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THE AMERICAN LAW INSTITUTE

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The American Law Institute was organized at Washington, D. C., on February 23, 1923. Its purpose is the ambitious one of re-stating our law with such wisdom and accuracy that the courts of the country will accept the re-statement as authoritative. The movement had its beginning in the project of the Association of American Law Schools to establish a juristic center which should direct the attention of the law schools toward the improvement of the law and utilize the learning of their faculties to that end. The investigation carried on by the committee of that association resulted in the conclusion that the co-operation of all the organized forces of the profession, that is, the courts, bar associations, law schools, and learned societies would be necessary to the success of the project. A committee was therefore appointed by the Association of American Law Schools to secure the necessary cooperation. At the invitation of this committee a distinguished group of judges, lawyers and law teachers formed a Committee on the Establishment of a Permanent Organization for the Improvement of the Law. This committee set to work in the spring of 1922 to formulate a report as to the advisability of establishing such an organization, and, if it should recommend its establishment, to present a proposed constitution and recommend the specific work which should be first undertaken by the organization.

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The Committee secured funds from the Carnegie Corporation to defray the expenses of its meetings and employ the necessary assistance, and proceeded to formulate its report. It then sent out invitations to several hundreds of presiding justices, officials of bar associations and of learned professional societies, deans of law schools, and distinguished members of the bench and bar of the country, to meet at Washington on February 23, 1923, and consider the report of the Committee. The elaborate report covering one hundred and nine printed pages, was sent to each invitee before the meeting. The response to the invitation was a gathering of the members of the profession in such numbers, and with such interest, as to convince the Committee that its self-imposed task had responded to a real demand of the profession.

The reading of the printed report had apparently convinced most of those in attendance, of the necessity and feasibility of the plan proposed, for there was no opposition in the meeting to the general plan. Mr. Elihu Root was elected temporary and later permanent chairman of the meeting. The organization of The American Law Institute was completed, with those in attendance as its members. The constitution adopted states that the object of the institute is: "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." It was promptly incorporated under the laws of the District of Columbia to insure the permanence of the organization. A council of twenty-one eminent judges, lawyers, and teachers was elected, to have the direction of the affairs of the Institute. This council has authority to determine the subjects of the law to be re-stated, and to select and employ the personnel for the task, hence it may be expected that the work will commence promptly.

There was a considerable discussion in the meeting as to the subjects which should first be re-stated. The Committee had proposed that conflicts of laws (the entire subject if possible), torts (dealing perhaps first with negligence), and business corporations should be taken up first. There was some sentiment in the meeting for undertaking the subject of criminal law and procedure because of the deplorable condition in which that subject now finds itself, with its consequent effects of creating disrespect for law in general, and the clogging of the courts by criminal cases to the exclusion of their other business. This suggestion was opposed,

however, because of the fact that the law both of crimes and criminal procedure is largely statutory, varies widely in the different states, and many of these variations are reflections of mooted questions of public policy and local necessity, which would not yield readily to any uniform re-statement. There was fear that if the Institute should first enter this field, its success would be doubtful, and that if it should fail in its first undertaking, its whole future would be jeopardized.

The attitude which the institute will adopt in delimiting the field of its work is probably shown by the following extract from the report of the Committee:

"GENERAL CHARACTER OF THE WORK OF ANY ORGANIZATION ESTABLISHED BY LAWYERS FOR THE IMPROVEMENT OF THE LAW.

"An association organized to improve the law might conceivably busy itself with reforms as various as the activities of man. The organization we have in view, however, is to be an organization founded by the American bar. It will be created in response to the growing feeling that lawyers have a distinct public function to perform in relation to the improvement of the law and its administration. This function is necessarily confined to work for which they are qualified by training and experience. The fact that a man is a lawyer does not make him an expert on the tariff, or on the proper organization of city government, or enable him to speak with authority on hundreds of other questions of existing or proposed law debated on public platforms and in legislative assemblies. It is therefore important to a correct understanding of the objects we have in view and vital to the permanent usefulness of the proposed organization that we regard its activities as restricted to improvements in existing law and administration in relation to those subjects of which the legal profession has expert knowledge.

"It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticise the instruments by which these policies are effectuated. The proposed organization should concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure or the administration of law, and judicial organization. It should not promote or obstruct political, social or economic changes. In order to ascertain what its work should be we have examined the defects in our law, rather than those merits of which the legal profession is justly proud."

The result of the discussion concerning the subjects for restatement was that no change was made from the recommendations of the Committee, though of course the Council has authority to make such changes as it may find advisable.

Chairman Root, in response to an inquiry from the floor, made the following statement with reference to the manner in which the work, which it is estimated, will cost approximately one hundred thousand dollars a year for the work upon the three suggested topics, will be financed:

> "The volunteer committee that started this matter 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.
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> "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 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.
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> "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."

The spirit of service in which this enormous task is undertaken by the legal profession of America should not be underestimated. Nevertheless the courts and the profession generally, upon whose support the work must depend for its success, will surely not regard the work in the light of a philanthropy, nor as undertaken entirely *pro bono publico*. Professional selfishness, if no higher motive, should give to this movement the whole hearted support of every lawyer. The two chief defects in the law, its complexity and its uncertainty, at which the work of the Institute will be aimed, while they exact a heavy toll from the public, are imposing upon the courts and the legal profession a burden which is well nigh intolerable. When one holds himself out to the public as a legal ad-

viser, and yet finds it frequently necessary to reserve requested advice until he has made an expensive and laborious original investigation, at the end of which he had arrived at only a tentative conclusion, which he must state to his client with much doubt and many reservations, the proceeding is one not calculated to inspire confidence in the lawyer or the law. Such situations will always exist, but at present they are far too frequent, and are becoming increasingly so. If a physician were obliged, upon a definite statement of symptoms, to conduct an original laboratory investigation for each of a large proportion of his cases, the situation would be analogous. His usefulness would be impaired, and his earning power largely diminished, in spite of great additional charges upon his patients. The legal profession has fallen into just this situation. Much of its energies are expended in threshing over old straw which has already been threshed by every lawyer or court which has considered a similar case, and yet it has been nobody's business to give to the profession at large the benefits of a single thorough and searching investigation and analysis and appraisal of the source material. The American Law Institute proposes to fill just that need.

Experience in isolated fields of the law shows the demand for and the usefulness of expert and authoritative statement. Among others, the works of Pomeroy on Equity, Wigmore on Evidence, and Williston on Contracts, have been received by the courts and the profession with such confidence in their accuracy of analysis and fidelity of statement, that they stand in a large measure in the place of the source material, the cases, upon which they are based. Yet they have no authority except to those who by experience have learned their worth, and they have been produced by private ambition and intiative, at private risk and expense. How infinitely better could these excellent books be made if the profession generally, through some organization such as the American Law Institute, should bear the expense of producing them, furnishing adequate trained assistance to the principal author, and giving him the benefit of criticism and suggestions from the courts, law teachers and eminent lawyers in advance of final publication. All this is within the plan of the American Law Institute. It seems that we may expect from such a plan real Books of Authority, which will go far to lead the profession out of the ever widening wilderness.

Until such an authoritative re-statement shall be made, it would seem that the only place to find the law is in the source mate-

rial, the cases, with such aids in the search as we now have in the way of digests and compilations. Yet it is now, and is becoming, physically impossible for the courts to go to the sources. A recent writer[1] notes a "tendency of courts especially in the southern and western states to cite the various legal encyclopedias in their opinions as the basis of judicial decision. It is not unusual to find such a citation given as the sole authority for the legal precept which is seized upon to determine the rights of litigants, obviously because the search of the authorities would be either too laborious or too uncertain in its results to justify the expenditure of judicial labor upon it." To one familiar with the methods by which the encyclopedias are and must be made, such a tendency in the courts shows a desperate situation indeed. The work of these publishers in collating citations and indicating the trend of decisions is commendable and valuable. The staffs of writers who produce them take as their field the whole subject of the law, and write this year upon torts, next year upon real property, and so throughout the whole field of the law. Anyone who has attempted, as a practitioner or teacher, to acquire an authoritative knowledge of even one or two subjects of the law, knows that under modern conditions the task is that of a lifetime. Professor Kales regarded it as an ambitious task to become expert in the law of a few subjects in a single jurisdiction.

It was not impossible for Blackstone and Kent to produce commentaries covering the whole field of the law, yet it is worthy of note that Kent, a century ago, lamented the "multiplicity of law books," as "an evil that has become intolerable." Dean Stone quotes the above statement of Kent, and then makes the following comment:[2]

> "Yet Kent's law library, assuming that it was complete with reference to all American reports and statutes, would at that time have embraced about 180 volumes of American reports and less than one-third that number of American statutes. A law library, correspondingly complete, at the present time would have upon its shelves about 18,500 volumes of reports and 5,500 volumes of statutes. My mathematical friends tell me that, at the same rate of progression, a law library correspondingly complete one hundred years hence, assuming that we had buildings in which to house it would reach the stupendous proportions of 1,850,000 volumes of reports and 550,000 volumes of statutes.

[1] Harlan F. Stone, "Some Aspects of the Problem of Law Simplification," 23 COL. L. REV. 319 at 332 (1923).
[2] Harlan F. Stone, "Some Aspects of the Problem of Law Simplification," 23 COL. L. REV. 319 at 320 (1923).

> There is of course reason to hope that the rate of increase in reports and statutes will not be as rapid in the next century as the last, and that instead of an increase represented by an ascending curve we may proceed at more nearly a level rate of approximately the present of about 350 volumes of reports and 250 volumes of statutes per year. If we should succeed in stemming the flood of law books to that extent, another century would see a good working library for an American lawyer containing something like 100,000 volumes of reports and statutes and something more than half that number in fifty years. To this, of course, would be added a suitable number of digests, text-books and treatises."

The report of the Committee to the Washington meeting stated that during the year 1914-1915 it was estimated that one hundred and seventy five thousand pages of American reports and five thousand pages of British reports had been published. The profession cannot continue to bear the responsibility of knowing the law, when it is concealed in such a mass, without the assistance of an approved and authoritative analysis and statement.

Assuming the re-statement of a given field of the law to have been prepared, subjected to criticism and suggestion by courts, expert practitioners, professors and business interests. revised, approved by the Institute, and finally published, what will be its status? That, of course, will depend upon the attitude of the courts and the legislatures of the several states and that attitude will be largely determined by the legal profession in those states. The Institute does not desire that its re-statement should be enacted into a code, since that would deprive our legal system of one of the chief merits of the common law, its elasticity and adaptability. If the legal question involved is undecided or uncertain in a particular state, the courts can, without more, adopt the re-statement by decision, even though the weight of authority in other states is at variance with the re-statement. Where the re-statement is clearly at variance with prior decisions in the jurisdiction, the courts could not follow the re-statement without overruling previous decisions. This the courts would hesitate to do without legislative sanction, because vested property or contract rights might be disturbed. It has been stated by eminent judicial authority "that it is comparatively rare that the retroactive effect of judge-made law actually involves hardship. In those instances where precedent is overruled or limited it is seldom that the conduct of litigants has actually been influenced by the rule previously laid down, or that overruling it has operated more harshly than

would the creation of a new precedent where no rules had been previously declared."[3] The writer does not fully agree with the above statement, and believes that, generally speaking, the overruling of previously settled rules of law should be avoided except in cases of clear necessity, unless the retroactive effect of the new decision can in some way be avoided. Certainly there are some fields of the law, such as those of property and contracts where a retroactive change in the law would work havoc, if not to the particular litigants, certainly to many other interests gained in reliance on the former rule. Such an attitude of the courts toward precedent would hardly be an auspicious beginning for a movement which aims at greater certainty in the law.

Is there, then, any method by which the re-statement could be followed in cases in which it is inconsistent with the previously settled law of the jurisdiction. In some cases where courts have held statutes unconstitutional, and have later overruled these decisions, they have declared the statutes inoperative until the time of the second decision.[4] This is of course a frank departure from the traditional common law conception that the courts merely find and declare the existing law, and do not make it. Another suggestion has been made, to the effect that the legislatures might enact that the re-statement could be followed in those cases, and in those cases only, which arise subsequent to the publication of the re-statement.[5] This would constitute a delegation of legislative power to the courts, by granting to them the power to change the law. The constitutionality of such a provision should be carefully scrutinized, to see whether it embodies a violation of our doctrine of the separation of powers, which doctrine seems nowadays "more honored in the breach than in the observance," but which does occasionally assert itself. The same observations would apply to a legislative enactment giving the courts the power to limit the effect of decisions following the restatement and overruling precedent, to cases arising subsequent to the publication of the re-statement.

The report of the Committee suggests tentatively that the legislatures might give quasi-statutory sanction to the re-statement by providing that it should have the force of principles enunciat-

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[3] Harlan F. Stone, "Some Aspects of the Problem of Law Simplification," *supra*, citing CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, (1921) 146.

[4] Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision," 18 COL. L. REV. 230 (1918); Carpenter, 66 Court Decisions and Common Law," 17 COL. L. REV. 593 (1917).

[5] Harlan F. Stone, "Some Aspects of the Problem of Law Simplification," 23 COL. L. REV. 319 at 336 (1923).

ed as the basis of the decisions of the highest courts of the states, the courts having power to declare modifications and exceptions, or by providing that it should be used as a "guide and aid" to the courts. It is difficult to see how this suggestion would obviate the difficulty of retroactive decisions. It is probable that we shall be obliged to do whatever is necessary to confer upon the courts the power to make decisions which shall not be retroactive beyond a fixed date. If the re-statement conflicts with a statute, then it should be embodied into a statute to take the place of the conflicting one. The states have been willing to do this, for the sake of uniformity and certainty, in the case of the statutes drafted by the Commissioners on Uniform State Laws. In any event, a way will be found whereby the re-statement will be received into the body of the law of the states, and it will come as a welcome relief to the profession which is now attempting to do that which is impossible, and which is becoming undeservedly discredited because of its failure.