

AMERICAN LAW INSTITUTE HOLDS FIFTH ANNUAL MEETING

Leading Scholars, Judges and Practicing Lawyers Hold Three-Day Session at Washington to Consider Additional Portions of Tentative Restatements on Conflict of Laws, Agency, Torts and Contracts—President Wickersham Restates Origin and Purpose of the Institute—Chief Justice Taft Congratulates Organization on Its Work—Director Lewis Reports Progress on Restatements to Date—Preparation of Model Code of Criminal Procedure Well Under Way—Restatement of “Property” and “Trusts” — Bar Cooperation—Tentative Drafts Considered Section by Section.

THE fifth annual meeting of the American Law Institute held in Washington, D. C., May 12, 13, and 14, saw the work of restating the law as to Conflict of Laws, Agency, Torts and Contracts carried forward to a substantial and gratifying extent. It also afforded the Director an opportunity to make a statement as to the progress and present status of the work on the Model Code of Criminal Procedure, which has already so far advanced as a result of the labors of Reporters William E. Mikell and Edwin R. Keedy that “it may with reasonable certainty be anticipated that the draft of the Code covering all matters down to Trial can be made public shortly after the first of the year.”

This will include the chapters on Arrest and Bail, the preliminary drafts of which have already been completed, and the chapters on Preliminary Hearing, Methods of Prosecution and Grand Jury, and Indictment. The Reporter announced that the first preliminary draft of the chapter on Indictment was also completed, “with the exception of the commentary dealing with a part of the statutes and decisions on this topic in the several states.” The Reporters and their Advisers are now working on the chapter on Preliminary Hearing.

The Director also announced that the Reporter on Trusts, Mr. Austin W. Scott, had already made considerable progress on the preparation of the preliminary draft of “Trusts,” one of the additional subjects recently taken up by the Institute. He added that Prof. Harry A. Bigelow of the University of Chicago, to whom and a group of advisers the subject of “Property” was recently assigned, has prepared his first preliminary draft of a part of the topic of “Estates.”

There is a natural interest in the proportion of the subjects covered by the Restatements already submitted, and on this point Director Lewis furnished some definite and interesting information. “The drafts submitted for your consideration,” he told the Institute, “together with those submitted on the same subjects in 1925 and 1926, represent somewhat more than one third of Agency and Contracts and one half of the Conflict of Laws. Torts is, of course, a much more extensive subject than any of the others. But the drafts submitted this year with those previously submitted cover Interests of Personality and Privileges to Commit Intentional Invasions of such Interests. The next

topic on Torts and the one on which the Tort group are now engaged is Negligence.”

President Wickersham’s address at the meeting which rounded out the first four years of the life of the Institute was devoted largely to “a consideration of our beginning and our objectives and the nature and the value of the progress we have thus far made.” He deemed this proper because, despite many pronouncements, there still existed in some minds a misconception of the proper function of the Institute. He concluded with an emphatic reassertion of accuracy and clarity as its main object. Chief Justice Taft’s brief address was full of a splendid assurance that the Institute would prove itself by its work, and he especially commended it for having added to its immediate usefulness by the incorporation in its objects of direct aid to the improvement in Criminal Procedure.

The Practicing Lawyer’s Standpoint Asserted

Consideration of the parts of the various Restatements submitted was earnest and careful. Suggestions from the floor were frequent. A point of special interest was the frequency with which the Reporters’ attention was called to the standpoint of the practicing lawyer with reference to the statement of a principle or illustration. It was quite evident that the practicing lawyer was well represented in the membership in attendance and that his idea was not only to help secure a brief and accurate restatement of the law, but also one which would commend itself by reason of its utility to the profession. And at times the point of view of the judge was likewise called to the Reporters’ attention, with a view of making the Restatement as useful as possible to the Bench. Some of the criticisms were merely textual, while some were fundamental, going to the substance of the Restatement itself. Some of the questions raised were immediately settled by a clarifying statement by the Reporter, but many others were noted for further consideration by him and his advisers. And it is safe to assume that the discussion in person with the membership in attendance will cause the Reporters themselves to think of various possibilities of improvement in the text.

The meeting was called to order in the Ball Room of the Mayflower Hotel on Thursday at 10:00 a. m., by President Wickersham. There was a large attendance of the membership, including leading scholars, judges and practicing lawyers from all

parts of the country. President Wickersham delivered his address, and this was followed by the report of the Treasurer, George Welwood Murray. Director Lewis then presented his report, which had previously been printed and distributed to the members. It began with a statement as to "The Progress and Present Status of the Work on Criminal Procedure," to which reference has already been made.

Progress of Work on the Restatement

The report next dealt with "Progress of the Work on the Restatement." It stated that the new tentative drafts submitted represented the work of the Editorial Staff from November, 1925, to November, 1926, and comprised in all 291 sections, while the sections, comments, illustrations and special notes covered 561 pages. Part of the time of the last meeting of the Council had been occupied with a discussion of a part of the preliminary draft submitted by the group working on Business Associations, and it was hoped that this draft, after being reconsidered by the Council in connection with additional matter to be submitted, would be ready for discussion at the next annual meeting.

Part III of the report dealt with the "Acceleration of the Payment of the Donation of the Carnegie Corporation," whereby additional work could be undertaken by the Institute and that already undertaken could be carried forward at full speed. This information appears in the report of the meeting of the Council in the January, 1927, issue of the JOURNAL, and in President Wickersham's address.

Part IV of the Report dealt with the work on the subject of "Property," now going forward along the lines recommended by Prof. Bigelow's special report, and the work on Trusts, which Mr. Austin W. Scott, of Harvard, the recognized authority on the subject in the United States, has in charge. As to this subject the Director calls attention to a slight change in method:

"The Subject of Trusts is much less extensive than any Subject we have heretofore undertaken. The combination of these circumstances has led us to try an experiment which, if successful, may become the model for the way in which the tentative drafts of Restatements in all comparatively small subjects will be produced. The first preliminary draft on which Mr. Scott is now working will, when completed, cover not a part of the Subject Trusts, but the entire Subject. This draft will then be submitted to a group of Advisers and thereafter proceed in the usual way from preliminary draft to preliminary draft until a draft is produced which may be submitted to the Council. He has already made considerable progress on the preparation of the first preliminary draft, but it is too early yet to predict the exact time when the tentative draft of the entire Subject can be submitted to you. However, we may look forward with reasonable confidence to the completion of the entire Subject in three years."

Council's Consideration of Tentative Drafts

"The Relation of the Council to the Tentative Drafts" was the next topic of the report. The report called attention to the work of the Council in giving a searching examination to the tentative drafts submitted by the Reporters, and the increasing difficulty of finding a way to do this effectively as the volume of material increases. It continued:

"The mechanics for treating the drafts submitted by the editorial force to the Council, so that their function with respect to them may be properly performed, presents one of the most difficult problems with which they have had to deal. The first attempt made to solve the difficulty was the appointment of committees to go over the draft with care considering both form and substance, the Council confining themselves to the more important substantive state-

ments of law appearing in the sections. Experience, however, has shown that this plan does not work out as well as was hoped. At present the Council are trying the plan of having the President ask a number of members to consider with care before the meeting small portions, indicated by the President, of the preliminary drafts to be considered at the meeting; each member undertaking this work making a report to the Council on the sections referred to him. At the meeting, as each topic treated in the draft is reached, the criticisms and suggestions made in the Report on the sections in the topic are discussed, though not to the exclusion of suggestions and criticisms by other members. The results of this new plan have so far proved most satisfactory. It apparently enables the Council to turn at once to the matters in the section which should receive their attention."

Plan to Stimulate Bar Criticism of Tentative Drafts

Under the head of "Cooperation of Bar Associations in the Preparation of the Final Drafts of the Restatement," the report said that the invitation to State and the principal local Bar Associations to cooperate by appointing committees to consider the various drafts had been widely accepted. Twenty of these had appointed committees, some having appointed separate committees on each subject undertaken for restatement. Furthermore, Bar Associations were cooperating by calling attention of members to the desirability of procuring tentative drafts, which had resulted in the sale of 4,154 copies of these since the last meeting, exclusive of the 6,751 copies sold to law students for use in connection with their school work. It continued:

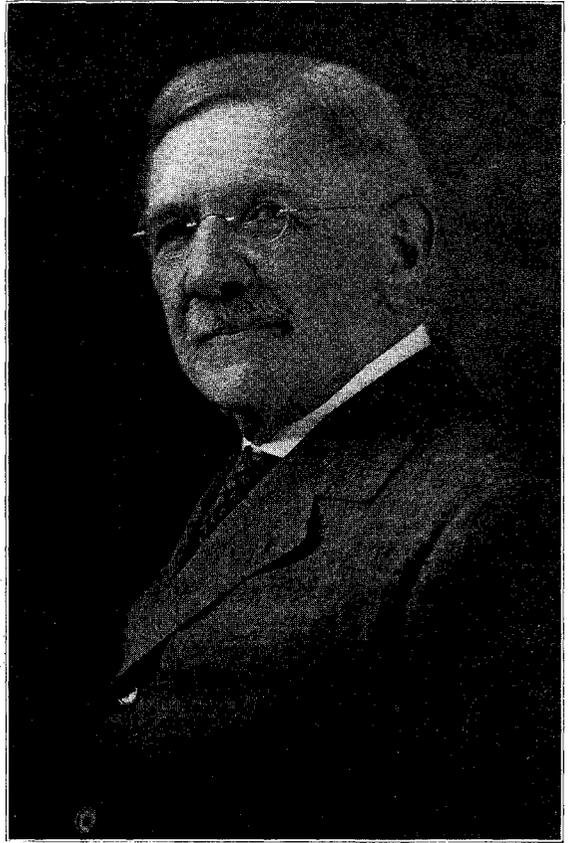
"From all this appointment of committees and distribution of the tentative drafts we have received a considerable number of criticisms and suggestions with a view to their improvement. Nearly all of these criticisms and suggestions have some use and some of them are most important and helpful. At the same time we have not received as many criticisms and suggestions as we hoped. This is doubtless due in part to the care with which these tentative drafts have been prepared. But in spite of the care given to their preparation, the tentative drafts do need to be subjected to searching criticism. Personally I do not believe that we shall obtain this criticism unless we can devise some plan which will stimulate the committees which have been appointed by the state and local bar associations. Several plans have been suggested to this end. One suggestion which appeals to me as meriting serious consideration is that the members of the committees appointed by bar associations in several adjoining states meet at some central location and devote two or three days to a discussion of all the tentative drafts so far published on some one Subject, as Contracts or Agency; if possible, the Reporter or one of his principal Advisers or your Director to be present at these discussions. Thus the committees appointed in the States of Illinois, Indiana, Michigan, Wisconsin and Iowa could meet in Chicago, while those appointed by bar associations on the Pacific Coast could meet in San Francisco.

"I am, of course, aware that no one plan can be put into operation in all parts of the country. The details must be varied according to circumstances. What we desire is discussions of these tentative drafts by groups of representative lawyers. The Reporters need such discussions before taking up the work of preparing the final drafts."

The report added that it was important that criticisms and suggestions by cooperating bar associations of the drafts so far published should be submitted as soon as possible. The acceleration of payment of the Carnegie Corporation's donation will result in its being expended at the end of 1931, or four years from next December. The Institute has kept steadily in view the desirability of completing in final form a definite and significant portion of the Restatement before that date. Its aim, in brief, is to complete in final form by that time the Restatements of the Law of Agency, Contracts, Conflict of Laws and Trusts and a significant portion of Torts, Business Associations and Property.



Harris & Ewing JOSEPH HENRY BEALE
REPORTER ON "CONFLICT OF LAWS"



SAMUEL WILLISTON
REPORTER ON "CONTRACTS"

To make it certain that this is accomplished, the tentative draft of the last part of the matter should be considered at the Annual Meeting in 1930.

A question to which the Council would give early consideration, was whether the revised drafts of all matter which it was desirable to publish in final form before December, 1931, should be presented for consideration and action all at one time, that is at the Annual Meeting in the spring of 1931, or whether the final draft of the first part of the various subjects now being restated should be presented at earlier meetings. While undue haste in preparation of final drafts was undesirable, there was much to be said in favor of so planning the work as to avoid laying before any one annual meeting all the final drafts covering the entire matter prepared during the first eight years of work.

Chief Justice Taft Makes Brief Address

At the conclusion of Director Lewis' report Chief Justice Taft entered the room and as soon as he was seen the members rose in a body. He was escorted amid applause to a seat on the rostrum. President Wickersham felicitated the Institute on his visit and said he was sure the members would be delighted to hear him. The Chief Justice spoke in part as follows:

"It has been exceedingly interesting and I am delighted that I was able to be here. Of course, I must account to you for my time. This is a period when we are writing opinions, and I am sure there

will be some here who will think I would better have spent my time here than in writing those opinions. (Laughter). But it has been full of instruction to hear what you have done as well as to hear what you are going to do.

"I am delighted that you have this money, which is going to make what you do a great work. We do not despise money in this country—and we ought not to—but we may very well rejoice when the money is being devoted to something that will be most useful to the nation and to the people. And I hope you will not be discouraged when you consume the money more rapidly than you expected to spend it, because there is more money that can be gotten for a work which can prove itself, as I am sure this will prove itself. . . .

"I want to felicitate you on your great and chief work, the Restatement of the Law. That is what you organized to do. But it aids your work and it adds much to its immediate usefulness to have incorporated in the objects of your Institute this direct aid to the improvement in Criminal Procedure, and I am delighted that you should have taken it up, and that you should have secured through the Spellman Fund the means of doing this.

"No lover of his country can have gone through the last three or four years without having been stirred deep in his heart over the failure of the administration of our Criminal Law. I am no pessimist about that, however much some people may

think I am. But I think one of the grounds for being optimistic in regard to it is the deep feeling that has evidenced itself all through the country, among the members of the Legislatures and among the people at large as distinguished—I do not want to be invidious—but as distinguished from those gentlemen of our profession whose chief function in the matter of legislation has been in the past to interfere with the effective operation of the criminal law by special provisions to save the case. We have them. We love our profession—but we know it—and if there is not somebody or some organization to look after the Forgotten Man—that is, society at large—we are not going to have an improvement in the administration of the criminal law as we ought to have. Now, I think that Forgotten Man has raised himself so to speak, and here if you offer, as you are going to, an admirable Code to the Legislatures of the States, you will find there are majorities in every Legislature who will be delighted to be instructed and to be helped in putting in a Code that shall be effective, and that shall come from a source of impartiality and of knowledge which may not be doubted.

"I want now to say a word for the small and humble body that I represent. We are trying to do what we can, and Congress has helped us to catch up with the Docket. It is a little difficult to speak with certainty with respect to just how much progress has been made until two or three years pass. The necessary delay in putting into operation the new Act of February 13 postpones our ability to determine. But the Solicitor-General advised me the other day that if we had sat another week we should have been hearing cases which were begun in our Court the first of the Term—that is, since the first of October.

"Now, I do not know whether that will continue. You cannot always tell. But I think that it is an indication that by the extended exercise of the writ of certiorari we are accomplishing what we hoped by the change.

"I was amused at the necessity your director found himself under of assuring those who were interested, that the Council really gave attention—real, earnest attention—to the conclusions which were finally stated. Misery loves company, and I was glad to hear there was some doubt as to whether they were not using just an ordinary rubber-stamp, or whether they were doing the work their responsibilities required them to. I sympathize with that, as that same thing has been queried with respect to the Supreme Court of the United States in the disposition of certiorari; and I am glad to make a similar defense and to assure you that such suggestions are not well founded; that they are as far from being well founded as they were in the story that Attorney-General Knox used to tell of the Congressman who came in to see him and who said to him: 'I would like to get two pardons.' 'What for?' asked Mr. Knox. 'For a postmaster and his son that have been convicted and sent to the penitentiary for embezzlement of public funds,' said the Congressman. 'Well,' Knox said, 'Were they not guilty?' 'Yes, they were guilty, but they were good fellows. They were strong supporters of mine.' Knox said, 'Why should they be pardoned?' The Congressman said, 'I understood there was a custom here, and I came in to claim my right, that

every Congressman had two pardons during a Term.' (Laughter.)

"Now that seems to be the view of some counselors with respect to our allowance of certiorari. (Laughter.)

"One more thing and I am done, and that is I am glad to say we have got the question of a new building for the Supreme Court of the United States fixed. (Laughter). I agree that it has not been with the unanimous consent of the Court—but that is not always present. We have, however, secured an appropriation of one million five hundred thousand dollars to buy the lot,—or the two lots, which lie immediately next to the Congressional Library Building and are just opposite The Capitol. We like our court room very much, and if all we had to do was to sit in the court room, it would be all right. But our records are being distributed all over. I sent out for a record the other day and they had to send to the Senate Office Building to get it.

"You gentlemen of the Bar know how little accommodation we can give you in the Supreme Court, and we must look forward to the growth in our records; we must look forward to a building that should be adequate and dignified; and therefore I think it is an occasion for congratulation that that course is settled. And I think it will go through, because we have the money in the treasury and the still more certain assurance that the Senate wishes to get rid of us." (Laughter and applause.)

Drafts Considered Section by Section

The first tentative draft taken up by the Institute was "Conflict of Laws—Restatement No. 3," prepared by Joseph H. Beale, Reporter—with Mr. Austin W. Scott as Associate Reporter in connection with the Chapters on Status and Corporations—in consultation with the Director and the Advisers. It was considered by the Council at a meeting held December 17-20, 1926, and as amended it was submitted to the Institute with a view to criticism and suggestion for improvement. The Restatement with Indexes and Comment covers 178 pages and makes quite a substantial addition to the work already done on this subject. The topics treated begin with "Status," under which Marriage, Legitimacy, Adoption and Guardianship are treated. Then follows the Chapter on "Corporations," under the first topic of which—"Creation, Recognition and Dissolution"—there are certain comments emphasizing a distinction between "the corporation, the legal instrument, and the association, the real actor, the recipient of rights and the performer of obligations." And it is stated that "in the Restatement of this subject, therefore, property will be said to be acquired, held and transferred by the Association through the corporation; and action will be ascribed to the Association."

This distinction called forth objection on the ground that it was a metaphysical view not in accord with the general legal understanding of the matter and unnecessary as comment in a Restatement. One member, for instance, insisted that the corporation was a thing—the real actor—and that it did not help to say the association was the actor and the corporation the mere instrument. Others expressed a similar view. Mr. Beale replied that the parts of the comment which were questioned were necessary to make clear the principle on which

the Restatement on this subject was based. He suggested that the Restatement be proceeded with, and that this question, if necessary, be taken up later.

The topics, "Action by a Corporation," "Carrying on Business," "Shareholders," "Interference with Internal Affairs," and "Associations Incorporated in More Than One State," were then considered section by section, and numerous suggestions were noted by the Reporter for further consideration. Various sections stating what a state cannot constitutionally provide with regard to the admission of a foreign corporation and conduct of business within its borders were objected to as involving no conflict of laws but as being plain questions of constitutional law. The Reporter met the criticism by saying that these sections were so intimately related to the subject that it was deemed advisable to include them. Chapter 7 was devoted to "Property" and under this general subject the topics of "Property in General," "Immovables," and "Movables," were taken up.

Consideration of the Restatement on Conflict of Laws was carried over to the session Friday morning. At its conclusion "Agency—Restatement No. 2" was taken up, Mr. Floyd Mechem, the Reporter, being on the platform for the purpose of answering questions and explaining any of the sections or comments which members wished to know more about. This Restatement with comments and index covered 111 pages and embraced the following topics: "Definitions," "Termination of Authority," "Termination of Apparent Authority," "Termination of Power Given for Security," and "Termination of the Principal's Consent that a Sub-Agent May Act." The Reporter explained the terms employed from time to time, as occasion called for it, calling particular attention to the need for the expression "apparent authority" in connection with the rights of third persons without knowl-

edge or grounds for knowledge of termination of authority, or with no understanding that such should not be required, as against principals and agents.

Consideration of "Torts—Restatement No. 3" and of "Contracts—Restatement No. 3" followed the same course as that of the Restatements already mentioned. Mr. Bohlen, Reporter on "Torts," gave such explanations of text and comment as were requested and made various notes for further consideration. This Restatement with the comment and index filled 145 pages and continued the subject of "Privileges to Commit Intentional Invasions of Interests of Personality," dealing with the topics. "Defense of the Actors' Interest in Retaining Possession of Real or Personal Property," "Forcible Entry," "Forcible Taking of Personal Property," and "Arrest." Mr. Williston, Reporter on "Contracts," explained the work of himself and Advisers. This Restatement, with Comment and Index, filled 75 pages, and covered the subjects of "Contractual Rights of Persons not Parties to the Contract," and "Assignment of Contractual Rights and Delegation of Performance of Contractual Duties or Conditions."

At the banquet held on Saturday evening, President Wickersham presided and addresses were made by Prof. William Searle Holdsworth, Vinerian Professor of English Law at the University of Oxford; Owen J. Roberts, Special Counsel in the Government Oil Litigation and Member of the Council of the American Law Institute, and Silas H. Strawn, American member of the Chinese Extraterritoriality Commission and Member of the American Law Institute. There was an informal reception by the Council of the Institute to members and guests in the Ball Room of the Mayflower Hotel on Wednesday evening, and also a reception and tea on Friday afternoon in the Palm Court of the same hotel.

PRESIDENT WICKERSHAM'S ADDRESS TO INSTITUTE

GENTLEMEN OF THE AMERICAN LAW INSTITUTE: The rounding out of the first four years of the life of the Institute, marked by this, its fifth annual meeting, justifies, and perhaps requires, a consideration of our beginnings and our objective and of the nature and value of the progress we thus far have made. To some of you it may appear superfluous, but to others it will not seem amiss, while for the public I think it is quite important to state with some particularity just what is the task which the Institute has undertaken. For despite many pronouncements, there still exists in some minds a misconception of our proper function.

Possibly the implications from the title of our organization run far beyond the limits of our task. An institute of law reasonably may be assumed to deal with any portion of that vast field which is connected by the word "law"; a word which in a democracy may imply anything from laying down or interpreting the fundamental organization of the State to the minutest regulations of the habits,

manners, dress, education, religion or amusements of a people. But taking it in the sense in which Judge Cardozo and Mr. Justice Holmes have defined it, as the rule which Courts of Justice apply in the determination of cases submitted to them, and the function of the lawyer as the sound prediction of the principle, the rule or the standard which a court will apply in a given case, an institute of law may well be supposed to concern itself with the study and ascertainment of all those factors which, on the one hand, may reasonably be assumed to justify prediction and on the other, which courts of justice with propriety may employ as bases of judgment. Viewed thus broadly, there are scarcely any limits to the legitimate activities of such an organization. But we came into existence for a more definite purpose and with a far more restricted intent.

You will recall that the Institute grew out of a movement in the Association of American Law Schools, which led to a careful inquiry and study