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THE POSITION OF STATUTORY CONSTRUCTION IN PRESENT DAY LAW PRACTICE

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I

Even the title assigned to this article emphasizes a point of view. We will consider the position of statutory construction not from the aspect of judges, appellate or trial, who must decide cases. Instead we are to look at the subject from the point of view of the practitioner, the lawyer himself. The practice of law is of course varied. And there are many fields of knowledge which control that practice. Some of these obviously do not involve law at all. The lawyer is a litigator, an advocate in court or before quasi-judicial bodies. He is also a counsellor, an advisor and a guide. Sometimes he is a specialist. In many of his activities he is called upon to exhibit his knowledge of diverse fields as well as certain of his attributes of character and personality which have little to do with "the law" as such. In all of his activities, however, the solid foundation of law and his knowledge of it provide the reason for his retention and for his presence in the matter. Traditionally, the lawyer's skill in analyzing and interpreting judicial decisions has been a primary requisite for all phases of practice. It is now becoming increasingly necessary for him to refer to statutes, and to develop methods and skills in interpreting them, in order to practice the art of counselling as well as the art of advocacy.[1] This is obviously true in the field of public law, which usually depends on a basic statute. It has become equally true in the great areas of private law with which most lawyers are primarily concerned in the day-to-day practice of their profession.

In public law the primary emphasis is on statute and rule. The function of the case is usually to settle questions of interpretation and constitutionality. In private law there are few statutes of such exclusive authority. The ancient statutes of frauds, of limitations, of wills, are of course examples to the contrary. The modern codifications of well developed ease law, even with their necessary adoption of one of several divergent rules or with their conscious changes in rule or doctrine, usually function within a larger body of law in which decisions remain paramount. The various commercial codes may also constitute exceptions in that they purport to be self-contained. But in the field of private law—and this represents the danger for the practitioner—the problem of the statute is often that it is limited in scope. It may be supple-

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1. *Cf.* Lenhoff, Book Review, 2 J. LEGAL EDUC. 116, 122 (1949).

mental to a large body of cases, or it may "overrule" some or all of the cases in a narrow field. In addition, it is not as readily discoverable in the literature of the subject—encyclopaedia, digest, text or citator. There is a great chance it will be overlooked. Even where notice is given of the existence of statutes, the sentence "this matter is now covered by statute in many jurisdictions" is all too familiar to researchers who are then thrown on their own. We simply do not have the reliable indices of statutes which we have of cases. Nor has the competitive commercial spirit which in its advertising would argue that "looking up law" is machine-like in precision produced, as yet, a digest of statutes, let alone merged statute with case-law background.

The lawyer who knows that his topic is governed exclusively by the Securities and Exchange Act, by rules of the commission to which its administration is entrusted, and by opinions of reviewing courts, is in one position. The lawyer who suddenly discovers that in New York since 1933 a contract to make a will must be in writing is in quite another.[2] The statute—its discovery, let alone its construction,—is the sword of Damocles over the head of every lawyer who fears both moral and legal malpractice. He has been taught the niceties, the distinctions, the ways around cases. He knows reasonably well where to find them, and how to trace back and forward from any conceivable point. By using one method, and all other methods as a check, he rarely misses and, if he does, is rarely blameless. He does not know where to find statutes—not infallibly or even reasonably well. I testify that there is no fool-proof way except one: the laborious reading page for page of the book of statutes itself. Several times it has been necessary for the staff of the New York State Law Revision Commission to read *all* of the New York Consolidated Laws and the selected portion of the unconsolidated statutes which appears as Book 65 of McKinney's edition of the Consolidated Laws. There was no other way to be sure. No commercial indexer could undertake the indexing of each and every period of limitation imposed by any statute, or of each and every definition of crime wherever it might be found.

What is the position of legislation in present day law practice? Is it the bark of the dog, as it would seem from the curricula of law schools, from the availability of research materials, from the techniques of research usually employed in private law? I know that the answer is no. Indeed, I urge that legislation is the heart of the animal. To abandon the metaphor, legislation should be the starting point of research. The presence or absence of a statute should be the first and controlling question in any investigation. That question must be answered, for the entire technique of study will depend on the answer.

In judging cases, and therefore in litigation, we have the testimony of Mr. Justice Frankfurter, who, speaking of his own Court, wrote: "even

2. N.Y. PERS. PROP. LAW § 31(7) as added by N.Y. LAWS 1933, c. 616.

as late as 1875 more than 40% of the controversies . . . were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. . . . It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it." [3]

A court whose primary emphasis is on private law will not be taken entirely away from fields in which the case is the all-important factor. Yet an examination of the reports of the courts of any jurisdiction will reveal an amazing proportion of statutory (and therefore constructional) eases as opposed to purely common law litigation.

II

The first problem of the lawyer in the practice of the art of advoçacy as well as the art of counselling, is to find the relevant statute, if any; the second is to determine its meaning. His technique of construction will differ somewhat from that employed by the court. Mr. Justice Frankfurter has pointed out the objection to the use of the words "legislative intent," and has quoted from a letter of Mr. Justice Holmes: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." [4] Of course, anyone who has ever dealt with the legislative process knows how conspicuously absent is a collective legislative intention. In the article from which I have already quoted, Mr. Justice Frankfurter quotes from Representative Lane, "in the second session of the 78th Congress 953 bills and resolutions were passed, of which only 86 were subject to any real discussion." [5] The procedures of legislatures which throw the burdens of the whole session on the last few days prevent any real legislative, as opposed to committee, consideration of bills on the calendar. Mr. Abbot Low Moffat, a most diligent and scholarly student of the legislative process, and himself an experienced legislator, has written:

> "On the last day of the session when it may be physically impossible to have a printed calendar of the bills, members have little opportunity to secure and look over copies before they are passed. Indeed, if the bill has recently been amended or introduced, there may not even be copies available, and many votes are cast in complete ignorance of what is being votcd on." [6]

To speak of legislative intention, at least with respect to these bills, is obviously to employ a fiction, and the exponents of current "realistic" trends in the law have made fictions unpopular, if not disreputable. Still a fiction, however weak it may prove to be upon logical analysis, is created from sheer

3. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947).
4. *Id.* at 538.
5. *Id.* at 545.
6. Moffat, *The Legislative Process,* 24 CORNELL L.Q. 223, 228 (1939).

necessity. In many instances a choice of meaning must be made. "Which choice is it the more likely that Congress would have made?" asks Mr. Justice Cardozo.[7] In determining that meaning, the practitioner must ascertain the general purpose the statute was intended to serve before he can apply its terms to a particular case. In the ascertainment of that purpose, there is no better indication than the objective of the draftsman of the statute if such can be discovered. The words of the statute are of course important. We cannot do violence to the words.[8] On the other hand, when we are dealing with apparent conflicts, or inconsistencies, or ambiguities, a most sensible starting point certainly is from the question "what did the author mean." We may perhaps conclude that he did not accomplish what he intended to accomplish. If we do, necessarily we are regretful. At least we know what the goal was. If this be true with respect to casual draftsmanship, such as is done by agencies not charged with policy-making, how much more true it is in dealing with deliberate, studied draftmanship by agencies whose function is exclusively concerned with the formulation of legislation and the accomplishment, by draftsmanship, of specific determinations of policy.

It may be necessary to look behind the draftsman, of course. In the heyday of prohibition, and even before the fight for repeal, the attitude of New York, and especially of its cities, toward the federal policy will be vividly remembered. One of the leaders of the "wet" side of the argument annually introduced a bill in the New York legislature to permit the secession of several counties in metropolitan and urban areas and to permit, assuming Congressional approval, the creation of the State of Manhattan. The New York State Bill Drafting Commission,[9] an agency of the very state to be dismembered, presumably was forced, on request of this legislator, annually to draft the bill. For several years the bill held the honored citation of Assembly Introductory Number 1, Print Number 1. In the drafting of that measure, the function of the Bill Drafting Commission was simply technical and ministerial. The purpose of the bill was that of its proponent. The purpose of the draftsman was only to accomplish by words, substantively and procedurally, the objective of the proponent of the bill.

On the other hand, contrast the performance of that function with a comparable New York state activity of somewhat the same time. From 1928 to 1933 following several years of study, the legislative Commission to Investigate Defects in the Laws of Estates reported to the Legislature.[10] The

7. Again quoted in Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 539 (1947), with the comment: "While in its context the significance and limitations of this question are clear, thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind."

8. *Cf. id.* at 543.

9. N.Y. LEG. LAW § 24.

10. See N.Y. LEG. DOC. (1928) No. 70; *id.* (1930) No. 69; *id.* (1931) No. 69; *id.*

chairman of that commission was the most distinguished and influential of all of the New York surrogates since the establishment of that court in his state, James A. Foley. The counsel was the able and experienced dean of the Buffalo Law School, Carlos C. Alden. The commission submitted a voluminous report to the Legislature on scores of subjects—*e.g.* the New York two-life rule, the abolition of dower and curtesy and the substitution of a spouse's right of election, implication of power of mortgage and of sale to executors, etc. Bills were submitted, and each one—for the first time in that state—was accompanied by a statutory note, printed on the bill itself, explaining briefly its purpose and how that purpose was proposed to be accomplished.[11] Eventually the note found its way into the commercial editions of the consolidated laws. The draftsmen of these statutes consciously set out to accomplish certain results. Those results required the use of certain technical devices—*e.g.* the deletion of certain words from old statutes, and the insertion of new words, sometimes in many places, apparently unrelated. At the end of the bill purporting to obtain these results, the draftsmen then told, in language understandable to a lay legislator, exactly what the purpose of the bill was. Can it be supposed that this statement would not be very influential as a constructional aid in any place where construction might ever be required? Perhaps the interpreter might conclude that the purpose was not accomplished; if so, he certainly—privately and publicly—would have to justify his conclusion, for the presumption, at least, is otherwise.

It would not seem that in the ascertainment of the draftsman's purpose as an aid to construction and interpretation it makes much difference whether the draftsman is an official agency or an unofficial one. We are not here formulating inflexible canons or rules. We are simply answering the question "what did this draftsman mean when these words were used."

In the office of the Executive Secretary of the New York Law Revision Commission, perhaps a hundred letters are received yearly with regard to the meaning of statutes not recommended by the Commission. The writers hope that the staff of the Commission can tell them whether published materials are available. The universal answer in these cases acknowledges receipt of the letter and states that the Commission has made no study of the particular problem, and that no Commission materials are therefore available. Frequently, however, citations to other helpful materials can be furnished. A few years ago, I was dictating such a routine reply, when I became interested in the problem itself. In my courses in procedure, I teach for a few hours the subject of arbitration, and I was familiar with certain decisions which had indicated that valuation of loss under fire insurance policies was not an arbitrable matter

(1933) No. 55 [all collected in COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION (Reprint ed. 1935)].

11. See N.Y. Ass. Int. 816, Pr. 843, 1537, 1723, 2199 (1937), which would have compelled the Law Revision Commission to follow the practice.

under the New York statutes. In the previous session of the Legislature, a statute had been enacted which would seem to have indicated that the previous rule was changed, and that these decisions were overruled. The lawyer who had inquired was directed by the court hearing a motion in such a proceeding to inquire of the Commission whether the measure had been recommended by it, and whether its recommendation was available. The simple answer would have been negative. A few minutes' search conclusively demonstrated the source of the legislation. The cumulative indices of the reports of the Committee on State Legislation of the Association of the Bar of the City of New York indicated that a bulletin was devoted to the bill. That bulletin showed that the bill had been recommended and, presumably, drafted by the Committee on Arbitration of that Association, and that its purpose was to change the rule of the decisions in question.[12]

It is immaterial whether the report of this unofficial group is controlling as to meaning. Nor do we need to weigh the relative persuasiveness of a committee report, or the statement of a chairman, or words said in debate on the bill. This search demonstrated clearly only one important fact: what the draftsman intended. But that fact is all-important to the lawyer. At least he knows exactly what the proponent of the change meant to do. His next step is to test the words used with the purpose expressed.

Thus the problem of the lawyer with reference to his own (as opposed to the court's) interpretation of statutes is partly solved by identifying the source of legislation. The court will be aided in interpretation by the research which is disclosed in briefs. The lawyer in interpretation, especially in his activity of counselling, is often unaided by authoritative decision. Before he tests by canons or maxims, he ought first to discover what the draftsman intended. But who is the draftsman? Because of the difficulty encountered in answering that question, it has become important for the annotator of statutes to rely less and less on case material, and more and more on source material. The publishers of McKinney's edition of the New York Consolidated Laws have recognized this important function of the annotator, for assiduously they publish a "Note of Commission" whenever they can discover an official source of the legislation. The reports, recommendations and studies of the Commission to Investigate Defects in the Laws of Estates, the New York Law Revision Commission, the New York Judicial Council, the Executive Committee of the New York Surrogates' Association and other comparable agencies are invaluable aids in the interpretation of statutes which have not yet been judicially construed. The

12. See COMMITTEE ON STATE LEGISLATION OF ASS'N OF BAR OF CITY OF NEW YORK, BULL. No. 7, p. 487 (1941), on N.Y. Sen. Int. 844, Pr. 969, N.Y. Ass. Int. 1021, Pr. 1138 (1941), *amending* N.Y. CIV. PRAC. ACT § 1448, enacted as N.Y. Laws 1941, c. 288, referring to the effect of the bill on *In re* Fletcher, 237 N.Y. 440, 143 N.E. 248 (1924), and tracing the rule back to N.Y. REV. STAT., pt. 3, c. 8, tit. xiv (1829), and Elmendorf v. Harris, 5 Wend. 516 (N.Y. 1830).

volume of correspondence between the administrative offices of these agencies and the bar indicates the use in research to which these published materials are put. It also indicates as nothing else can, even a count of cases in the reports and a calculation of the percentage of cases in which statutes are involved, the important position in modern law practice of statutes and statutory construction.

However, these "notes of Commission" do not disclose the unofficial, private and quasi-public, sources of legislation in New York. Nor do they disclose the sources, even public, if reports are not published. The great departments of the state government—banking, insurance, taxation and finance, commerce, social welfare, etc.—each has its counsel, and each presents its annual program to the Legislature. What do these bills mean to express? What are their purposes? Do they accomplish those purposes?

The committees on law reform, and on specialized topics of all sorts, of the great metropolitan bar associations, and of the New York State Bar Association, are also annually at work. The great activity in law reform in New York since the establishment of the Law Revision Commission and the Judicial Council in 1934 has likewise stimulated many of the upstate bar associations to establish committees on law reform and on state legislation in recent years. Each has its program, sometimes actually introduced but more often submitted as suggestions to legislators or to state agencies, for substantive and procedural amendments.

Suggestions and bills also come from certain other groups, the Commerce and Industry Association, the Merchants' Association, the labor unions, the insurance companies' associations, the savings banks' associations, the savings and loan associations, the chambers of commerce, etc. When one thinks that the great changes in the New York law relative to stockholders' derivative actions in New York came as a result of an elaborate study made by the Chamber of Commerce of the State of New York, now known as the Wood report,[13] one realizes how important the problem of identification of source is to the practicing lawyer.[14]

Another indication of purpose is the legislative history of the bill. The process of report from committee, amendments proposed, rejected or adopted, reference back to committee, and subsequent procedure is most illuminating as to the meaning of the ultimate statute which results.[15] Like the reports of

13. FRANKLIN S. WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (1944) (prepared for the Special Committee on Corporate Litigation, Chamber of Commerce of the State of New York).

14. A new publication known as the New York Legislative Service, and the New York Legislative Annual, is being published by a non-profit membership corporation and annually improved. It will aid in this identification. It contains memoranda published by agencies which propose legislation, describing the purposes of that legislation. It is to be hoped that the Service and Annual will flourish; the start is often discouraging to those who pioneer in new fields and methods of research.

15. For an interesting discussion on the use of legislative materials in determining

debates in constitutional conventions, the legislative history of a bill will often reveal what was *not* intended by the drafting of legislation, a useful revelation in itself. Comments made by bar association committees are frequently helpful in indicating the social and legal background of a bill. Finally the background of the legislation in case law is often of prime importance. The existence of a recent decision, the principle of which is either adopted or rejected by a statute, can indicate the purpose of the statute.[16]

III

A few illustrations of certain types of constructional problems will demonstrate how important statutory construction has become in present day law practice.

In any state in which session laws have been consolidated into general chapters, it is quite common for the legislature at a single legislative session to pass multiple amendments of a single section. Each of the amendments adds its own language to the section as it stood prior to the amendment but neither of them refers to the other. The result is that one of the session laws adds a particular clause to the old section and the other adds another and different clause. When the session is over, two texts of the section exist, each one like the other in major regards but unlike the other by virtue of the new language which is added by one of the two amendments. So far as possible, statutes enacted at the same session of the legislature are to be read together. One of two possibilities exists: (1) the amendments enacted are consistent with each other, or (2) they are contradictory—at least inconsistent in premise or implication. The problem of consistency or inconsistency is itself constructional; the interpretation is directed to each of the amendments. If it is concluded there is no inconsistency, the two sections must be read as one. Yet the formal consolidation shows two sections. In correcting such a situation, in a subsequent legislative session, the draftsman must be careful not to indicate by any device or technique the possibility that his draft is changing the previous law. He will not delete words, nor will he add them. He will do no more than consolidate the two texts so as to incorporate in the old language the multiple amendments made at the same session.[17] On the other hand, if there is incon-

"legislative intent," see Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942).

16. See, *e.g.*, *In re* Kaplen's Will, 195 Misc. 132, 88 N.Y.S.2d 851 (Surr. Ct. 1949); and see N.Y. Sen. Int. 97, Pr. 97, N.Y. Ass. Int. 61, Pr. 61 (1950), and N.Y. LEG. DOC. (1950) No. 65 (O). See also *In re* Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931); and N.Y. Sen. Int. 106, Pr. 106, N.Y. Ass. Int. 183, Pr. 183 (1950), and N.Y. LEG. DOC. (1950) No. 65 (F).

17. See N.Y. LEG. DOC. (1947) No. 65 (N), N.Y. LAW REV. COMM'N, 1947 REPORT, RECOMMENDATIONS AND STUDIES 439-515, relating to "Statutory Definition of Legislation Correcting Errors in the Form of Statutes and to Construction of Statutes Affected by Two or More Amendments Enacted at the Same Legislative Session Without Reference to Each Other." See also N.Y. Sen. Int. 39, Pr. 39, N.Y. Ass. Int. 116, Pr. 116 (1947), vetoed by the Governor, March 26, 1947.

sistency or contradiction he is faced with the necessity of resolving a substantive difficulty. The problem of repeal by implication is often involved. The lawyer, however, before corrective legislation is enacted, must be, in effect, both draftsman and judge. It is his task to find the whole meaning of the two sections before that meaning has been declared by legislature or court.

Somewhat similar to such a problem, although it involved separate sections of the same consolidated law rather than the same section, was the situation which resulted in New York from the enactment of the Uniform Sales Act and the Uniform Bills of Lading Act by the 1911 session of the New York legislature.[18] The Sales Act was the earlier of the two proposed for adoption. It did not adopt the principle of full negotiability of documents of title. The Bills of Lading Act, coming later, adopted full negotiability. But the Bills of Lading Act was adopted first in New York (June 6, 1911) and the Sales Act came over three weeks later (June 30, 1911), but at the same session. There was a provision in the Sales Act as adopted that nothing therein should be deemed to repeal any of the provisions of the act to make uniform the law of bills of lading, if the latter should be adopted. Applying the rule that statutes enacted at the same session of the legislature should receive if possible a construction which will give effect to each, and then the rule that a special statute providing for a particular case is not repealed by a statute general in its terms unless the intention of the legislature is manifest, it was possible to conclude that the Sales Act did not substitute its provisions for the Bills of Lading Act. Not until 1935, however, did the legislature resolve the difficulty,[19] and this change was far from the process of incorporation—it involved amendment with deletion of words and addition of new words. The further problem of implied repeal of course must always be faced with statutes enacted at different sessions of the legislature.

An interesting type of statute which is commonly used today is one which frees the courts of restricted (or limited) portions of a prior doctrine established by *stare decisis,* without interfering with major and co-ordinate doctrines, either statutory or decisional in origin, which are also essential for the determination of controversies.[20] Another type of challenging statute is one which frees the courts completely from the implications of prior law, statutory or decisional, without specifying new rules to govern controversies, inviting instead judicial development of these new rules. In 1942 section 112-f of the New York Civil Practice Act was added:

18. See N.Y. LEG. DOC. (1935) No. 65 (B), N.Y. LAW REV. COMM'N, 1935 REPORT, RECOMMENDATIONS AND STUDIES 37 *et seq.*

19. N.Y. Laws 1935, c. 337, *amending* N.Y. PERS. PROP. LAW §§ 113, 119.

20. See, *e.g.,* Woman's Hospital v. Loubern Realty Corp., 266 N.Y. 123, 194 N.E. 56 (1934), and the successive drafts of attempted curative legislation which was ultimately enacted as N.Y. Laws 1946, c. 402, adding N.Y. CIV. PRAC. ACT § 977-c. The history of these bills appears in N.Y. LEG. DOC. (1946) No. 65 (A), N.Y. LAW REV. COMM'N, 1946 REPORT, RECOMMENDATIONS AND STUDIES 25-29.

"Relief against mistake of law. When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact." [21]

In the statutory note appended to the bill as recommended by the Law Revision Commission the following appears:

"Its purpose *is* to change the existing rule which denies relief merely because the mistake is one of law. Its purpose *is not* to grant relief in every case of mistake of law or to make the same rules applicable as in the case of mistake of fact. It does afford to the court, however, the power to act in appropriate cases involving a mistake of law."[22]

This idea was elaborated in the Recommendation of the Commission:

"To avoid hardship in extreme cases, and in a manifest effort to avoid the rule, a mistake which would seem to have been actually one of law has sometimes been treated by the courts as a mistake of fact. Such cases, however, provide no certain rule for the guidance of the bar, nor are they sufficient in number to establish a precedent in cases where the circumstances would seem to warrant the granting of relief. . . . If the maxim which precludes relief, however, is abrogated, the courts will be afforded a freedom to act which is now denied, and general rules, appropriate to cases involving a mistake of law, may be developed."[23]

A comparable technique was employed in a 1936 Commission bill which failed of enactment.

"In an action to recover damages 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." [24]

The purpose of the bill was to change the New York law resulting from *Mitchell v. The Rochester Ry.*,[25] a decision which followed the English case of *Railways Comm'rs v. Coultas*,[26] as later modified in *Comstock v. Wilson*.[27] The technique turns on the phrase "recovery shall not be denied." As stated in the Recommendation of the Commission:

"Granting that the rule denying recovery in all cases should be changed, it does not appear to be wise to attempt by statute to define the limits which should be placed upon the right of recovery. This is a matter which may best be left to the courts to determine in actual cases as they arise. For this reason, it is recommended that a statute be enacted solely for the purpose of freeing the courts from the decision in the *Mitchell* case, but not compelling the courts to give a recovery in any particular case." [28]

21. N.Y. Laws 1942, c. 558. See N.Y. LEG. DOC. (1942) No. 65 (B), N.Y. LAW REV. COMM'N, 1942 REPORT, RECOMMENDATIONS AND STUDIES 29.
22. N.Y. Sen. Int. 73, Pr. 73, N.Y. Ass. Int. 68, Pr. 68 (1942) (italics added).
23. N.Y. LEG. DOC. (1942) No. 65 (B), at 5, N.Y. LAW REV. COMM'N, 1942 REPORT, RECOMMENDATIONS AND STUDIES 31.
24. N.Y. Sen. Int. 1247, Pr. 1446, N.Y. Ass. Int. 1528, Pr. 1720 (1936). See N.Y. LEG. DOC. (1936) No. 65 (J), N.Y. LAW REV. COMM'N, 1936 REPORT, RECOMMENDATIONS AND STUDIES 375.
25. 151 N.Y. 107, 45 N.E. 354 (1896).
26. 13 App. Cas. 222 (P.C. 1888).
27. 257 N.Y. 231, 177 N.E. 431 (1931).
28. N.Y. LEG. DOC. (1936) No. 65 (J) at 7, N.Y. LAW REV. COMM'N, 1936 REPORT, RECOMMENDATIONS AND STUDIES 381.

Another type of statute which in and of itself presents no particular problem of construction, but which taken together with companion statutes, makes an interesting interpretative situation is illustrated by the series of bills enacted in 1939 on the recommendation of the Commission relating to the doctrine of election of remedies.[29] In 1924 and 1926 the New York Court of Appeals in two notable decisions, *Schenck v. State Line Telephone Co.*[30] and *Clark v. Kirby,*[31] went far to prevent extreme and unjust applications of the doctrine. The cases pointed the way to the New York courts. Therefore no general legislation was proposed. Yet the Commission recommended in 1939 four bills, all of them enacted, and in subsequent years, several others, on this stated basis:

> "It confines its proposals to special cases where lines of decision have caused injustice or confusion and where those lines have existed so long that it seems probable—even in the light of the *Schenck* and *Clark* cases—that only legislation can bring relief." [32]

This type of statute is the converse of the illustration previously given. Instead of freeing the courts from a decision or a doctrine, these statutes applaud the holdings in particular cases and apply the obvious premise to other situations not strictly within the holdings. Hence the statutory notes for each of the bills concluded with this statement:

> "The purpose is to bring the law in this field into accord with the decisions in *Schenck v. State Line Telephone Co.,* 238 N.Y. 308 and *Clark v. Kirby,* 243 N.Y. 295, limiting the doctrine of election of remedies to avoid injustice." [33]

Another type of statute which utilizes doctrines developed in other fields of law in a field where heretofore it was not applied is illustrated by the 1935, 1936 and 1937 proposals of the Law Revision Commission relating to implication of cross remainders:

> "When a limitation, if contained in a will, would create a tenancy in common of legal or equitable interests with implied cross remainders between the tenants in common, then the same limitation, if contained in a deed, shall have the same effect." [34]

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29. N.Y. Laws 1939, cc. 126, 128, 127 and 147, adding N.Y. CIV. PRAC. ACT §§ 112-a, 112-b, 112-c and 112-d, respectively. See N.Y. LEG. DOC. (1939) No. 65 (F), N.Y. LAW REV. COMM'N, 1939 REPORT, RECOMMENDATIONS AND STUDIES 205.

30. 238 N.Y. 308, 144 N.E. 592 (1931).

31. 243 N.Y. 295, 153 N.E. 79 (1926).

32. N.Y. LEG. DOC. (1939) No. 65 (F), at 9, N.Y. LAW REV. COMM'N, 1939 REPORT, RECOMMENDATIONS AND STUDIES 213. See subsequent legislation as follows: N.Y. Laws 1941, c. 315; *id.* 1946, c. 683; *id.* 1947, c. 97, adding N.Y. CIV. PRAC. ACT §§ 112-e, 112-g and 112-h, respectively. See N.Y. LEG. DOC. (1941) No. 65 (L); *id.* (1946) No. 65 (B); *id.* (1947) No. 65 (K), included, respectively, in N.Y. LAW REV. COMM'N, 1941 REPORT, RECOMMENDATIONS AND STUDIES 283; 1946 *id.* 31; 1947 *id.* 249.

33. N. Y. Sen. Int. 483, 484, 485, 486, Pr. 500, 501, 502, 503, N.Y. Ass. Int. 692, 694, 693, 688, Pr. 714, 716, 715, 710 (1939).

34. N.Y. Sen. Int. 1426, Pr. 1637 (1935); N.Y. Sen. Int. 1238, Pr. 1437, N.Y. Ass. Int. 1518, Pr. 1710 (1936); N.Y. Sen. Int. 238, Pr. 244, N.Y. Ass. Int. 282, Pr. 285 (1937). The latter bill was enacted as N.Y. Laws 1937, c. 48, adding N.Y. REAL PROP. LAW §

The basis of the recommendation was stated in 1937 to be:

> "The will cases have been sufficiently frequent to establish a rule. Such limitations in deeds have been so infrequent that no actual decision or dictum exists in the state as to such instruments. The existent doubt is based on statements of text writers and a few expressions by the courts of other jurisdictions. The increasing frequency of deeds of settlement makes it desirable to dissipate the doubt and thereby to prevent unnecessary litigation. Simplicity and clarity of the law unite in urging that the rule of construction in the two cases should be the same." [35]

IV

These several illustrations have been given out of hundreds of possible types of statutes to demonstrate the importance of recognizing the draftsman's purpose. Again, the accomplishment of purpose is another question. In 1935 the statute relating to survival of personal injury actions was enacted in New York:

> "No cause of action for injury to person or property shall be lost because of the death of the person liable for the injury. For any injury an action may be brought or continued against the executor or administrator of the deceased person, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. This section shall extend to a cause of action for wrongfully causing death or continued against the executor or administrator of the person liable therefor." [36]

Four years later the Supreme Judicial Court of Massachusetts held, applying New York law, that no action could be brought against an administrator for damages for the death of the plaintiff's intestate where defendant's intestate whose negligent operation of an automobile caused the death was killed instantaneously.[37] The theory was that the action for wrongful death came into existence only at the death of the plaintiff, and that at that instant there was no person in being who was liable for the wrong.

The Commission wrote in 1942:

> "Under section 118, as the Commission understands it, the death of a person who caused injury to or death of another, or who is responsible therefor, has no effect upon the injured person's right to recover damages for the wrongful act causing death." [38]

66-a. See N.Y. LEG. DOC. (1935) No. 60 (F); *id.* (1936) No. 65 (B); *id.* (1937) No. 65 (C), included, respectively, in N.Y. LAW REV. COMM'N, 1935 REPORTS, RECOMMENDATIONS AND STUDIES 345, 421-30; 1936 *id.* 59; 1937 *id.* 35.

35. N.Y. LEG. DOC. (1937) No. 65 (C) at 5, N.Y. LAW REV. COMM'N, 1937 REPORTS, RECOMMENDATIONS AND STUDIES 39.

36. N.Y. Laws 1935, c. 795, adding N.Y. DEC. EST. LAW §§ 118, 119 and 120, and amending N.Y. CIV. PRAC. ACT § 89, and N.Y. VEHICLE & TRAFFIC LAW § 94-k. See N.Y. LEG. DOC. (1935) No. 60 (E), N.Y. LAW REV. COMM'N, 1935 REPORTS, RECOMMENDATIONS AND STUDIES 157.

37. Silva v. Keegan, 304 Mass. 358, 23 N.E.2d 867 (1939).

38. N.Y. LEG. DOC. (1942) No. 65 (A), N.Y. LAW REV. COMM'N, 1942 REPORT, RECOMMENDATIONS AND STUDIES 19, 23.

Yet the doubt cast by the Massachusetts decision was so substantial as to cause an amendment in 1942 specifically covering the situation:

> "Where death or an injury to person or property resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not occurred simultaneously with such death or injury or had not intervened between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the executor or administrator of such person." [39]

V

The volume of legislation which is accompanied by a detailed explanation of its purpose, or by an explanation of its source, or by any explanation at all, is unfortunately extremely limited. Faced with an unexplained amendment, the practitioner must find the explanation by reference to case and statute law as they existed before enactment of the statute; he must decide whether the statute is limited or drastic in its intended application; and he must test its apparent purpose with the language used. As advocate, he must convince the court. As counsellor, he must advise his client. This is in many cases such a hazardous undertaking that the importance cannot be overemphasized of reference to any existing source material, however inadequate or poorly accessible it may be. There are very few publications which attempt to supply background information for current legislation. Here, as in other growing fields, the need exists long before it is satisfied. The growing volume and complexity of legislation have increased the responsibility of the practitioner year by year, but adequate and organized aids for the discovery and construction of that legislation have not yet been provided. Resourcefulness must fill the gap, for there is no escape for any practitioner from the continuous need for skillful statutory construction.

39. N.Y. Laws 1942, c. 314, *amending* N.Y. DEC. EST. LAW § 118.