The present rule is unsound and operates unjustly. It is to be hoped that the Commission will again recommend the enactment of this bill to the present session of the Legislature.

2. *Contribution among joint tortfeasors and release of joint tortfeasors.**

In its excellent study of this subject the Commission points out that among the anomalies in the English common law is the rule that, where one of several joint tortfeasors has been held responsible for an injury, he has no right of contribution against the other tortfeasors although they were equally liable for the injury. If liability in tort rested solely on injury wilfully inflicted, or existed only where the wrongful act was a crime, the rule would be understandable. But where it applies, as it does in most cases, to unintentional injury, there is neither explanation nor justification for the rule. This is particularly evident when it is seen that the rule has no application to wilful breach of contract.

The rule was abolished in England in 1935, following the report of the English Law Revision Committee, and several states in this country have repudiated it. The Commission is right in believing that the "anachronistic principle" of no contribution among joint tortfeasors should be eradicated as a "thoroughly unfortunate and socially undesirable rule of law." Its bill recommending contribution among joint tortfeasors contained provisions dealing with the effect of a release given to one joint tortfeasor upon the liability of the others and with their right of contribution from the one receiving the release.²⁰ These provisions were designed to facilitate *bona fide* settlements without penalizing either the injured person or the unreleased tortfeasors. The Commission's bill passed the Senate but failed of passage in the Assembly. It should receive strong bar endorsement.

3. *Liability of receivers in mortgage foreclosure for passive negligence.*

A recent decision of the Court of Appeals, following cases in the Appellate Division, First Department, gives immunity to a receiver whose negligent failure to make repairs causes injury. Recovery against a receiver is denied,

¹⁹*Supra* note 15, at 382.

*For a recent discussion of this subject, see Bohlen, *Contribution and Indemnity between Tortfeasors* (1936) 21 CORNELL L. Q. 552.—ED.

²⁰*Supra* note 15, at 709.

even out of funds in his official possession, for damage to person or property caused by his own or his employee's passive negligence.²¹

The Commission, after an extended and thorough research study, concluded that the rule was in conflict with the legal rules applying in similar situations, undesirable in its social consequences and unjust. The bill originally drawn was subject to the possible criticism that it might hold the receiver personally liable for passive negligence. Though this was corrected by amendment, the bill nevertheless failed to pass.²² The recommendation of the Commission is sound, corrects an unjust situation, and should be enacted into law.

4. *Risk of loss in executory contracts for the sale of real property.* The rule, based upon the technical doctrine of equitable conversion, that risk of loss passes to the purchaser as soon as he enters into a contract to buy realty has been abrogated by a statute recommended by the Commission and supported by a scientific research study.²³ The Commission used as a basis for its bill the act approved by the National Conference of Commissioners on Uniform State Laws. Numerous changes were made in the act, but the basic idea, that risk of loss should shift only with a shift in possession or in legal title, was retained. Indicative of the careful treatment that this problem received was the recommendation of a specific bill protecting the vendor against impairment of his fire insurance protection in the interim between the making of the contract and the transfer of possession.²⁴

5. *The seal and consideration.* This is perhaps the most comprehensive study thus far made by the Commission. Aware of the frequent criticisms of the technicalities of the doctrines of consideration and of the seal, the Commission undertook a broad examination of the two fields. Its study is divided into four parts: (a) *The Development of the Doctrine of Consideration*, prepared by Professor Horace E. Whiteside, of the Cornell Law School—a thorough study of the history of the Anglo-American doctrine of consideration and of the modern problems arising under that doctrine; (b) *The Counterpart of Consideration in Foreign Legal Systems*, by Professor A. Arthur Schiller, of the Columbia Law School—a scholarly and interesting exposition of *causa* in Roman and modern continental law and its application to various specific situations; (c) *A Promise to Perform or the Performance*

²¹*Women's Hospital v. Louborn Realty Corp.*, 266 N. Y. 123, 194 N. E. 56 (1934).

²²*Supra* note 15, at 625, 1927.

²³*Supra* note 15, at 761.

²⁴*Supra* note 15, at 762.

of a *Pre-Existing Duty as Consideration*; and (d) *Doctrines Relating to the Seal*. The third and fourth divisions of the study were prepared by research assistants of the Commission under the direction of its Director of Research.

As early as 1765, Lord Mansfield held in a commercial case that a promise in writing was enforceable without regard to consideration.²⁵ The decision of this distinguished judge was overruled, however, by a later case.²⁶ Though modern business conditions are thought by many persons to require that a written promise should be enforceable despite the absence of a technical consideration, the Commission has not yet indicated that it is ready to go this far with respect to the formation of new contracts.

The Commission did, however, attack the problem of consideration where changes are made in existing contracts or where an existing obligation is discharged by agreement. Under the old law, it was the general rule that to change or discharge an existing contract required a consideration.²⁷ The Commission recommended and secured the enactment of a statute which enforces an agreement to change or discharge a contract, or other obligation, without regard to consideration, provided it is in writing.²⁸ The requirement of a writing is a recognition of the good commercial sense of Lord Mansfield's decision and an appreciation of the vagaries of oral proof in this type of situation. The new statute abrogates the rule laid down in *Pinnel's Case*²⁹ and in *Foakes v. Beer*,³⁰ long unwillingly followed by the courts, that a lesser sum cannot be satisfaction for a greater sum due.

The same subcommittee which dealt with consideration embarked upon a complete study of the question of the seal. In all probability no recommendation would have been made by the Commission until the subject had been studied in all its aspects. The situation was complicated, however, by the fact that two bills dealing with aspects of this problem were introduced in the Legislature, independently of the Commission, and enacted into law.³¹ These bills did not meet with the approval of the Commission—one as to form, the other as to substance. To secure the repeal of the latter and to clarify ambiguities in the former, the Commission prepared and introduced its own bill.³²

As a result of the Commission's recommendations, the seal no longer has any effect on consideration,³³ a sealed instrument may be varied by an

²⁵*Pillans v. Van Mierop*, 3 Burr. 1663 (1765).

²⁶*Rann v. Hughes*, 7 T. R. 350 n. a. (1778).

²⁷There are of course, exceptions to this general rule. *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890).

²⁸*Supra* note 15, at 71.

²⁹5 Coke 117.

³⁰9 App. Cas. 605 (1884).

³¹Laws 1935, c. 708; Laws 1936, c. 353.

³²See *supra* note 15, 74-77, 1038, 1039.

³³Laws 1936, c. 685.

executory written agreement,³⁴ and an undisclosed principal can sue or be sued on an instrument under seal.³⁵ The Commission undoubtedly will continue its studies of other problems arising in connection with the use of the seal. These include, for example, the effect of a seal on the Statute of Limitations and the necessity that the authority of an agent who is to execute a sealed instrument be itself under seal.

A further problem was raised as to whether a release without consideration was valid.³⁶ The Commission believed, and rightly so, that all doubt as to the efficacy of this simple device for ending claims and litigation ought to be set at rest. A statute was therefore recommended and enacted making a release in writing valid despite the absence of consideration or a seal.³⁷

6. *Rule against perpetuities and spendthrift trusts.* One of the most important subjects undertaken for study by the Law Revision Commission was the rule against perpetuities and related matters. The rule in New York, the result of the revision of 1828, allows the power of alienation of both land and personalty to be suspended only for two lives in being, plus a minority where a contingent remainder in fee is limited on a prior remainder in fee.^{37a} Although the rule has been in existence without substantial change for over one hundred years, there is still confusion and uncertainty in the law. As eminent an authority as Professor John Chipman Gray stated in 1886, and reiterated in 1915, that: "In no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York."³⁸

A study was made for the Commission by two experts in the field, Professor Richard R. Powell of the Columbia Law School and Professor Horace E. Whiteside of Cornell. After acting upon their proposals, the Commission submitted a tentative draft of a series of changes in the Real and Personal Property Laws to the Committee of the New York State Bar Association appointed to cooperate with the Commission, and to Surrogates Foley, Slater, and Wingate, members of the Commission to Investigate Defects in the Laws of Estates. This last Commission studied the question several years ago and reported against any change in the law.³⁹

Objections were made to that portion of the draft bill which would change

³⁴*Ibid.*

³⁵*Ibid.*

³⁶*Supra* note 15, at 11, 13, 14.

³⁷Laws 1936, c. 222.

^{37a}REAL PROP. LAW § 42; PERS. PROP. LAW § 11.

³⁸GRAY, RULE AGAINST PERPETUITIES (1886 ed.) § 750, (1915 ed.) § 750.

³⁹N. Y. LEG. DOC. (1933) No. 55, 7-18.

the two-lives rules to allow the use of lives in being generally together with the minorities of persons in being at the end of the measuring lives, or, in the alternative, a flat period of not more than 21 years. As stated in the communication of the Law Revision Commission to the Legislature, the objection was made ". . . that during the present period of depression—however valid the criticism directed against the present New York rule—there should be no lengthening of the 'permissible period,' because even under the two-lives rule, a serious situation has resulted from frozen assets, lack of income for *cestuis*, and defaults in mortgages, mortgage participations and guaranteed mortgage certificates."⁴⁰

The objections were especially directed at the possible lengthening of the permissible period for which a spendthrift or inalienable trust might be set up. The Commission, recognizing this as a criticism of the law of trusts in this state, has indicated its intention of making a study of the law relating to spendthrift trusts and other matters pertaining to the administration of trust estates before making a recommendation to the Legislature.⁴¹

In the meantime, the tentative draft statute of proposed changes has been made available to bench and bar. Wide consideration may be given to the proposals, and salutary criticisms and suggestions should result. When the study of the trust problems has been completed, the entire question can be taken up as a whole. The Commission is to be commended for its scholarly and careful approach in this matter. The subject is one of extreme difficulty and importance and well deserves a few years of the most painstaking consideration.

7. *Expert testimony.* The Commission is conducting a broad survey of the field of expert testimony, and has divided the topic into three categories: the expert in personal injury actions; the use of the expert on lunacy commissions; the use of the expert in criminal proceedings. The 1936 report contains a comprehensive introduction to the entire problem and a detailed study of the expert in personal injury actions. The statute recommended by the Commission deals only with the use of expert testimony in such actions.⁴²

A serious abuse of expert testimony in personal injury actions is the role assumed by the expert as protagonist of the party who calls him and pays his fee. Clashes between experts called by opposing parties and deliberate attempts to confuse the jury by using highly technical language often result. The Commission recommended that the court be given power in a

⁴⁰*Supra* note 15, at 481.

⁴¹*Supra* note 15, at 19, 20, 482.

⁴²*Supra* note 15, at 801, 802.

personal injury action to call a disinterested and impartial expert on its own motion.⁴³ This expert would then make a physical examination of the injured person and submit a written report under oath to the judge. Copies of the report would be furnished to the opposing attorneys and either side, or the judge, could call the expert to the witness stand. The expert's fees, to be fixed by the court, would be paid by the parties, either equally or in such proportion as the court might fix, and would be taxed as costs in the action.

Experience alone can demonstrate whether or not the proposed plan is practicable. In the Commission's judgment, however, the experiment was worth trying, not only for the positive benefit to be derived from the findings of an impartial expert, but also for the negative effect the threat of a disinterested expert would have on those called by the parties themselves. The recommendation of the Commission is conservative and reasonably calculated to accomplish a needed reform in the use of expert testimony in personal injury actions. There is no doubt that abuses exist in this field. It is to be hoped that further study will result in recommendations that will meet with legislative approval.

Those interested in the work of the Commission will find in this Report a list of law reform projects from among which the Commission proposes to select subjects for future study.⁴⁴ The Commission very properly fails to list among those projects a study of our matrimonial and divorce laws. While a thorough scientific investigation of these laws and how they operate is most essential, it should be by a special commission created for that purpose. It would be unwise, for many obvious reasons, for the Law Revision Commission to attempt this difficult and highly controversial task. Whether the Commission should engage in a research study of the operation of our laws relating to negligence and determine if the principles of the Workmen's Compensation Law should be extended to cover motor vehicle accidents is more debatable. In any event, it would be helpful if the Commission would decide at an early date whether or not it will embark upon this study itself, so that, in the event it concludes not to, an appeal may be made to the Legislature for the creation of a special commission for this purpose.

We have seen that one of the duties of the Commission is, in appropriate instances, to draft remedial legislation embodying its recommendations for changes in the existing law. This is a delicate task requiring the greatest patience and skill. Wisely, I believe, the Commission has decided, so far as practicable, to submit its proposed bills to committees of various bar asso-

⁴³*Ibid.*

⁴⁴*Supra* note 15, at 24.

ciations and to members of the bench for criticism and suggestions before transmitting them to the Legislature. "The power of legislation," said Professor Ames, "is a dangerous weapon. Every lawyer can recall instances of unintelligent, mischievous tampering with established rules of law."⁴⁵ The drafting of legislation is a scientific experiment with words—a search for the *mot juste*, the careful adjustment of language, and the choice of alternative modes of expression. There is no fixity in the meaning of words, and nobody on this side of the looking glass can say with Humpty-Dumpty: "When I use a word it means just what I choose it to mean—neither more nor less."

An expert legislative draftsman must possess a certain amount of humility, and this regardless of his estate. An interesting story is told in this connection. "Once, when they sat together considering the drafting of a bill, Balfour suggested the alteration of one word in Ashbourne's draft. 'I like that word,' said the Lord Chancellor, 'I wouldn't alter it.' 'Ah,' rejoined Balfour quietly, 'then perhaps you could put it into another Act.'"⁴⁶

Gulliver, in describing the laws of the land of Brobdingnag, noted that "no law of that country must exceed in words the number of letters in their alphabet, which consists only in two and twenty. But, indeed, few of them extend even to that length. They are expressed in the most plain and simple terms, wherein those people are not mercurial enough to discover above one interpretation."⁴⁷ Though this level of simplicity be for us unattainable, draftsmanship should aim at something akin to it. To say what you have to say in the simplest, most direct and exact manner possible, with no surplusage "that the means towards its approximation. Schopenhauer's observation "that thought so far follows the law of gravity that it travels from head to paper much more easily than from paper to head" commands the attention of all who draft legislation.

The Commission is to be congratulated on the constructive achievements accomplished in the first two years of its existence. It is a happy augury of what may be expected in the future. The Commission has already won, and deservedly so, the confidence and support of the bar, with whom it is working in close coöperation. The character of the Commission's work, combining, as it does, scientific legal scholarship and social utility, is at once an inspiration to legal students and practitioners everywhere and a realization of the hopes and expectations of those who urged its creation. How gratifying it must have been to Mr. Justice Cardozo, whose name will ever be identified with this agency, to read this report of the ministry which is surveying "the body of our law patiently and calmly and deliberately, attempting no

⁴⁵Ames, *The Vocation of the Law Professor*, LECTURES ON LEGAL HISTORY (1913) 354, 367.

⁴⁶MARJORIBANKS, CARSON THE ADVOCATE (1932) 93.

⁴⁷Quoted in CLAUD MULLINS, *op. cit. supra* note 1, at 113.

sudden transformation, not cutting at the roots of centuries, the product of people's life in its gradual evolution, but pruning and transplanting here and there with careful and loving hands . . ."!⁴⁸

With both Law Revision Commission and Judicial Council operating efficiently and courageously, the people of the state may look hopefully to the day when our system of law will be made "the best possible instrument of justice."

⁴⁸Quoted in *Report of the Commission on the Administration of Justice*, LEG. Doc. (1934) No. 50, p. 55.