

# AMERICAN LAW INSTITUTE ADOPTS ITS FIRST OFFICIAL DRAFT

Issues Final Restatement of One Hundred and Seventy-seven Sections of the Law of Contracts Representing About One-half the Material on the Subject—Devotes Day to Discussion of First Portion of Tentative Draft of Code of Criminal Procedure—Tentative Draft of First Portion of Restatement of Law of Business Associations Considered—Other Tentative Drafts—Chief Justice Taft Addresses Institute

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**A**Doption as the official work of the American Law Institute of a draft containing one hundred and seventy-seven sections of the Restatement of the Law of Contracts was the outstanding feature of the Sixth Annual Meeting of that body, held at the Mayflower Hotel in Washington April 26, 27 and 28, 1928. This represents the completion of the Restatement of about one-half the material in this subject. In adopting it, the Council of the Institute was authorized to make further changes in style and wording.

This is the first of the Restatements to be submitted in final form. Its completion marks a distinct advance step in the undertaking to restate the law. A fuller description of the preliminary work on this Restatement may be found elsewhere in this number of the Journal, together with a reprint of some of the significant sections of the Restatement of this important branch of the law.

In addition to the customary addresses and reports the meeting considered a tentative draft of the first portion of the Restatement of the law of Business Associations, and tentative drafts of portions of the law of Agency, Conflict of Laws and Contracts. A whole day was given to discussion of the first portion of a tentative draft of a Code of Criminal Procedure.

Mr. Robert G. Dodge of Boston and Mr. Daniel N. Kirby of St. Louis were elected to membership in the Council, to fill the vacancies caused by the death of Mr. Nathan Matthews of Boston and Mr. Herbert S. Hadley of St. Louis. Two other vacancies on the Council, one occasioned by the death of James Parker Hall of Chicago and the other by the resignation of Mr. Justice Harlan F. Stone, were left open for further action by the Council. The present officers were reelected for the coming year, and an amendment made to the by-laws, authorizing additional vice presidents. More than five hundred members and guests were present.

A meeting of the Council was held on Wednesday evening, April 25, and was for the most part concerned with the report of Director William Draper Lewis upon various phases of the work of the Institute. Following the meeting an informal reception was held for members and guests at the Mayflower Hotel.

The opening session of the general meeting was Thursday morning, April 26. After disposing of several routine matters Mr. George W. Wickersham delivered the presidential address. Mr. Wicker-

sham reviewed the work of the Institute, and its accomplishments to date. He spoke of the significance of the undertaking to improve criminal procedure through the drafting of a model code, and closed with a mention of the significant possibilities for an even wider field for improvement in the law when the present task of restatement shall have been successfully accomplished.

## Chief Justice Taft Addresses Meeting

Chief Justice William Howard Taft was called to the platform by President Wickersham and received a hearty and enthusiastic greeting from all present. The Chief Justice spoke in part as follows: MR. PRESIDENT, MR. DIRECTOR AND GENTLEMEN:

"You come with spring and you are just as welcome and just as pleasing. I always come here because I think a judge needs that kind of discipline—to be humiliated by learning how much other people know, and with a realization of how little assistance, if I were to take part in the discussions, I could render.

"But there is one subject which, due to our large jurisdiction, I am getting a good deal of experience in, and that is the subject of the Criminal Law. We have become a criminal court (laughter), not so much in the cases we hear as in the cases we decline to hear, and, therefore, when this formidable volume was sent to me (indicating Draft No. 1 of the Code of Criminal Procedure) I went through what has been given here as a Tentative Draft No. 1 of the Code of Criminal Procedure. I want to felicitate you from the standpoint of one who has to do with a good many questions therein discussed upon the work you have done in formulating and preparing and reducing to a practical treatise, or suggestion, rather—it is not a treatise at all—of what the States ought to try to do in making concise and direct the Criminal Code.

"I venture to think that at no time in the history of the country are the legislators of the country so much interested in the preparation of new methods of administering justice under a criminal code, and that is not because a good many of the legislators are themselves personally interested, but it is because people who vote for them are beginning to stir them up to their responsibility in making the law so that it can be quickly and properly administered. I have reason to know that in every legislature there is a great deal of inquiry as to what they can do, and I feel confident that as you go on

and make this a full Code it will be used in many legislatures to improve the law—and we need it. . . .

"There is one other thought that perhaps I may be able to speak to you about with reference to this criminal matter. We in our court have determined that those gentlemen who have been unfortunate enough to be convicted in the State courts and in the lower Federal courts are not going to have a period of rest and contemplation before they begin to serve the State in a close relation through us, and we, therefore, are advancing every criminal case that comes into court. When we adjourn for the summer we shall have heard every case on the docket of a criminal character. (Applause.) That has been made possible by the operation of the Act of February 13, 1925, which has enabled us to go on so that now, my friends, we are hearing today cases that were filed in October and November last on the regular calendar. (Applause.) They are not advanced, but it is on the regular calendar, and I hope that next year we may be able to make even a better showing than that, and, if we do, we are likely to arouse in some members of the bar the query whether the Constitution does not forbid such expedition.

"I am very glad to come here and welcome you, and I say God speed to you."

#### Report of Director

William Draper Lewis of Philadelphia, Director, reported upon the progress of the work of the Institute. Since the last annual meeting twenty-two conferences of Reporters and Advisers working upon the Restatement have been held, and the committee working upon the Criminal Code has had three meetings. These meetings, plus the work of the Council and a conference among the Reporters, resulted in the submission to the Institute of five tentative drafts of various Restatements, a final draft of the first half of Contracts and a tentative draft of the first half of the Criminal Procedure Code.

In addition to the material submitted, continued Mr. Lewis, the Reporters have done a great deal of work on those parts of the Restatements which will be considered at the 1929 meeting. Not only will there be additional portions of the Restatement in the subjects considered this year, but the Reporter for Torts, Mr. F. H. Bohlen, will have a considerable part of the law of Negligence in tentative form, and Mr. Harry A. Bigelow will have a portion of Property. Mr. Austin W. Scott, who is restating the law of Trusts, expects to have a tentative draft of the entire subject within the next two years.

An announcement of great significance was that pertaining to the time of completion of the Restatements. The preliminary work on the last chapters on Conflict of Laws is now being done. The last of the tentative drafts are expected in 1929 and a proposed final draft in 1930. Proposed final drafts in Agency and the remainder of Contracts are expected in 1931.

Mr. Lewis summarized the discussion at a conference of the Reporters in the various subjects. This conference met to agree, if possible, upon the use of terms, so that a word such as "right" used in one Restatement will have the same significance

when used in another. Some of the conclusions of the Reporters follow:

"(1) The term 'right' should mean a claim of one person against another, that the second person shall do a given act or shall not do a given act, either enforceable by legal processes or in some indirect way recognized by law.

"(2) The term 'privilege' should mean a legal freedom on the part of one person as against another to do a given act or such freedom not to do a given act, but that there is no objection to its use in a more limited but similar sense, where such limited sense corresponds to the definition of the term in Section 78 in the Second Tentative Drafts of Torts, namely, as denoting the fact that conduct which under ordinary circumstances would entail liability, under particular circumstances does not entail liability.

"(3) The term 'power' should mean an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

"(4) That the term 'immunity' should mean a freedom on the part of one person against having a given relation altered by a given act or omission to act on the part of another person."

An important development of the work of the Institute during the year was increased activity in the cooperating of the committees of state bar associations. Director Lewis summarized the conference held in Chicago last October. An account of this conference has appeared in a previous number of the JOURNAL. At that meeting was discussed the Michigan plan of state annotations of the Restatements. In the words of Mr. Lewis:

"The opinion of the delegates to the Conference from Michigan was that the way to give the judges and lawyers of a State authoritative information concerning the pertinent State statutes and decisions is to have the information furnished by the State Bar Association; or in other words, that the State Bar Association should prepare and publish State annotations. All those present at the Conference so far agreed with this as to unite in urging other State Bar Associations to try out the plan by way of experiment. . . .

"While for some time we must all regard these annotations as an experiment, none of us can fail to realize that the work necessary thoroughly to test the worth-whileness of the plan is in itself beneficial. We may, I believe, be certain that it will result in a growth of a spirit of cooperation between bar associations and the Institute, which is vital to the success of the Restatement or any other work undertaken by the Institute. Again is it not reasonable to expect that we shall have many valuable suggestions and criticisms of the Tentative Drafts which we would not otherwise have as the result of the work necessary to prepare these State annotations?"

The Director's report closed with a statement concerning the work on the model code of Criminal Procedure. The original appropriation of the Laura Spellman Rockefeller Memorial for the work on the code was \$60,000. It was found that if the work was to be completed, additional funds would be required. On February 9, of this year, an additional \$57,000 was appropriated by the Memorial. "This generous action," concluded Mr. Lewis, "will enable

us to complete the work on the code as originally planned."

#### Adviser on Professional and Public Relations

Following the report of the Treasurer, Mr. George W. Murray of New York, President Wick-ersham called upon Herbert F. Goodrich of Michigan, who has been appointed Adviser on Professional and Public Relations. He reported on a plan for a series of articles in the AMERICAN BAR ASSOCIATION JOURNAL, dealing with the various phases of the work of the Institute. In addition to this means of professional information, a great deal of help is being given by the bar associations in the individual states. More than thirty states have appointed co-operating committees; the work of the Institute will be featured in many of this year's programs of state bar associations. The Michigan State Bar Association has completed an annotation of the first three of the tentative Restatements on the Conflict of Laws, and the volumes are practically ready for distribution to its members. Similar work is going on in Pennsylvania, New York and Wisconsin, and beginnings have been made in other states.

#### The Restatement of the Law of Contracts

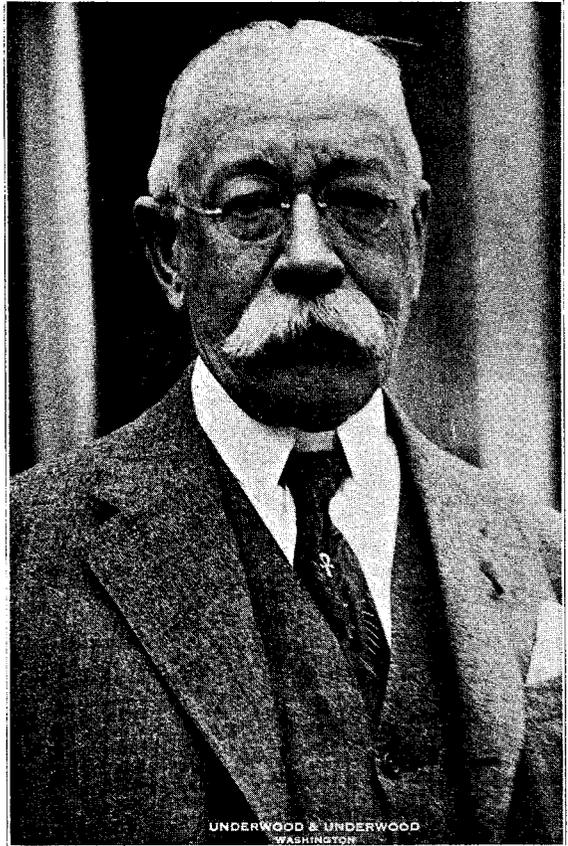
The first material considered for technical discussion was the proposed final draft of Contracts. This includes about one-half of that subject. In tentative form various portions of it had been considered by the Institute at the meetings in 1925, 1926 and 1927, and at the conference of bar association committees in Chicago in October, 1927. In addition, many written suggestions for improvement had been received. The various suggestions had all been considered by the Reporter and his Advisers, and changes and improvements made in accordance therewith. The revised draft offered to this meeting was the result.

The material was considered section by section. Further suggestions, especially on matters of form, were made from the floor. At the conclusion of the discussion it was voted to approve the proposed final draft, reserving to the Council the power to make such further changes in form as seemed necessary.

In addition to the proposed final draft, Professor Williston and his committee offered for criticism and suggestions tentative drafts in Contracts numbers four and five. Three new names appear among the advisers assisting in the preparation of these drafts. They are: George P. Costigan, Jr., of the University of California; Merton L. Ferson of the University of Cincinnati, and George J. Thompson of Cornell University. The first of these tentative drafts (No. 4) deals with the Statute of Frauds. The great amount of disagreement among the courts upon the points involved, as shown in the Commentaries which accompanied the Restatement, was reflected in the comments and suggestions made from the floor. Restatement number five dealt with "The Scope and Meaning of Contracts," and covered such topics as interpretation, the parol evidence rule, and usage. Here the division in the authorities is less marked, and the discussion was, for the most part, upon the form of expression rather than the rule expressed.

#### Business Associations

Director Lewis, who has been assisted by Mr. Alexander H. Frey, of the Yale Law School, pre-



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President of American Law Institute

sented the first portion of a tentative draft on the law of Business Associations. The advisory committee which assisted Mr. Lewis in its preparation is composed of the following practicing lawyers, judges and teachers of corporation law: George E. Alter, of the Pittsburgh bar; James Byrne, of the New York bar; George F. Canfield, of the New York bar; Henry S. Drinker, Jr., of the Philadelphia bar; Cadmus Z. Gordon, Jr., of the Philadelphia bar; William Browne Hale, of the Chicago bar; Edward Hopkinson, Jr., of the Philadelphia bar; Dudley O. McGovney, of the Yale Law School; Gilbert Montague, of the New York bar; Harry S. Richards, of the University of Wisconsin Law School; Thomas W. Swan, Judge on Second Circuit of the Circuit Court of Appeals; Austin T. Wright, of the University of Pennsylvania Law School.

The material covered in this draft is a chapter dealing with "Creation of Shares by Transactions Subsequent to Incorporation," with subdivisions, "Agreements for the Immediate Creation of Shares," "Creation of Shares and other Legal Relations Resulting from the Transfer of an apparently valid Share Certificate" and "Corporations Formed under Special Incorporation Statutes." Discussion was very spirited. Nearly all the lawyers present were of wide personal experience in corporation practice and many suggestions of value were offered. No adoption of the draft was asked for, and it was re-

committed to the Reporter for further consideration in the light of the discussion.

#### Conflict of Laws

Restatement number four of Conflict of Laws covers eighty-seven pages and seventy-one sections of the law of that subject. It deals with the important chapters on "Contracts" and "Wrongs." The most important section, and the one around which the greatest part of the discussion centered, was Section 353, in which was stated the rule that the law of the place of making governs the validity of a contract. The black letter statement of principle, as it appears in the Restatement, is:

"Section 353. The law of the place of contracting determines the binding effect of a promise with respect to

"(a) The capacity to make the promise;

"(b) The necessary form, if any, in which the promise must be made;

"(c) The legal requirements for making a promise binding, such as consideration, seal, etc.;

"(d) The circumstances which make a promise ineffective or a contract voidable;

"(e) The nature of the act to which a party becomes bound;

"(f) The time when and the place where the promise is by its terms to be performed;

"(g) The absolute or conditional character of the promise."

The discussion upon this section reflected the divergence of views held by the courts upon the point. The other chapter of this portion of the Restatement deals with conflict of law problems in both tort and crimes. While important and, in places, difficult, it does not involve the confusion in the decisions found in the rules governing the contracts.

#### Agency

Professor Floyd R. Mechem, of the University of Chicago, Reporter for the law of Agency, and his Advisers, submitted for discussion Restatement No. 3, consisting of 134 pages. "Interpretation of Manifestations of Consent" is the general heading of this portion of the work. The chapter composing this portion of the Restatement is entitled "General Rules of Interpretation." As in the case of the material on Conflict of Laws and Business Associations, Mr. Mechem's material was presented for discussion and criticism only and will be revised before submission as a final draft.

#### Code of Criminal Procedure

An entire day was devoted to the discussion of the tentative draft of the proposed Code of Criminal Procedure. This code is the one piece of legislation which the Institute has undertaken. The Restatements heretofore referred to are in no way intended to codify the law; no legislative action concerning them is sought or desired. They will go to the courts upon their own merits as sound and accurate statements of the common law. This Code is a proposed code of procedure for legislative adoption. It does not, therefore, confine itself to statements of existing law. It presents what to the Reporters and their Advisers seems a model code in Criminal Procedure. The Reporters for this work are William E. Mikell and Edwin R. Keedy, both of the University of Pennsylvania Law School. The advisory committee, it will be noted, contains three

judges and three practicing lawyers in addition to men from the law schools. The committee is: William S. Forrest, of the Chicago bar; Robert W. Millar, of Northwestern University Law School; Justin Miller, University of Southern California Law School; Judge Charles C. Nott, Jr., Court of General Sessions, New York; Joseph F. O'Connell, of the Boston bar; Judge Harry Olson, Municipal Court of Chicago; Timothy N. Pfeiffer, of the New York bar; Henry L. Stimson, of the New York bar; Judge Floyd E. Thompson, Supreme Court of Illinois; John B. Waite, of the University of Michigan Law School; Tyrrell Williams, of the Washington University Law School.

This first draft covers about one-half the subject. It consists of two hundred sections, which include the topics, Arrest, Preliminary Examination, Bail, Methods of Prosecution, Grand Jury, and Indictment and Information. Accompanying the text of the proposed statute is a commentary of about four hundred pages. Originally these were prepared by the Reporters and their assistants for their own use and to furnish information to their advisory committee. It seemed of sufficient importance to publish along with the proposed Code. The commentaries give an immense number of references to state constitutional provisions and statutes. The effect of almost every section of the proposed code can thus be contrasted with the existing statutory law in each state.

Discussion of the code was participated in by a somewhat smaller number of members than some of the Restatements. The interest, however, was very great indeed. Questions and suggestions made from the floor showed not only great interest, but a careful study of the code provisions. No final action was asked for upon the proposed statute, and it will be further considered and revised by the Reporters.

#### Annual Dinner

The closing event of the meeting was the dinner, held at the Mayflower, Saturday evening, April 28. The president of the Institute, Mr. Wickersham, presided and introduced as speakers Robert M. Hutchins, dean of the law school of Yale University; Joseph Redlich, professor of law, Harvard Law School, and Horace Kent Tenney, of the Chicago bar.

Dean Hutchins suggested interesting possibilities for wider activities in the work of the Institute. "Every one who has taken any interest in the proceedings of the American Law Institute knows its future is secure," said the speaker, who then proceeded to discuss the further question: "Is restatement the whole story? Does finding out what a rule of law is tell whether it is accomplishing its object?" After rules of law are restated, said Mr. Hutchins, it is desirable that we should study how they work in action. Especially is this true in the procedural field. Instances were cited of a beginning made at Yale of studying the business of courts in Connecticut, and suggestions made of the great possibilities in such fields of investigation. "To such problems some portion of its attention at some time I urge the Institute to give," concluded the speaker.

The second speaker, Professor Joseph Redlich, will be remembered as the author of the famous

report on the case method of teaching law in America, the result of a study made for the Carnegie Foundation in 1912. He is now a member of the Harvard Law School faculty. Mr. Redlich emphasized the remarkable cooperation among the judges, practitioners and law teachers in the undertaking to restate the law, and compared this effort of American lawyers with earlier projects in European countries.

Mr. Horace Kent Tenney, of the Chicago bar, was the concluding speaker. He pointed out that the rules of conduct as declared by courts are not

self executing, even when stated. It is every lawyer's business to help the courts fulfill their purpose. Mr. Tenney spoke of the absurdity of some of our rules of pleading and the language in which pleadings are cast. "Why should we have one language for talking to each other, and another for the courts?" he asked. The remedy, concluded Mr. Tenney, is for the legislature not to interfere with matters of procedure, about which it knows nothing, but to turn the matter over to the courts who know all about it. The present federal equity rules show the wisdom of such a policy.

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## SELECTED SECTIONS OF OFFICIAL RESTATEMENT OF LAW OF CONTRACTS

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AT the Sixth Annual Meeting of the American Law Institute held in Washington, April 26 to 28, the outstanding accomplishment in the progress of the work was the adoption of a final draft of Sections one to one hundred and seventy-seven of the Restatement of the Law of Contracts. By vote of practically all of the members present the draft was made the official draft of the Institute. The Council of that body was given authority to make further changes in style and wording if need for such changes appeared.

This is the first of the Restatements to be offered to the Institute for final approval. It constitutes about one-half of the subject matter of the law of Contracts, and makes a book of something more than two hundred pages. There are seven chapters. The first deals with the meaning of terms; the second with general principles upon the formation of contracts. The third chapter of eighty-three pages is the longest. It deals with the formation of informal contracts and its subdivisions treat of such topics as the expression of assent and consideration. Chapter Four deals with formal contracts; chapter Five with the rights and duties where more persons than one are promisors or promisees. Contractual rights of persons not parties to the contract are treated in chapter Six. The last chapter deals with the assignment of contractual rights and delegation of the performance of contractual duties.

This completed draft represents work done by the Reporter and his Advisers begun in June, 1923. The first portion of it, consisting of Sections one to seventy-five, was submitted to the Institute at the 1925 meeting for discussion and suggestions. Subsequent portions were submitted and discussed at the 1926 and 1927 meetings. In addition to the consideration the material has received from the Council of the Institute, and at the previous Annual Meetings, it was also discussed fully at a Conference of Cooperating Committees of State Bar Associations held in Chicago in October, 1927. The drafts in their tentative form have also had a wide circulation among the profession. Director Lewis reports that more than five thousand copies of the first

draft have been sent to various lawyers, judges and law teachers throughout the country. The distribution of the succeeding tentative drafts has been almost as great. Many scores of suggestions have been received. These have been exceedingly helpful, particularly in suggesting improvements for clarification in wording of the statement of legal rules.

Professor Samuel Williston, of the Harvard Law School, is the Reporter for the Law of Contracts. Upon him rests the initial responsibility for the Restatement. He has been assisted by a group of advisers. They are: Arthur L. Corbin, Yale University School of Law, *Special Adviser*, and Dudley O. McGovney, Yale University School of Law; Herman Oliphant, Columbia University Law School; William H. Page, University of Wisconsin Law School, *Advisers*, and William E. McCurdy, Harvard Law School, *Legal Assistant*.

Copies of this Restatement are available at cost of printing and distribution. They may be obtained from the American Law Institute, 3400 Chestnut Street, Philadelphia. The price is \$1.25.

A portion of the Restatement is produced here. No attempt has been made to give individual chapters in full, but rather to pick out the sections dealing with interesting problems in this field of law and to show how they are treated in the Restatement.

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### THE LAW OF CONTRACTS

#### Chapter 1

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#### MEANING OF TERMS

##### Section 1. CONTRACT DEFINED

A contract is a promise or a set of promises for the unexcused non-performance of which the law gives a remedy or the performance of which the law in some way recognizes as a duty.

*Comment:*

a. A contract may consist of a single promise by one person to another, or mutual promises by two persons to one another; or, there may be, in-