

# WORK OF THE AMERICAN LAW INSTITUTE

Brief Statement of Steps Already Taken to Carry Out Purposes of New Organization—American Legal Scholarship Adequate for Difficult Task—How Restatement When Made Can Secure Needed Authority\*

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WE welcome the opportunity offered by the courtesy of your Committee on Arrangements to make this statement in regard to the work of the Institute.

The organization of the Institute at the Meeting held in Washington on February 23rd has been fully described in the AMERICAN BAR ASSOCIATION JOURNAL. Three hundred and forty-one persons were present. All but three, a member of the Canadian Bar and two representatives of other professions, were members of the American Bar Association. Your President and six ex-presidents, six members of your Executive Committee, and fifteen members of your Council, were among those present. The By-Laws of the Institute provide that during the continuance of their respective offices "the President of the American Bar Association and the members of its Executive Committee" shall be members of the Institute. Though membership in the Institute is limited, and election a distinct professional honor, its future meetings, as its organization meeting, will in fact be meetings of a group of members of the American Bar Association.

The object of the Institute as set forth in its charter or Certificate of Incorporation 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." But the definite thing which the Institute has been organized to do is the restatement of the law in the manner indicated in the Report which was made to the Washington Meeting by the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.

The primary purpose of the restatement is to make what we know as our Common Law clearer, simpler, and better adapted to the needs of life; and in this way to preserve our system of developing and administering law from breaking down under the ever increasing accumulation of recorded cases.

No profession in this, or any other country, has ever undertaken a task of greater difficulty. The restatement is not a code to be adopted in its entirety by the legislatures of the States, but the difficulty and magnitude of the work can only be compared to the codification and exposition of the Roman Law undertaken in the reign of Justinian.

Since the formation of the Institute necessary financial assistance has been secured, and work on four topics has been begun.

The generous action of the Carnegie Corporation assures us an income of nearly \$110,000 a year to April 1, 1933. Whatever our future needs, this income is at present sufficient. Until we have

solved the problems connected with the main details of the form of the restatement and the best methods of work, the number of topics which can be successfully undertaken at one time is necessarily limited.

As stated in the June number of your JOURNAL, the topics first undertaken for the restatement are: Contracts, Torts, Agency, and Conflict of Laws. We have also asked our Director to submit a Report on the Practicability of the Restatement of the Law of Business Associations, and Dean Roscoe W. Pound is to give us in October a Report on Classification and Terminology. We have also arranged for a Survey and Statement of the Defects in Criminal Justice.

For each of the four topics undertaken for restatement, we have selected a Reporter. The Reporter is a person primarily responsible for the submission to the Council of the Institute of the tentative and final drafts of the restatement of the topic. Samuel Williston is Reporter for Contracts; Francis H. Bohlen is Reporter for Torts; Floyd R. Mechem is Reporter for Agency; and Joseph H. Beale is Reporter for Conflict of Laws. All of these began work in June except Mr. Mechem, who will begin the work on Agency in October.

It is unnecessary to point out that the Reporters selected are the chief experts on their respective subjects in the United States. Around each Reporter, we are now engaged in building up two groups of assistants; a younger group for detailed legal assistance working under the immediate direction of the Reporter; and a larger group for what we have termed "advisory legal assistance."

In June a Conference attended by members of the Council, the legal staff and other specially invited persons was held in Cambridge, Massachusetts. At this Conference, different forms showing possible ways in which the restatement can be set forth were examined and criticized. After three days' discussion there was unanimous agreement on certain fundamental questions of form. It was recommended that the publications of the Institute on a topic shall consist of two parts: the restatement and the accompanying treatise; that the restatement shall consist of principles stated with such fullness as will afford adequate presentation of the subject, accompanied by such amplification, illustration and explanation as shall be necessary for their complete understanding and practical application; and that the treatise shall consist of a complete statement of the present condition of the law, and a full citation of authorities, besides analyzing and discussing all the problems presented, and in the fullest sense justifying the statements of law set forth in the restatement.

Another Conference on matters pertaining to the form of the restatement and on questions of

\*Statement made to American Bar Association at Annual Meeting, at Minneapolis, on August 31.

terminology and classification will be held in October.

These details give an idea of the progress we have made. The time of the appearance of the first tentative or completed draft of any portion of the restatement will depend in part on the time it takes to work out those rules pertaining to the form of the restatement which will insure a reasonable degree of uniformity in the treatment of different topics. With the start we have already made, it does not seem unreasonable to expect that, at least, a tentative draft of important parts of, at least, one of the topics on which we are now engaged can be placed before a meeting of the Institute in February, 1925.

At the Organization Meeting of the Institute considerable difference of opinion developed in regard to the advisability of the Institute's undertaking a restatement of the Law of Crimes or Criminal Procedure. Some of those present stated that the strong popular interest in the subject marked the criminal law as one of the first topics to be considered by the Institute. Others felt that the serious defects in criminal justice were due to other causes than defects in the substantive or procedural criminal law, and that therefore the announcement that the Institute was about to make a restatement of the criminal law would create popular expectations of reform that could not be realized.

The Council determined to postpone any decision on the question of restating any part of the criminal law until they obtained a Report, or Survey and Statement of the Defects in Criminal Justice in the United States. The work on this Survey and Statement is being done by a Committee composed of Herbert S. Hadley, Chairman, William E. Mikell, and John G. Millburn. Considerable progress has already been made, and it is expected that the completed draft will be in the hands of the members of the Council before the end of the year.

The object of the Survey and Statement is to present such a clear analysis of the defects in criminal justice as will serve not only to guide the Institute in determining how far, if at all, it should undertake the restatement of the criminal law, but also serve to show other associations and agencies work, not within the province of the Institute to do, which nevertheless should be done to improve existing conditions.

It is needless to say that the work and reports of your Special Committee on Law Enforcement, though having a different object, nevertheless have been an assistance to the members of our Committee.

In describing our work, we have gone into details because we wish the members of your Association to have an opportunity to keep in touch with the progress of the work on the restatement. We believe that the majority of those who have read the Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law to the Washington meeting are convinced, as those who attended that meeting were convinced, that while the execution of the restatement as planned presents great difficulties, with sufficient financial support, American legal scholarship is adequate for the task. The necessary financial support has been secured, and a good start has

been made in securing the services of our foremost legal scholars.

There is one question, however, which is on all our minds: Can the restatement, no matter how well done, without being adopted by the legislature as a code, secure sufficient authority to accomplish that simplification and clarification of the law which will alone justify the time, labor and money expended. The answer to this question will depend on the attitude towards the work taken by our judges, our leading lawyers, and the faculties of our principal law schools. No rule of statutory law requires a court to treat its own decisions or the decisions of other courts as legal precedents. The legal professional instinct which in determining the law applicable to a given case regards all prior decisions on analogous facts as more or less authoritative is the result of our training as lawyers. If the restatement is to be a success, there must be developed among the members of our profession a feeling towards the work of the Institute which will lead us to give to the statements of law set forth in the restatement an authority comparable to that now accorded the decisions of our highest courts. To do this it will not be sufficient that the restatement be well done, though this, of course, is essential. There must be a feeling on the part of the members of the bench and bar that the restatement is necessary for the preservation and proper development of the Common Law; that the Institute represents in the best sense of that word the American Legal Profession, and that its work is our profession's most important contribution to the improvement of the law. To create, maintain and develop this feeling, it is essential to have the intelligent co-operation of the American Bar Association.

The American Bar Association and the American Law Institute have no organic connection. Such connection would be unwise. The constructive scientific character of the work of the Institute makes it necessary for us to have a constitution which will insure the continuance of a definite policy. But we need your co-operation; the friendly but searching criticisms and helpful suggestions of your committees on our work and the various drafts of the restatement of different topics. We also need what we may call the machinery of your organization, and especially that most useful of all legal periodicals, the AMERICAN BAR ASSOCIATION JOURNAL, to carry to the profession in all parts of the country a correct understanding of the nature of our work.

#### Interchange Between Solicitors and Barristers

"Perhaps the most striking change in the aspect of the Bar in our generation has been the ever-growing extent of interchange between the two branches of the profession. At the beginning of the twentieth century a solicitor who came to the Bar was indeed a *rara avis*; everybody could enumerate at once all his colleagues who had done so. Today it is exceedingly common. Indeed, it is becoming quite a regular avenue to the Common Law, as distinct from the Chancery Bar. A young solicitor gains experience and finds his feet as an advocate in the County Court, and then 'changes over' to the Bar with the advantage of a wide professional experience elsewhere. And, although this does not happen so frequently, it is becoming not uncommon for barristers in middle life to prefer the more varied life of the solicitor."—*Sol. Jour. & Rep.*