AMERICAN LAW INSTITUTE IS ORGANIZED

First Step in a Great Constructive Movement to Restate and Simplify the Law, and Thus Rid Nation of the Burden of Legal Complexity and Uncertainty, Is Taken at Notable Meeting at Washington Attended by Leading Representatives of Bench, Bar and Law Schools—Elihu H. Root Presides and Explains Purpose of Gathering

THE American Law Institute was organized at Washington, on February 23, at one of the most notable meetings in the history of the profession. Invitations had been sent by the Committee on the Establishment of a Permanent Organization for the Improvement of the Law to a list of outstanding figures of Bench and Bar and Law Schools to meet and adopt a plan for dealing with the growing uncertainty and complexity of the law. To each one so invited there had also been sent a copy of a carefully prepared preliminary report, the labor of nearly a year, on the undertaking to be considered. The response testified to the feeling of the profession that the occasion was no ordinary one, and that the opportunity offered for rendering a great public service was unique. The character of the men who formed the Institute, representative of the best that the profession can furnish, is sufficient to launch the new movement under the most satisfactory auspices and to commend it to the intelligent consideration and approval of the public.

The objects of this organization, as stated in the by-laws, "shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." In other words, it aims at a restatement of the law which will be so capably done as to commend itself as authoritative to the courts of the country. In order better to discharge its functions the Institute has been incorporated under the laws of the District of Columbia, for perpetual existence—thus giving that assurance of permanency necessary not only to the work, but also to the creation of public confidence in its character. At the Washington meeting the council, which is to be the governing body, was chosen, by-laws were adopted after a careful consideration of certain important features, and the choice of the subjects which the Institute will take up first for simplification and restatement was practically left to the council there selected. The report of the Committee which formed the basis for the discussion on this point at the meeting proposed Conflict of Laws, Corporation and Torts.

The morning and afternoon sessions in Continental Memorial Hall were for the most part extremely business-like in character. There was discussion, of course, but it was not difficult to reach a conclusion on the points considered. Concededly the most significant thing of all was the spirit that pervaded the meeting—a spirit which caused Chairman Root, in closing the proceedings later in the afternoon, to declare that he was satisfied that "there has been no previous period in the history of the development of American institutions when such a meeting as this, held in such a spirit as has been expressed here, would have been possible." A record of detailed proceedings can hardly do justice to the inspiration and appeal which there was in the idea that an undertaking that had floated so long in the minds of thoughtful men as a sort of unrealizable ideal, was at last taking form and substance and entering on its hopeful beginnings; that a practical plan was being adopted and a definite line of action determined; and—what was equally important for ultimate success—that a start had been made toward getting behind an undertaking in which the country is so profoundly interested the force of an enlightened public opinion.

Hon. Elihu Root was chosen temporary, and afterward permanent, chairman of the meeting, on motion of Hon. Cordenio A. Severance. He began with the statement that it was an inspiring and cheerful spectacle upon which he gazed, the spectacle of men eminent in the great profession of the law who had come from high station and leadership in practice in the various courts of our country from all parts of the Union, to participate in a conference upon the improvement of the law. He continued:

"I have been requested by the Committee to make a brief statement in explanation of the proceedings which bring us to the point where we are now. Most of you know that for many years we have been talking in the American Bar Association and in many State Bar Associations about the increasing complexity and confusion of the substantive law which is applied in all our states and in the federal courts. We have been talking about it. We have had committees appointed, but nothing has been done; and about a year ago a number of gentlemen interested in the subject began to consult as to whether something could not be done, and how it could be done. It was apparent that the confusion, the uncertainty, was growing worse from year to year. It was apparent that the vast multitude of decisions which our practitioners are obliged to consult was reaching a magnitude which made it impossible in ordinary practice to consult them. It was apparent that whatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view upon the same topic. The great number of books, the enormous amount of litigation, the struggles of the courts to avoid too strict application of the rule of stare decisis, the fact that the law had become so vast and complicated that the conditions of ordinary practice and ordinary judicial duty made it impossible to make adequate examinations—all these had tended to create a situation where the law was becoming guesswork.

"You will find in the paper which has been distributed the statement that a count made in 1917 showed 175,000 pages of reported decisions in the United States, as against 7,000 in Britain. Three

years before that I had a count made in the Library of Congress, the result of which I have often stated. It showed that during the five years preceding 1914 over 62,000 statutes had been passed and included in the printed volumes of laws in the United States, and during that same five years over 65,000 decisions of courts of last resort had been delivered and included in the printed volumes of reports. And still it goes on.

"It was evident that the time would presently come, unless something were done, when courts would be forced practically to decide cases not upon authority but upon the impression of the moment, and that we should ultimately come to the law of the Turkish Cadi, where a good man decides under good impulses and a bad man decides under bad impulses, as the case may be; and that our law, as a system, would have sunk below the horizon, and the basis of our institutions would have disappeared.

"The result of the conference was, first, to consider an attempt to secure a great meeting of representatives of the Bar from all over the country, and then the suggestion was made that the meeting would have nothing to do of practical effect, because they would have nothing to work on, and that they would be driven to appoint a committee to study the subject and to report upon it at a further meeting. It was also suggested that for such purpose, merely to come together and appoint a committee, it would be impossible to secure attendance from all parts of the country of the men who ought to be in such a meeting; and accordingly it was determined to constitute such a committee as everybody knew such a meeting would constitute, and let them make a thorough, exhaustive study of the subject, How can the work of restating in clear and simple terms and in authentic form the substantive law be performed?

"Accordingly, such a committee was got together. They secured funds, they employed competent and experienced assistants, and for nearly a year the work has been conducted, and the result of the work is this report which we make to this meeting as if we had been appointed by you to make this study and report, asking you to receive it and to consider it and act upon it.

"Copies of the report have been circulated, sent, I think, to each one of you in sufficient time for you to have an opportunity to read it, and I assume it will not be necessary to spend the day in re-reading it here. The idea of the report is that if we can get a statement of the law so well done as to be generally acceptable, made the basis for judicial consideration, we will have accomplished at the outset a very great advance.

"We recall the part played in judicial decisions by what Judge Story said, not only in his decisions, but in his text books, in his writings; the part played in judicial decisions by what Chancellor Kent said in his great work. To take recent instances, take the work on equity written by John Norton Pomeroy. I have not followed the reports closely enough to know whether it still continues, but for a good many years after the publication of that work the courts quoted what he said with practically the effect that they would have quoted a great judicial decision.

"There is a work now which is playing the same part, Mr. Williston's work on contracts, which is being quoted in that same way.

"Now, if you can have the law systematically, scientifically stated, the principles stated by competent men, giving their discussions of the theory upon which their statements are based, giving a presentation and discussion of all the judicial decisions upon which their statements are based, and then such a statement can be revised and criticised and tested by a competent group of lawyers of eminence, and then when their work is done their conclusions can be submitted to the Bar that we have here,—if that can be done we will have a statement of the common law of America which will be the prima facie basis on which judicial action will rest, and any lawyer, whose interest in litigation requires him to say that a different view of the law shall be taken, will have upon his shoulders the burden to overturn the statement.

"Instead of going back through ten thousand cases it will have been done for him—not a conclusive presumption but a practical prima facie statement upon which, unless it is overturned, judgment may rest.

"If such a thing is done, it will tend to assert itself and to confirm itself and to gather authority as time goes on. Of course it cannot be final, for times are continually changing, new conditions arise, and there will have to be revision after revision; but we will have dealt with the past and have gotten this old Man of the Sea off our shoulders in a great measure.

"It is a great work. It is a work before which anyone might well become discouraged. Unless the work can be done greatly, it is worthless. It is of no use to produce another digest, another cyclopedia. That kind of work is being done admirably. It is no use to duplicate the work of the West Publishing Company, which has done so well. It must be so done as to carry authority, as to carry conviction of impartial judgment upon the most thorough scientific investigation and tested accuracy of statement.

"Can it be done? If it cannot, why, we must go on through this swamp of decisions with consequences which we cannot but dread. The great work of the Roman law had imperial power behind it. Theodosius and Justinian could command and all the resources of a great empire responded. In the simpler and narrower work of the Code Napoleon, again, imperial will put motive power behind the enterprise. What have we? No legislature, no Congress can command; no individual can do the work. Men who come and go, who spend a little time from their ordinary occupations, and go, cannot accomplish it.

"Means must be raised for adequate force, for continuous application. Participation in the enterprise must be deemed highly honorable. Selection for participation must be deemed to confer distinction, it must be recognized as a great and imperative public service. How can it be done? It can be done only if the public opinion of the American Democracy recognizes the need of the service, and that public opinion you here today represent and can awaken and direct.

"That is why the Committee solicited your attendance here, to ask you whether you will put all

that you represent behind the undertaking, so that the American democracy may be behind it.

"You will perceive that it is a simple task in statement, that it stands by itself, and that the organization required is an organization specifically adapted to this particular work.

"I have received a number of letters from friends in various parts of the country suggesting that certain other things ought to be done, especially that there should be a reform of administration of the law, that there should be reform of criminal law. To that I agree, we all must agree. But that is another story. The American Judicature Society, a most excellent institution, is addressing itself to the subject of administration. There is a most excellent society in connection with the criminal law, which is dealing with criminal law. The trouble with the criminal law is chiefly a trouble of administration. In both branches of the law, civil and criminal, there are these existing organizations, which it is not desirable to duplicate or to substitute ourselves for; but further than that, to deal with defects of administration, great defects, requires an organization especially adapted to that purpose, and quite a different organization from one which would be available and effective for this purpose of the scientific study and re-statement of the substantive law.

"Defects in administration have been receiving the attention of the American Bar Association and most of our State Bar Associations for many years. The trouble with reforming them comes when you run against the legislative bodies that have the power to pass the laws necessary to reform them. In my own state most thorough and excellent work has been done on the subject, and when it runs up against the legislature there is always some little thing that the reform hitches on and fails to make progress, and the legislature adjourns without action; and that goes on year after year.

"I busied myself for years in the Senate of the United States in trying to get through reforms in procedure that had been discussed and recommended over and over again by the American Bar Association. Quite often I would get favorable report from the Judiciary Committee; but always there was some little difficulty which prevented their being enacted into law, and the trouble is plain that the motive power behind the demand for reform is not strong enough. You get the real motive power of a people that demand reform behind the demand and no little hitch will occur in the legislature, either of the State or of the Nation.

"But while we are all for reform, we are mildly for reform; we don't put any beef behind it; we don't put any power behind it. Nobody is in danger of being run over by it if he gets in the way. That is the trouble with the demands for reform of judicial procedure, civil and criminal, because almost anyone in the State Legislature or the National Congress can stand in the way and stop it without danger of consequences to himself.

"Perhaps we can help. The gathering of the distinguished leaders of opinion of America here in this hall today will help; the making of a permanent organization to accomplish this re-statement of the law, with the earnest and real interest in the subject on the part of real men, will help; and as time goes on the organization which you have made may accomplish such relations with other organizations and such additional duties, and avail itself of such opportunities, as to aid all along the line in the reform of law and the reform of procedure. But at present it seems plain that the thing to do is to form an organization adapted to this specific thing. Institutions which try to do everything do nothing. This great, difficult task will be load enough for us to carry if we can carry it.

"Gentlemen, many competent observers, many thoughtful students of history, are beginning to fear that the competency of mankind to govern is not keeping pace in its development with the ever-increasing complexity of life in this new era of universal interdependence.

"I have faith that our people will prove themselves equal to the ever-growing, ever-increasing demands upon them, of life, of these strange new years. I have faith; but they can not do it by lying down. No free people, no democracy—and I include in this the American Democracy—can maintain its institutions, its freedom, its justice, its opportunity for the future, unless there be general, practically universal effort, willingness to serve, desire for knowledge, determination to grapple with and deal with the difficult problems that confront humanity.

"We may not succeed, but we can try. Here is one thing we can try. It is something the need of which is universally recognized. It is something the responsibility for which rests especially upon us. It points the pathway where we will be acknowledged the natural leaders of the democracy in its struggles towards better life, towards permanency of institutions. If we fail, who shall succeed? And if none succeed, what becomes of the law which we are, each one of us, from day to day appealing to, and demanding the application of, in the interests of our clients, what becomes of the great system of American law to which we have undertaken to devote our lives." (Applause.)

At the conclusion of Chairman Root's address the report of the Committee was received. Before it was taken up for discussion a member suggested that someone give them an idea of the "mechanics" of the enterprise. Mr. William Draper Lewis, Secretary of the Committee, replied that he thought he could answer the gentleman's question by pointing out what the Committee believe are the four necessary steps to produce something that the Institute, if it is formed, can put forth as its official publication.

"The first step," he continued, "is to select a topic or topics of the law. In the report we have suggested that it would be wise to select at least three topics, but probably not more than three topics at the start. One of the things that the Committee wished out of this meeting was suggestions as to what those topics should be. . .

"Having selected a topic, the next business of the Committee, as we conceive the way in which the work should go forward, is to select what we may call a Reporter, some one person who is responsible for getting before a group of experts on that subject an initial, not complete statement of the topic, but responsible that drafts or parts of the topic are produced. Such a Reporter will have to be an eminent person who is thoroughly familiar with that topic. He must stand out to the country as generally recognized among the members of the legal

profession as having a profound knowledge of that subject, and he must devote his time, for the time being, to that work, and he must be given the necessary assistants. No legal work can be done properly without a thorough examination of the existing authorities. Therefore, that man must have, in view of the vast number of authorities, efficient assistants. Different men are differently constituted. Some men can work best when they practically have very little assistance. Others are accustomed to work, as many of you here are accustomed to operating your law offices, with a large number of assistants; and therefore, whether the Committee should give to this Reporter a number of able men who would assist him, and the character of those men, will largely depend upon the individual characteristics of the particular reporter selected. . .

"The third step is the selection, at the same time that a Reporter is selected, of a group of experts in that subject. Those experts should also be persons who have a profound knowledge of the particular topic. They should also give a portion at least of their time systematically and regularly. They should be compensated. There should be a professional obligation for compensation given, to render systematic and regular attendance at the meetings of the Committee and at work in the time in between the meetings of the Committee. Those of us who have had experience with the Conference on Uniform State Laws know that one of the difficulties of the Conference is that no one is compensated, except perhaps the actual person called draftsman, who is selected. Therefore, too much is left perhaps to the draftsman by the Committee of experts of the Conference. That is an inevitable result, not the fault of the Conference, but the inevitable result of having a group of experts that are not compensated for their work. That is the third step.

"Now, we will imagine that the Reporter has presented a preliminary draft, the Committee has examined that draft, has criticised it, and it is in shape to be put out as a tentative draft and distributed among the members of the Institute and among the members of the profession generally; that it then comes back with criticism to the expert committee; that the Committee return it to the Reporter, and that process goes on, the process of getting out a tentative draft, of having it widely discussed and criticised, and finally the Expert Committee have got to the point where they are willing to stand by that restatement of the law in the general form—I shall not go into that at this time—in the general form as stated in this report.

"Then comes the last step. I do not think anyone who has had any experience in getting out an important piece of legal work wants to have the whole work done by experts on that particular topic of the law. I am quite sure the members of the Committee do not. We believe that the last step is taking this work which has been done by the experts on that topic and putting it before a larger body, such as the members of this Institute that we are talking about, and left them go over it time and time again. When a body of experts in the Conference on Uniform State Laws have finished some one act and they have brought it before the full body of the Commission, they get back a reaction, they get ideas that come not from the expert in that topic, but which come from an intelligent, legally trained audience. That fourth step, this so-called restatement of the law, has to come through. When you are through with that, then you are in a position to determine whether the thing that has been produced, should be put out as the publication of the Institute."

The discussion which followed turned chiefly on the subjects which the Institute would take up for clarification at the outset. The report of the Committee, previously referred to, proposed Conflict of Laws, Corporations, and Torts; and Mr. William Draper Lewis, the Secretary of that Committee, explained that these had been suggested after very careful consideration because they offered a great variety of problems and would thus enable the Institute in its first few formative years to get as wide an experience as possible. However, suggestions as to other subjects were earnestly invited. Ex-Governor Hadley of Missouri and certain other members thereupon urged the advisability of requesting the council, or governing body, of the Institute to give prompt and careful attention to the subject of criminal law, on both substantive and procedural sides, and in case they found a restatement practicable and advisable, that they should proceed to make it.

The suggestion was opposed by others, either on the ground that they did not understand that the Institute was forming for the purpose of dealing with criminal law, or because they did not think it advisable at the outset to cumber the council and the men who were to do the actual work with too many suggestions. The subject of Contracts was also suggested, and it was argued by another member that Corporations, being largely a matter of statute and a subject as to which the text-books had constantly to be revised, was perhaps a trifle too difficult for the Institute to undertake in the beginning. The freest range of discussion was allowed, and in the end the proposals of the committee as to subjects were left unchanged. The Chairman took occasion, however, to state that this did not prevent the council from taking up the subjects suggested, in case it desired to do so.

The by-laws were carefully considered and the tentative draft was amended in some respects in order to perfect an organization calculated to secure the confidence of the public. With this object in view, on motion of Judge Dickinson of Chicago, it was provided that members of the council, which is to be the governing body, should be elected by the members of the Institute, instead of making the council self-perpetuating, as had been suggested. The council, however, was given the power to choose members and fill vacancies until the next annual meeting. Members are to serve for nine years, but the first council is to divide itself by lot into three classes, to serve respectively three, six and nine years, in order to insure a continuity of experience.

The first council chosen consisted of twenty-one members, but they were authorized to select additional members until the next annual meeting, with the proviso that the total membership of the body must not exceed thirty-three. The officers are to be chosen by the council and will hold for one year or until their successors are elected. They will be

a President, vice-president, treasurer and secretary, each having the powers and duties incident to such offices. No member of the council, while serving in that capacity, shall receive any compensation from the Institute. The council was authorized to appoint an executive committee and delegate such powers as it deems proper. Meetings are to be annual. They may be called by the council on three weeks' notice, and shall be called on a written request of fifty members. Fifty members shall constitute a quorum and a majority of the members voting on the question at the annual meeting may amend the by-laws.

The members of the Institute will be those whose names appear on the roll of the Washington meeting on the invitation of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law; the members of the council and any other persons elected by the council or the Institute; during the continuance of their respective offices, the Chief Justice and the Associate Justices of the Supreme Court of the United States, the Senior Judge of each Circuit Court of Appeals, the Attorney-General and the Solicitor-General of the United States, the Chief Justice of the highest court of each state, the president of the American Bar Association and the members of its Executive Committee, the president of each state bar association, the president of the American Institute of Criminal Law and Criminology, the president of the American Branch of the International Law Association, the president of the American Judicature Association, and the president of the Commissioners on Uniform State Laws.

The resolution approving the formation of the American Law Institute was offered by Mr. George W. Wickersham and unanimously adopted. After this the meeting approved a form of certificate of incorporation and by-laws also presented by Mr. Wickersham, who briefly explained that it was drawn under the laws of the District of Columbia, provided for perpetual existence and set forth the objects of the organization as they had been previously stated. A committee on nominations proposed the following twenty-one members of the first council, and the meeting unanimously elected them: Elihu Root, George W. Wickersham, Learned Hand, Victor Morawetz, John G. Milburn, George Wellwood Murray, Harlan F. Stone, Benjamin N. Cardozo, John W. Davis, William Draper Lewis, George E. Alter, Alexander King, Andrew J. Montague, Emmett N. Parker, James P. Hall, William B. Hale, Edward J. McCutcheon, Arthur P. Rugg, Samuel Williston, Cordenio A. Severance, Herbert S. Hadley. The council thus elected was, on motion of Mr. Wickersham, unanimously adopted, "directed to call for further criticism of the plan outlined in the report of the Committee for the Establishment of a Permanent Organization for the Improvement of the Law, to call for suggestions as to the scope of the project and the mode of carrying it out, and to hold hearings if desired by any member of the Institute present at this meeting or hereafter becoming a member."

While the committee on nominations was conferring, Chairman Root took occasion to answer a question that had been asked as to plans for financing the enterprise. He stated that this was a very appropriate question and one that had doubtless occurred to many members. "The volunteer committee that started this matter," he continued, "realized that it would cost a good deal of money to go on with the work. They realized that the work cannot be done by casual dipping in of busy men out of the hours of their ordinary business, that able and competent men have got to be employed and paid to devote their time to the work, in the first instance.

"They realized also that it was impossible to secure funds for any great enterprise so long as it was vague and problematical, and that it was necessary to carry it to such a point that persons appealed to to contribute would see that there was a real movement, with real power behind it, and a reasonable certainty of its going on and doing work. And they felt confident that if this body which has been called together here would put itself behind the undertaking, they could then go to the same sources which have endowed the colleges and the hospitals, and all the great public institutions supported by private contributions, the same sources that supply the money for Eastern Relief and the Red Cross, and be certain that a great public work having public recognition and needing only to be supplied with means to carry it on would meet with a response.

"Of course if the money cannot be raised to pay the expenses, the undertaking will fail. Equally, of course, if this body is to be behind the work, the money will be obtained."

A banquet was held in the evening at the new Willard, at which Chief Justice Taft presided as toastmaster. Ex-Governor Hadley made a very illuminating address on the work accomplished under Justinian and on the preparation of the Code Napoleon. President John W. Davis of the AMERICAN BAR ASSOCIATION spoke briefly on the newly formed Institute and the aid which the American Bar Association can furnish. It is hoped in a later issue to devote to the banquet proceedings the attention which they deserve.

At the meeting of the Council on February 24, Hon. Elihu Root was elected honorary president of the Institute and Hon. George W. Wickersham, president. Judge Benjamin Cardozo of New York was chosen vice-president, William Draper Lewis of Philadelphia, secretary and George W. Murray of New York, treasurer.

Those Irresistible Subsidies

"National subsidies are limited only by the extent of federal revenue, and by the limits, if any, upon the persistence with which new subsidy schemes are urged upon Congress. With respect to matters judicially cognizable, the Supreme Court of the United States may be relied upon to protect state powers. But no organization exists for the restriction of the evils of the subsidy plan. The development of this plan is dangerous to the national treasury; but in favor of any proposed subsidy it is possible to organize a mass of state and local pressure not capable of effective political resistance. Unfortunately neither state governments nor their local subdivisions can be expected to resist encroachments upon state and local authority through the subsidy plan, for governments are usually willing to surrender control over policy in return for additional and immediate revenue."—Yale Law Journal (March).