July 26, 1957

Memorandum No. 5

Subject: Future Action on Bills not Passed by Legislature.

The following Commission bills failed of passage in the 1957 Session of the Legislature:

A.B. 246 (Retention of Venue for Convenience of Witnesses)
A.B. 247 (Dead Man Statute)
A.B. 248 (Marital Testimonial Privilege)
A.B. 249 (Suspension of the Absolute Power of Alienation)

This raises the general policy question whether the Commission will always, sometimes, or never reintroduce at a subsequent session a bill refused passage by the Legislature. Right from the start the New York Law Revision Commission has reintroduced bills refused passage and has had a number of them enacted. This practice may or may not furnish a desirable precedent for us to follow.

This question may seem to be premature since the 1959 Session is still far off. But if the Commission's decision were to reintroduce some or all of the bills refused passage, this would raise such additional questions relating to the procedure to be followed in the interim period as the following:

1. Should a further study of each matter be made with a view to possible revision of the bill?

2. Should the State Bar and other interested persons and groups be contacted to report the situation and the Commission's decision to reintroduce the bill, thus giving them the opportunity to decide whether to support (or oppose) the bill vigorously?

See also here study on jury instructions - what shall we do about it?

3. Should the members of the Judiciary Committees be similarly contacted in order to give them an opportunity to study the matter more carefully than they could during the Session?

4. Should we write to the Chairmen of the Interim Judiciary Committees, suggesting that they might wish to consider these matters as a part of their work?

Of the four bills refused passage I would guess that at least one, A.B. 249 (Suspension of Alienation) would have a reasonably good chance of passage at a future session.

Action

I suggest that we discuss this matter at the August meeting. I am writing to Mrs. Mulvaney of the New York Commission for whatever information she can give us on their experience and practice and hope to have her reply by then.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:fp

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State of New York
LAW REVISION COMMISSION
Myron Taylor Hall
Ithaca, N. Y.

COPY

July 25, 1957

Professor John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California

Dear John:

I was sorry to hear that some of your bills failed of passage; however, into each life some rain must fall.

It is quite true that we have re-introduced bills which failed of passage with some frequency, and my present rough guess is that we had about a 50 per cent success, if you count as successes every case where the bill finally became law, even though it took two or three tries and was in a revised form. I do not think that there is any general rule about the selection of topics for re-study and the basis on which re-introduction met with success. One of the facts that may be true of our experience and not true of yours, is that we have suffered vetoes of our bills fairly often, and the reasons for veto may differ frequently from the general category of reasons for failure of passage by the Legislature. The chief specific difference would be, I think, that to some extent we have found it easier to identify the reason for a veto and either supply a satisfactory answer in re-introducing the bill in the same form, or meet the criticism by a change in the bill.

Where the bills have failed in the Legislature, we sometimes know quite well that they failed because there was opposition in policy, by some interest which speaks persuasively -- e.g., the casualty insurance people. In such cases, where there is a general feeling among lawyers that the present law is wrong and the Commission bill was right, the guide to re-introduction includes at least several factors: the desirability of reaffirming a recommendation which the Commission feels is sound; second, the futility of re-introducing repeatedly a proposal which is doomed to failure (however, we introduced "Contribution Among Tort Feasors" five times in different forms over a twenty-year period); and, a rather subtle matter, the question of annoying or embarrassing our ex-officio members by asking them to re-introduce a bill which they have already indicated they do not themselves favor or which they, as chairmen, of the Committee it is referred to in the Legislature, do not wish to report or cannot have reported favorably.

In other cases where bills have failed to pass the Legislature, the reason may be a degree of conservatism in the membership of a committee in one or both

houses of the Legislature; in such cases if we are aware of that reason, the tendency would be to hold the measure for a year or two at least before re-introducing. Usually the Commission Recommendation is a recognition of a trend of opinion in the Bar, and it is possible that the situation of the conservative attitude in the Legislature may change. In other cases a bill may fail because some member of the Legislature or some Bar Association group or other group submitting criticisms, has picked flaws in it or has expressed opposition to a particular feature, or to the extent to which a bill goes, or to the way in which they think it would operate in a particular situation. When we can find out that this was the case, we do our best to meet the problem. Sometimes the asserted difficulty in the bill is not really a difficulty, and the criticism is based upon inadequate explanation or failure of communicating the explanation. Sometimes it reflects a difference of opinion among members of the Legislature or of a Committee, but not too sharp a controversy, so that there is a good chance of a decision the other way another year.

As you know, the Commission has quite frequently withdrawn its recommendation for further study when there were complicated or extensive objections; we have also withdrawn the recommendation in some cases merely to allow time for interested persons to study the bill and assert their objections, if any. This practice of withdrawing and re-studying a bill is made possible by very good cooperation by our ex-officio members who tell us immediately about criticisms of our bills that are filed with them. In addition, with respect to Bar Association criticisms and criticisms from organizations such as the New York State Title Association, we have got to the point, after many years, where the bar associations and these groups, on the whole, let us know about their difficulties promptly and directly.

I have the strong feeling that it takes several years at least to work out a satisfactory procedure for finding out why bills don't pass. In the first place, it takes quite a while to get general acceptance, as a matter of course, of the proposition that you are not a pressure group and are not lobbying, and that your whole interest is to improve the law. In the second place, the New York legislators are so terribly busy at the time when the objections to Commission bills are being expressed that we have to more or less have a man on hand to talk to them during the brief intervals when they happen to be free to talk, and obviously the man who is there to talk to them must be someone who gets along well with them and does not make a nuisance of himself -- someone who will have access to a busy senator or assemblyman, because the senator or assemblyman and his clerk know that the man will not be a nuisance. As I said, this takes time.

One of the specific things that we have done in the past is to ask our ex-officio members to come to the meeting in the spring when we select new topics, and decide whether to re-introduce bills that failed, and tell us quite informally what they think of the reasons for failure and whether a re-introduction with or without a modification would be useful. Sometimes the failure of a bill results from a combination of factors none of which alone would have been decisive and some of those factors are things unrelated to our proposals or its merits,

which merely happen to coincide. For example, at a particular session there may be a heated controversy which is of interest to the same people as those affected to some extent by our bill and this coincidence occasions a defeat of our bill in the particular year. The ex-officio members cannot of course say that this will not happen again -- as a matter of fact, I don't recall that they ever gave us an explicit statement that this was what happened, but we could tell that this was what might have happened -- what they can do quite often is give their advice informally, and not for spreading on a record, that it would not be objectionable to try the bill again.

It occurs to me that you may have a special problem in view of the fact that some of your studies are made at the direction of the Legislature, and that you request authority to study others. Does this system of specific authorization apply only to the expenditure of monies for a study, or could it be thought to carry over and apply to the presentation of proposals on the topic, so as to affect the question of representation of the same proposal? Since we have never had this question, I do not really know whether any of the New York Commission's experience would be relevant to it. However, I think that the experience of the New York Judicial Council (abolished a couple of years ago) carries some indication that even without a formal requirement of express permission to study and make proposals there may be some feeling in the Legislature that no law reform agency should repeatedly re-submit proposals which the Legislature has rejected.

I hope all this will be of some use to you. My final thought, however, is that this is one of the things that has to be played by ear.

Sincerely yours,

/S/ Laura T. Mulvaney

LTM:tc