ANNUAL REPORT OF THE

NEW JERSEY LAW REVISION COMMISSION

1995

Report to the Legislature of the State of New Jersey as provided by C. 1:12A-9.

February 1, 1996

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I. MEMBERS AND STAFF OF THE COMMISSION IN 1995

The members:

Albert Burstein, Chairman, Attorney-at-Law

Roger I. Abrams, Dean, Rutgers Law School - Newark, Ex officio,
Represented by **Robert Carter**, Professor of Law

Peter Buchsbaum, Attorney-at-Law

Bernard Chazen, Attorney-at-Law

Roger Dennis, Dean, Rutgers Law School - Camden, Ex officio,
Represented by **Grace Bertone**, Attorney-at-Law

William L. Gormley, Chairman, Senate Judiciary Committee, Ex officio

Hugo M. Pfaltz, Jr., Attorney-at-Law

Ronald J. Riccio, Dean, Seton Hall Law School, Ex officio,
Represented by **Ahmed Bulbulia**, Professor of Law

Gary W. Stuhltrager, Chairman, Assembly Judiciary, Law and Public Safety Committee, Ex officio

The staff:

John M. Cannel, Executive Director
Maureen E. Garde, Counsel
John J. A. Burke, Associate Counsel
Judith Ungar, Associate Counsel
Leland J. White, Associate Counsel

II. HISTORY AND PURPOSE OF THE COMMISSION

In 1985, the Legislature enacted a statute creating the Law Revision Commission.[1] The Commission conducts a continuous review of New Jersey's statutes to identify subjects that require statutory revision. This review covers the correction of statutes that conflict, are obsolete or redundant, or require comprehensive revision. The Commission also considers recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and public officers. The Commission's objective is to simplify, clarify and modernize New Jersey statutes.

The Commission opened its office in 1987. Since then, it has filed 32 reports with the Legislature of which 16 have been enacted into law. Many recommendations are now pending before the Legislature. The Commission's work has been the subject of comment in law journals and has been used by law revision commissions in other states. In revising a law, the Commission extensively examines local law and practices and consults the law of other jurisdictions, experts in the area and proposals of learned bodies.

The meetings of the Commission are open to the public. The commission actively solicits public comment on its Tentative Reports which are widely distributed to interested persons and groups. In 1996, the Commission will begin to publish its reports on the internet. In this way, the Commission intends to field more comments on tentative reports and to make its work more accessible to the public.

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925. It produced the Revised Statutes of 1937.

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[1] The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

> a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to
> (1) Remedy the defects, (2) Reconcile conflicting provisions found in the law, and (3) Clarify confusing and excise redundant provisions found in the law;
> b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;
> c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and
> d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

The Legislature intended the work of revision and codification to continue after enactment of the Revised Statutes. As a result, the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies, most recently the Legislative Counsel.[2] In 1985, the Legislature then transferred the functions of statutory revision and codification to the New Jersey Law Revision Commission. [3]

III. LEGISLATIVE ACTION

In 1995, the Legislature enacted into law four of the Commission's recommendations contained in its Final Reports. They are: Uniform Commercial Code Article 3 -- Negotiable Instruments and Article 4 -- Bank Deposits - Collections (L.1995, c.28); Juries (L.1995, c.44); Replevin (L.1995, c.263); and Statute of Frauds (L.1995, c.360).

In addition, the Legislature considered four of the Commission's recommendations introduced in bill form. They were: Administrative Procedure; Fee Discrepancies; Uniform Commercial Code Article 9 -- Filing System Amendment; and Voting Offenses. It is expected that these Commission recommendations will be reintroduced in the 1996 Legislative Session.

IV. FINAL REPORTS

In 1995, the New Jersey Law Revision Commission published four final reports. A final report contains the decision of the Commission on a subject of law. The report contains an analysis of the subject, a proposed statute and appropriate commentary. It is published after the public has had an opportunity to comment on tentative drafts of the report. The final report is filed with the Legislature. After filing, the Commission and its staff work with the Legislature to draft the report in bill form and to facilitate its enactment.

A. Natural and Historic Resources

In 1995, the Commission completed the Report and Recommendations Relating to Natural and Historic Resources (attached to the Commission's 1994 Annual Report). This is the first part of a project begun in 1993 when the Commission entered into a working agreement with the Department of Environmental Protection and Energy to revise the State's extensive environmental statutes. The Report recompiles and rationalizes the law

[2] N.J.S. 52:11-61)
[3] L.1985, c.498.

governing state parks and forests, state monuments and historic sites and the preservation of open spaces. Other reports in the area of environmental protection will be filed in 1996.

B. Judgments

In 1995, the Commission completed the Report and Recommendations Relating to Judgments (see Appendix A). This proposal continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. The current 32 sections include many which are outdated, unclear and superseded in practice by newer, more detailed rules. Even taken together, the statutes and rules do not reflect the totality of current practice.

The Report states the processes by which a judgment or order is recorded and the process by which information concerning subsequent events that affect the judgment are added to the record. A copy of the whole text of the judgment or order is kept by the court. That assures that the detail of a judgment or order will always be available. Entry is made in the Case Docket each time a judgment or order is entered. The docket entry serves as notice to all parties of the existence of the judgment or order and makes the decree effective against them. A judgment or order that is for a sum of money or that affects title to real estate is recorded on the Judgment Docket. That docket provides notice to all persons and makes a judgment a lien against real property. Documents constituting the subsequent history of a judgment such as executions or assignments, also are indicated on the docket with the judgment.

C. Compilation of Criminal Law

In 1995, the Commission completed the Report and Recommendations Relating to Compilation of Criminal Law (see Appendix B). Title 2C of the Code of Criminal Justice (hereafter the Criminal Code) codified criminal law and established a statutory framework to regulate crimes. However, the Legislature did not incorporate all penal provisions found in New Jersey Law when it enacted the Criminal Code. Some criminal law remains in Title 2A. Similarly, when the Comprehensive Drug Reform Act compiled drug offenses in the Criminal Code, a few crimes were left in Title 24. Although the Legislature had intended to move these non-Code criminal provisions into Title 2C, it never completed this codification.

The New Jersey Law Revision Commission examined the criminal provisions within Titles 2A and 24 with a view toward completing the task of codifying New Jersey criminal law. The Report recommends that the

Legislature incorporate into the Criminal Code those Title 2A and Title 24 provisions with continuing validity. Provisions that are obsolete or superseded by other law are recommended for repeal. Provisions that are regulatory in nature are recommended for compilation in other titles of the statutes. The Commission revised the language for some provisions but mainly followed the substantive meaning of the existing statutes. The recommendations contained in this report, if adopted, would help to complete the codification of New Jersey criminal law.

D. Uniform Commercial Code Revised Article 8 -- Investment Securities

In 1994, the National Conference of Commissioners on Uniform State Laws and the American Law Institute --the sponsors of the Uniform Commercial Code -- approved a revision of Article 8 -- Investment Securities, along with related amendments to Article 9 and conforming amendments to other articles. Revised Article 8 has been enacted in 13 states.[4] In 1995, the Commission filed a Report and Recommendations on Article 8 - Investment Securities (see Appendix C).

Revised Article 8 deals with arcane subjects related to the securities holding and transfer system. Existing Article 8, adopted in New Jersey in 1961, is based on a holding and transfer system which assumes that securities are transferred by the physical delivery of certificates. The set of rules contained in existing Article 8 are premised on this practice. Because the majority of securities owners no longer hold physical certificates, existing law does not address the legal consequences of the acquisition, transfer and settlement of securities. In most cases, securities are held and transferred through an "indirect holding" system, that is, the ownership of securities is represented by a book-entry in the records of a depository, clearing house or brokerage firm. [5]

Revised Article 8 delineates the ownership right a person acquires in a financial asset held in the indirect holding system. This ownership right, called a "security entitlement," consists of a package of rights representing a pro-rata share in securities held by a financial institution for beneficial owners. Revised Article 8 provides legal rules for the acquisition and transfer of these investment securities. Therefore, the revision reflects the commercial practices of the marketplace.

[4] The 13 states are: Arizona, Arkansas, Idaho, Illinois, Indiana, Louisiana, Minnesota, Nebraska, Oklahoma, Oregon, Texas, Washington, and West Virginia.

[5] For example, a large proportion of publicly traded securities are held in the name of the Depository Trust Corporation (DTC). The clearing and settlement of trades with these securities is made through the National Securities Clearing Corporation. The DTC is the first tier shareholder of record for most IBM shares traded on the New York Stock Exchange The members of the DTC are the second tier owners. These large banks and brokerage firms hold respective positions in IBM shares by notations on their DTC account records. Similarly, banks and brokerage firms that have accounts with DTC members comprise the third tier of this ownership system. The chain of ownership flows downward to the ultimate owner, for example, a consumer holding through a small brokerage firm.

Revised Article 8 significantly clarifies the rights of third party creditors. Since Article 8 sets the legal foundation for clearance and settlement of trades on a book-entry system, it reduces the systemic risk posed by the insolvency of a financial institution in the indirect holding system. Banks, knowing their secured claims are protected, have incentives to make capital available to financial institutions in times of crisis. Federal Reserve Board Chairman Alan Greenspan has supported the revision..

The Commission's Report recommends that the Legislature enact Revised Article 8.

V. TENTATIVE REPORTS

In 1995, the Commission published two Tentative Reports. A tentative report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A tentative report is distributed to the general public for comment. The Commission considers these comments and amends its report.

A. Evidence

In 1995, the Commission released its Tentative Report Relating to Evidence (see Appendix D). That report follows the 1993 enactment of the New Jersey Rules of Evidence. The procedure used for adopting the rules was the one established by the Evidence Act, 2A:84A-33 through 39. That procedure represents a compromise settlement of the difficult issue of whether the Supreme Court or the Legislature has the power to enact valid rules of evidence. See Busik v. Levine 63 N.J. 351, 367-368 (1973). The procedure involves acquiescence by both the Legislature and the Court; by using this procedure any question of which branch has the power to make rules becomes moot. As a result, it is desirable that the New Jersey Rules of Evidence be what was intended, a comprehensive statement of the law of evidence.

However, a number of statutory sections that deal with the admissibility of evidence overlap with or duplicate the rules. In some instances, differences in terminology create the potential for confusion. In all cases, the overlap obscures the statutory intention of stating evidence rules comprehensively in one place. Some of these sections were identified as superseded both in the current Rules of Evidence and in its predecessor. These sections serve no purpose but to confuse.

The Report recommends the deletion of all statutory sections that duplicate or conflict with the Evidence Rules. However, in many instances, an evidence provision is part of a statute that deals with other subjects. Elimination of these provisions would require the revision of the sections in which they are embedded. The Report does not recommend amendments to repeal these provisions except when they are in clear conflict with the Rules.

B. Notice of Pending Action, Enforcement of Judgments, Public Sales and Foreclosure

In 1995, the Commission published its Tentative Report on Notice of Pending Action, Enforcement of Judgments, Public Sales and Foreclosure (see Appendix E). The Commission's review of these statutes continues the effort begun in 1989 to revise Title 2A provisions governing the courts and the administration of civil justice. Thus far, the Commission has completed six projects in this area; four have been enacted by the Legislature.

This Report proposes revision of the law on four subjects: Notice of Pending Action (lis pendens), Enforcement of Judgments, Public Sales, and Foreclosure. While each of these subjects is separate, their interrelationships make it desirable to treat them together. The law of foreclosure presents the greatest substantive problems. Practitioners report that it is far more burdensome to foreclose a mortgage in New Jersey than in other states. That difference has the effect of reducing the availability of mortgage capital here. Simplification of the foreclosure process involves revising the law directly controlling an action for foreclosure, and, even more, the law regulating public sales. Complication in the public sale law and the delay it engenders is the most important problem in the foreclosure process. The law on public sales regulates sales held to enforce judgments as well as sales that follow foreclosure. As a result, revision of the law on public sales is best done in conjunction with revision of the law on enforcement of judgments. Foreclosure on property also involves use of the law allowing the filing of a notice of lis pendens. The simplification of that law, and the solution of constitutional problems connected with it, is necessary to simplification of foreclosure.

Notice of Pending Action

The lis pendens procedure permits a party who institutes an action concerning real property to provide notice of the action to potential purchasers of the property, thus preserving the subject matter of the action until judgment is obtained. Current statutes were enacted in the nineteenth century with amendments to solve constitutional infirmities identified in Chrysler v. Fedders Corp., 519 F.Supp. 1252 (D.N.J. 1981), rev'd, 670 F.2d 1316 (3d Cir. 1982). See

also, Connecticut v. Doehr, 501 U.S. 1 (1991). This proposed revision retains the substance of the existing statute, while greatly simplifying its provisions. The term "notice of pending action" has been substituted for the archaic Latin term "lis pendens."

Enforcement of Judgments

The current law on enforcement of judgments includes many sections that are outdated, unclear or superseded in practice by newer, more detailed rules. As a whole, these sections fail to reflect current practice. The current law does not give proper guidance to a party trying to enforce a judgment or to the public officials who enforce it. The proposed law is a comprehensive statement of the law relating to enforcement of judgments

In addition to clarifications brought about by revisions in terminology, the Commission proposes some substantive changes. Foremost among these changes is the abandonment of the current requirement that personal property be preferred to real property in sale to satisfy a judgment. This priority has little foundation in today's society, and the requirement that personal property be exhausted before execution on real property makes it difficult, if not impossible, to insure the title to real property acquired through an execution sale. The Commission also proposes that the enforcement procedure be driven by written enforcement instructions from the judgment creditor to the enforcement officer. This innovation conforms the statutes to recent case law and practice.

Public Sales

Both the current sections and the Commission proposal concerning sales under execution apply to all sales conducted by sheriffs and other officers, whether pursuant to enforcement orders on money judgments or mortgage foreclosure. However, the current law includes many sections that are outdated, unclear, and superseded in practice by newer more detailed rules. It also fails to regulate certain aspects of sales, allowing a variety of local practices. As a whole, the current law fails to reflect present practice.

The Commission proposals involve a codification of current practice, as well as some significant changes to simplify and shorten the process of public sale. For example, the Commission proposal requires that the sale be advertised in newspapers only one time. That change and the inclusion of an example of a sufficient advertisement should reduce both the time and cost of advertisement. The proposal also reduces the length of the adjournments that the sheriff may grant the debtor from one month to 14 days. Adjournments are routinely given; reducing their time period will shorten the foreclosure process. In addition, on issues where practice varies, the Commission proposal establishes a standard.

The Commission proposal attempts to deal with the constitutional requirement that notice be given to holders of subordinate liens before property is sold to satisfy a prior lien. See New Brunswick Savings Bank v. Markouski, 123 N.J. 402 (1991). Under current law, the creditor or foreclosing party must conduct searches up to the date of actual sale and must notify creditors of the sale. The Commission proposes the filing of a notice of the sale in the land records and the notification of interest holders based on a single search before the first scheduled date of sale. This solution balances the constitutional rights of interest holders with the practical burden of multiple searches.

Foreclosure

The Commission simplifies the mortgage foreclosure process, codifies existing law and adds new provisions to expedite the foreclosure process. For example, this proposal dispenses with the writ of execution currently required, and allows the sale of property upon a judgment of foreclosure. Most significantly, the Commission proposes that if the sheriff cannot conduct the sale within 45 days after the judgment of foreclosure, and if the debtor agrees or if the debtor has abandoned the property, the court may order that the sale be conducted by someone other than the sheriff. New provisions also derive from the Fair Foreclosure Act, recently enacted by the Legislature. The most important of these provisions are those relating to "cure" of default by a debtor. These provisions promote the policy of helping homeowners retain their homes by reinstating their mortgages after missed payments.

VI. WORKS IN PROGRESS

A. Environmental Protection Projects

In 1993, the Commission entered into a working agreement with the Department of Environmental Protection to revise the state's extensive environmental statutes. The project was suggested by Senator Robert E. Littell. The first stage of the project involved identifying the numerous statutes to be included in the project, which are currently scattered through 13 existing titles of the New Jersey Statutes. The second phase involved reorganizing these statutes into eight new subtitles, to be organized under the new title "Environment."

In 1995, the Commission completed work on the proposed new subtitle "Natural and Historic Resources" (see heading Final Reports, supra.) In addition, work has continued on the subtitles "Navigation" and "Riparian Lands," preliminary drafts of which have been circulated in the Department of Environmental Protection and elsewhere for preliminary comment and review. (See Appendix F, "Proposed Subtitle - Navigation, Preliminary Draft March 13, 1995" and Appendix G, "Subtitle - Tidelands, Revised Preliminary Draft - 12/13/95.") Work has also begun on the subtitle "Land Use Regulation."

B. Uniform Commercial Code Article 5 -- Letter of Credit

In 1995, the National Conference of Commissioners on Uniform State Laws approved Uniform Commercial Code Revised Article 5 -- Letters of Credit, with conforming and miscellaneous amendments to Article 9. Revised Article 5 is intended to replace existing Article 5 enacted in New Jersey in 1961.

Revised Article 5 modernizes the law of letters of credit and attempts to achieve consistency with international banking practices codified in the Uniform Customs and Practice for Documentary Credits. Revised Article 5 is mainly a default statute, that is, with few exceptions, its rules may be varied by agreement. A principal objective of the revision is to shore up the "independence principle," and to adopt the "strict compliance" standard for honoring a letter of credit. The independence principle separates the credit from the sales and other contracts underlying the transaction. A bank's decision to honor a letter of credit is based solely on documentary conditions. The strict compliance standard requires a bank to honor a letter of credit only if the documents strictly conform to its terms.

Three issues have elicited public comment: (1) mandatory attorney's fees, Section 5-111(e), (2) court determined issue of bank's compliance with industry standards, Section 5-108(e) and (3) the definition of "good faith,"

Section 5-102(a)(7). It is argued that the mandatory award of attorney's fees to the prevailing party may chill the beneficiary's right to sue the bank for wrongful dishonor; the court determination of bank behavior is violative of a party's right to jury trial; and the proposed definition of good faith as "honesty in fact" is inadequate to protect non-bank parties to a credit transaction.

The Commission held hearings to consider these issues and received several position papers from letter of credit experts. The Commission is in the process of deliberating these issues and is expected to publish a Final Report in 1996.

C. Revision of Chapter 15 of Title 2A

Staff continues to review and revise the statutes in Chapter 15 of Title 2A. Chapter 15 contains 100 sections dealing with civil actions generally. These sections cover a variety of subjects, including the arcane writs of capias ad respondendum and capias ad satisfaciendum. This project is a continuation of the Commission's decision to revise Title 2A in its entirety. The Commission expects to publish a Tentative Report on these subjects in 1996.

APPENDICES

A. Report and Recommendations Relating to Judgments (c:\rpts\judgmt.doc)

B. Report and Recommendations Relating to Compilation of the Criminal Law (c:\rpts\crim.doc)

C. Report and Recommendations Relating Uniform Commercial Code Revised Article 8 -- Investment Securities (c:\rpts\ucc8.doc)

D. Tentative Report and Recommendations Relating to Evidence (c:\evidence\trpt.doc)

E. Tentative Report and Recommendations Relating to Notice of Pending Action, Enforcement of Judgments, Public Sales and Foreclosure (c:\forecls\trpt.doc)

F. Preliminary Draft Report, Proposed Subtitle - Navigation, March 13, 1995 (c:\environ\4nav\nav_edt-2.doc)

G. Revised Preliminary Draft Report, Tidelands, December 13, 1995 (c:\environ\5tide\accept.doc)