

to consumers, from which these as partners received the entire profits of the enterprise. From the success of its modest beginnings the movement has made great strides, until today it has not only captured a large percentage of Britain's retail trade (in which it sells everything from baby's outfits to funeral furnishings), but has also its own federal dairy, laundry, coal, and insurance societies, as well as the biggest baking plant in the British empire. Under the exigencies of competition with private business, the movement has expanded from retail to wholesale trade, thence to the field of production, to banking, and to the development of a press and a Cooperative Political Party. Federal organization has been the cooperators' answer to private capitalist concentration.

By subordinating his own ideas to the positive presentation of facts, Mr. Elliott has avoided the risks of partisan propaganda and acrimonious criticism of opponents. For a time, indeed, the consumers' cooperative movement enjoyed an advantage over trade unionism and political socialism, its allies, in not arousing organized opposition. In a democratic society few will openly challenge the worker's right to spend what he earns where he pleases. Hence if he chooses to spend his money at a cooperative store that returns dividends on purchases, and to become a shareholder in it for saving and insurance benefits, his efforts at self-help can hardly be criticized. Nevertheless in recent years the rising tide of restrictive legislation and of active hostility to cooperatives on the part of private trade associations, the Government, and the newspapers testifies unmistakably to their threat to big business.

In reply, the British cooperatives have launched a Ten Year Plan with the object not only of unifying, enlightening, and enlarging their membership, but of transforming their policy from one of passive protection of the consumer to an active offensive in his behalf. The sphere of production especially remains to be conquered. Cooperators have to develop

more efficient vertical combinations, to collectivize processes from the extraction of raw materials to the final delivery of the finished product. Their aim is to permeate the whole marketing structure, both in order to gain a deciding voice in fixing prices and costs, and to bring essential commodities under effective public control. One of the author's most interesting chapters analyzes the democratic organization of the movement as a working unity; from its roots in thousands of autonomous local societies voluntarily linked to farmers' associations, collective factories and wholesale groups up to its national directive agency in the Cooperative Union.

Whether Mr. Elliott is justified in claiming all that he does for the movement—whether its power is great enough to bring the economic goods of life under public control by the simple expedient of cooperative competition with private business (thus rendering the supersession of capitalism by statutory means unnecessary)—may be questioned; yet its importance as an ally of trade unions and such political organizations as the British Labor Party, and as a technique for training the public in the arts of economic combination and business administration, can hardly be overestimated.

MARIE SWABEX.*

RESTATEMENT OF THE LAW OF PROPERTY,
The American Law Institute. St. Paul:
American Law Institute Publishers.
1936. Pp. Vol. I, lxi, 503, 22; Vol. II,
liii, 675, 60.

These two latest volumes of restatement are part of a projected five-volume clarification of the law of property. Into their making have gone eight years of labor in the elaborate routine of the American Law Institute and "close to \$150,000."¹ Most of the work was done by or under the supervision of Professor Richard R. Powell, the present Reporter; Dean Harry A. Bigelow was Reporter for the first two and a half years and Professor W. Barton Leach is responsible for Chapter 15 (Stat-

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¹ Powell, *Cases on Future Interests* (2d ed. 1937) p. v.

utes of Limitation). A small group of distinguished advisers contributed collectively some 28 months of work.²

The outline of the completed volumes is simple—"almost unimpeachable" is the accolade of one reviewer.³ Volume I is devoted to definitions and to freehold estates. The definitions begin with the Hohfeldian correlatives and extend through "interest," "legal and equitable interests," "possessory interests," "estate," "owner" and so forth to "executory limitations;" the material on freehold estates treats of the "creation" and "characteristics" of estates in fee simple absolute, estates in fee simple defeasible (fee simple determinable, fee simple subject to a condition subsequent, fee simple subject to an executory limitation), estates tail, estates in fee simple conditional and related estates, and estates for life. Volume II defines and differentiates, with some innovations in terminology, the various types of future interests and treats of their characteristics. Characteristics include transferability by conveyance *inter vivos*, succession on death, subjection to the satisfaction of claims of creditors, partition, and judicially ordered sales, protection of future interests resulting from requirements for judicial action binding upon such interests, protection as against acts and omissions of the owner of the present interest, protection as against persons other than the owner of the present interest, protection as affected by statutes of limitation and the doctrine of prescription, ineffectiveness of an interest in its inception and effect thereof upon prior or succeeding interest, and termination of an interest as affecting succeeding interests. For annotated appendices on dower and curtesy as derivative estates, implication of gross remainders in deeds, the

severability of a power of termination, ineffectiveness of an ultimate executory interest, and aspects of the law of acceleration and sequestration the Reporter assumes sole responsibility. Later volumes are promised on further problems in future interests, on the social restrictions imposed upon the creation of property interests, and on servitudes.

In mechanical make-up, stated purpose, and scope of contents this *Restatement* differs little from its predecessors. Black-letter, comment, and illustration reappear in all their pristine rigor. The object of the Institute is again, so the Director writes in his introduction, to promote "certainty and clarity"—to prevent "the abandonment of our common law system" and its supersession by "rigid legislative codes."⁴ All this is to be accomplished by, in a phrase borrowed from Professor Leach, "still photography"⁵ of existing law, a restatement of the "general law of the United States"⁶ as it is. Nor are the Institute's anticipations of success modest. In a special caveat in the text appears exact expression of a sentiment several times echoed: "An attempt to formulate these matters in the form of definite rules at this time might well crystallize the law in a manner which would hinder progress."⁷ Earlier in the volume the fear is that such formulation might "hinder development."⁸ In scope of contents Professor Powell has, however, succeeded in making a few innovations; these volumes, with their appendices, do contain a considerable sprinkling of historical and statutory material, case discussion and reasoned comment. Yet such interstitial contributions, necessarily meagre and inadequate,⁹ fall far short of offering either a genetic account or a critical appraisal of institutions and doctrines. The many criticisms made of its predecessors

Property. 512, "Differences of this type may lack logical or pragmatic justification but cannot be overlooked or left unstated, in an attempt to photograph the existing law."

² *Supra* note 4.

³ Vol. I, 470.

⁴ *Ibid.*, 405.

⁵ Note one summary sentence: "Between the enactment of this statute in 1285 and the American Revolution in 1776, estates tail were extremely important factors in the English social organization." Vol. I, 203.

² Powell (1936) XIII Am. L. Inst. Proc. 117.

³ Schnebly, Book Review (1937) 37 Col. L. Rev. 881. This review contains an excellent critical discussion of various sections of the *Restatement*.

⁴ Vol. I, p. ix.

⁵ (1935) XII Am. L. Inst. Proc. 273, 274. "The Institute is committed, as I understand it, to what may be called legal still photography. . . . The movement cannot be reproduced . . . by still photography." Cf. 2 *Restatement of*

sors are, on the whole, valid indictments of the *Restatement of Property*.

To elaborate upon the now commonplace criticisms of the earlier restatements would be futile. Some reviewers have pointed to naiveté in fundamental assumptions—assumptions that certainty is obtainable and obtainable by high abstractions, that certainty is more important than flexibility, that “substantive law” is all-comprehensive and designed to govern human conduct in and out of courts, that the defects of “the law” can be cured by restating it as it is, that a restatement of the law as it is is a restatement of it as it ought to be, and so forth; others have deplored the omission of historical, economic, and sociological backgrounds and of studies of comparative experience in other countries, the ignoring of, except by indirection, consideration of what “the law” ought to be, a failure to study the social consequences of institutions and doctrines, the omission of supporting authorities, reasoned discussion, and contrast of conflicting opinion, the use of “doctrinal” rather than “factual” classifications and of the blackletter-comment-illustration formula of expression, and so forth.¹⁰ Yet to all of these criticisms the officials of the American Law Institute have remained impervious. Their only answer is that “the most claimed for the restatement is that it represents the *considered conclusion* of those who have for years been interested in a particular branch of the law,” that investigations of fact “cost a lot of money and take a lot of time and the legal questions in individual cases must be answered before all the facts can be learned,” and that “many questions of policy are incapable of demonstration by any fact examination which it is possible to make.”¹¹

¹⁰ For excellent elaboration of a host of criticism see Yntema, *What Should the American Law Institute Do?* (1936) 34 Mich. L. Rev. 461; *The American Law Institute* (1935) *Legal Essays in Tribute to Orrin Kip McMurray*; *The Restatement of the Law of Conflict of Laws* (1936) 36 Col. L. Rev. 183. Cf. Clark, *The Restatement of the Law of Contracts* (1933) 42 Yale L. J. 643; Green, *The Torts Restatement* (1935) 29 Ill. L. Rev. 582. Articles and reviews are collected by Goodrich, *Institute*

What does “considered conclusion” mean? Some insight—inadequate, of course—and with it some idea of the difficulties of restatement can be gleaned from the reports of the annual meetings of the Institute. Let us look, for example, at “Discussion of Property, Proposed Final Draft” in the report for 1936. Space will permit only a few excerpts. Take first the debate about words of inheritance. Section 27 of the *Restatement of Property* reads:

“Subject to the rules stated in §§30 and 32, a legal estate in fee simple absolute is created in a natural person by an otherwise effective conveyance inter vivos of land if, and only if, the conveyance contain words of general inheritance with respect to the conveyee.”¹²

Illustrations to this in comment (b) are:

“A makes an otherwise effective conveyance inter vivos of land with a limitation:

- I. “to B;”
- II. “to B forever;”
- III. “to B in fee simple.”

B in each case has an estate for his life.”¹³

Discussion of this section and its illustrations was not without heat.¹⁴

“Charles E. Clark (Connecticut): . . . I have fought this for ten years . . . it grows more ridiculous every time I see it. . . . If you work down through the Special Note you will find that at most it can only apply to eight states; that actually it only applies to two of them; that it is held the other way in four and the only states for which this Restatement is made are the States of Connecticut and New Mexico. . . . The

Bards and Yale Reviewers (1936) 84 U. Pa. L. Rev. 449, 450, n. 3.

¹¹ Goodrich, *supra* note 10, at 450, 452, n. 2. Italics supplied by the reviewer.

¹² Vol. I, 73.

¹³ *Ibid.*, 75.

¹⁴ (1935-36) XIII *The Am. L. Inst. Proc.* 164-180. The report here reprinted is much edited by the reviewer and perhaps does not do justice to any individual speaker; but it does, I think, carry the authentic flavor of the entire proceedings.

final apology . . . is that this law must apply to the cases of states having deeds before the statute takes effect. . . . I would make two answers. The first is that I did not suppose the Restatement was directed to past history, history at least fully a generation old, if not more, and my second is that I believe the law to be wrong as stated even in those cases. I think that the statutes show a general policy of the states the other way and there are not enough cases of recent origin to justify such an unrealistic statement of the law. . . .

Mr. Rosenthal: Was not that the common law rule?

Mr. Clark: What is the common law? If you say the American common law, I doubt it very much. If you say the common law at the present moment, I am fairly convinced it is not so on the mere count of noses. . . .

Mr. Powell: . . . Dean Clark has a most difficult situation to maintain that the law was not as we state it prior to the statute in the states of this country. There are some twenty-four decisions from some thirteen different jurisdictions that lay down explicitly that the interest in that case was not a fee because of the absence of words of inheritance. Even a court in Dean Clark's own state was so foolish (in his judgment) as to say that words of inheritance were necessary in 1892. . . . It seems to me that his rule is a bad rule; but that it is the rule of this country apart from statute. I don't like it but I feel compelled in my responsibility to you to report it to you as the law apart from statute. . . .¹⁵

Mr. Clark: . . . I deny the count

utterly and in toto. . . .

Hon. George T. McDermott (Kansas): . . . There is authority enough—I don't care whether it is the majority—there is authority enough in the common law to say nothing of the statute to support Dean Clark's position and, as I see it, the object of this Institute is to declare what that court would say and not merely count cases. . . .

Mr. Sims: . . . Personally I wish we could rule as Dean Clark does. I do not see how we can. . . .¹⁶

The Director: . . . I do not pretend to be an expert on Property Law, but I have a very fair conviction that the meaning of words should be the intent of the person who wrote them as interpreted by the surrounding circumstances and any such old and ridiculous rule as this is frankly anathema to my mentality. . . . In other words, if you really think as Judge McDermott has said that this rule which none of us likes is not the existing law in the sense that it would not be followed in any properly presented and pertinent case in the great majority of cases where it would arise, then this rule should be changed now, and now I point out is the last time to change it. . . .

Mr. Rosenthal: . . . What we have to do it strikes me is to restate the law as we find it, not as we would like to have it.

Mr. Powell: The rule as Dean Clark has stated it makes the rule operative as to deeds and as to wills identical. That is good sense. It is not the common law. . . . It seems to me that it is a change highly undesirable and arises solely from a confusion in seeing the

¹⁵ "Mr. Powell: . . . As to the fee simple with an executory limitation, there is a minority authority supporting us and a majority against us. There are eleven states against us and three with us, and there are thirty-four waiting for the announcement of the Institute to guide them. It seems to me that under these circumstances the Institute should throw its weight in favor of the three. We have been consistent at least." (1929-30) VIII The Am. L. Inst. Proc. 288.

¹⁶ "Harry Upson Sims (Alabama): . . . Are we, therefore in restating the law of Property, to consider primarily a return to the old law of Property of the Fifteenth century, or is it the duty of this group, with the Institute backing it up, to develop out of it a possible law of property for the next hundred years. . . . So, I think, in Real Property we ought to consider . . . what the law ought to be. . . ." Supra note 15, at 290.

purposes of the Institute. It confuses the effort to state the law as you would like to see it with a statement of your sober conviction as to how a court would decide a case in the absence of an applicable statute. It is wishful thinking which dictates the proposal that is moved in the motion.

Member: . . . I am not unmindful of what the Director has said that what is desired here is that this group should act as prophets in determining what the courts might decide under certain circumstances upon certain troublesome legal subjects. The Lord Almighty could not decide that question and certainly these men here assembled are not equal to that task. I for one am not qualified to vote on a question of prophecy.

Mr. Pepper: Gentlemen, you have heard the question which arises upon the motion made by Dean Clark at the suggestion of Judge McDermott and the substance of it is to substitute the language proposed by Dean Clark for what at present appears in Blackletter of Section 30. Is there any further debate? If not, all in favor of the substitute proposed by Dean Clark will say "aye." The noes have it. The substitute is lost."

Lest the above be thought unique, one further brief example. Section 160 of the published draft reads: "Except as stated in §161 the owner of a power of termination in land has no power to transfer his interest, or any part thereof, by a conveyance inter vivos."¹⁷ So the rule is stated "in spite of the belief of the Reporter and of some, at least, of his advisers that this principle of non-transferability is a pure anachronism."¹⁸ The first sentence of Comment (c) to the Blackletter reads: "A power of termination is destroyed by an attempt to make such a transfer as is forbidden by the rule stated in this Section."¹⁹ Witness part of the consideration of this obscure rule:

"Mr. Powell: . . . I have drawn Comment (c) in accord with the direction made by the Annual Meeting of 1933. It is as indefensible a rule as can be formulated in words.

Judge Hand: That raising no response, we will proceed to Section 203. I take it we prefer to stand on what we once said."²⁰

Reference to an earlier volume of the annual reports reveals that the first sentence in Comment (c) was put into its present form by a vote of 41 to 35.²¹

So much for the confusion of purpose that attends the Institute's public "consideration" of its pronouncements. Courtesy commonly requires that an individual author be judged by the extent to which he succeeds in accomplishing his chosen aim; even the Institute has been defended upon the ground that it was never intended that it should do what its critics demand.²² But in a world where funds and capacity for and interest in legal scholarship are limited it seems not unfair to criticize a great research organization for its choice of aims—especially when the announced aim is a will-o'-the-wisp that can lead only to subsidized snark hunting. To assume that the judicial handling of property problems in contemporary America can be made more predictable by an authoritative canonization and rationalization of ancient, feudal-conditioned concepts and doctrines—of, for examples, the distinctions between legal and equitable, divesting ("cutting short") and normal expiration,²³ conditions subsequent and conditions precedent, remainders and executory interests, rights of entry and possibilities of reverter, and so forth—is little short of fantastic. If the investigations of fact indispensable to reform "cost a lot of money and take a lot of time" (compare the eight years and "close to \$150,000 above"), there is all the more reason why an institute embodying the best resources of the nation should undertake such studies. Of course "questions of policy are incapable of demonstra-

¹⁷ Vol. II, 574.

¹⁸ (1933) Restatement, Property (Tent. Draft No. 4, 1933) 113, 114.

¹⁹ Vol. II, 577.

²⁰ (1935-36) XIII The Am. L. Inst. Proc. 198.

²¹ (1932-34) XI The Am. L. Inst. Proc. 153.

²² Goble, The Restatement of the Law of Contracts (1933) 21 Calif. L. Rev. 421.

²³ See Vol. I at 43, 54, 56, 59, 60, 63, 65, 118, 119, 147, 165, 195.

tion" by "fact examination." Demonstration belongs to the realm of logic, fact examination to that of observation or experiment, choice to that of nobody knows what; still it is a favored prejudice of our times that an informed judgment is more useful than mere hunch. Certainly counting cases and counting the votes of, necessarily, uninformed experts are neither new nor practicable techniques for escaping confusion. Mr. Felix Cohen has pointed to similarity in the method of the Institute and that prescribed by Valentinian's "mathematical" Law of Citations.²⁴ Of that law Professor Buckland writes: "These provisions show that scientific study of law was a thing of the past; they mark probably the lowest point reached by Roman jurisprudence."²⁵

These observations are not, however, intended to suggest that the *Restatement of Property* is either wholly bad or a negligible contribution to the fruitful study of property law. On the contrary—it is perhaps justly described by one competent critic as "the most scientific treatment of its field which is available to the profession."²⁶ Despite all the tiresome repetition, some of which could have been avoided and some not, despite the many thin distinctions and obvious, dull, or unreal illustrations, there is much in it that is useful to any worker in the field and much that cannot be found elsewhere. Professor Powell has struggled valiantly against the limitations of purpose and form imposed upon him. By continued insistence upon "rational," "symmetrical," and "consistent" rules, he has even been able to work a number of reforms. Notable examples are in the alienability of "contingent" remainders, executory interests, and possibilities of reverter, (§§162, 159) in the indestructibility of "contingent" remainders, (§§239, 240) and in the reclassification of remainders (§157; indefeasibly vested, vested subject to open, vested subject to complete defeasance, and subject to a condition precedent). Many portions of the text could be singled out for peculiar excellence; most of the material on the characteristics of future in-

terests is, in fact, more informative and stimulating than anything to be found in orthodox treatises. The same could be said of various sections and chapters on freehold estates. That pretty well covers both volumes. Technical excellence in sacred doctrine must indeed be taken for granted in a work subjected to so much scrutiny by so many scholars.

It is only when the *Restatement of Property* is measured by what needed to have been done and what might have been done that its shortcomings become oppressive. Scholarship in its field has now come to a reasonably sad state. Mr. Gray's great works were written in an intellectual atmosphere largely incomprehensible to modern students; Mr. Kales' volume is more satisfactory, but subject to well-known limitations; Professor Simes' recent treatise, though valuable for results, is not long on either history or critical analysis. What students, young and old, of the subject need is a comprehensive, genetic history of the ancient concepts, a delineation of how they came to be what they are, both their literary history and the social conditions that brought them forth, and a careful, informed assay of their adequacy to achieve certain commonly accepted social ends of our day. No one has expressed this need more clearly than Professor Powell. In the preface to his *Cases and Materials on Trusts and Estates* he wrote:

"He (the student) needs a picture of the past evolution of this law; of the present day forces which are shaping the law of the future; of the wide variety of present transactions requiring sometimes the re-discussion of ancient problems, sometimes the difficult process of new thinking; of the growing statutory ingredient in the law; and of the deeper problems of social engineering implicit in the allowance of wealth accumulations, inheritance, and testamentary dispositions."²⁷

Recognition of this need appears in various comments throughout the *Restatement*. Perhaps it is not too much to hope

²⁴ *Ethical Systems and Legal Ideals* (1933) 5, n. 7.

²⁵ *A Text-Book of Roman Law* (1921) 35.

²⁶ Schnebly, *supra* note 3, at 886.

²⁷ *I Cases and Materials on Trusts and Estates* (1932) p. vii.

that the Restatement may be but a prelude to more penetrating studies and to more effective social action. A few years ago the then President of the Institute stated a novel conception of its function. "It may be very helpful," Mr. Wickersham said, "to state what is a recognized principle of law in such clear and distinct form that its bad nature becomes apparent."²⁸ More recently Professor Simes has written: "If this statement of obscure and complicated rules is to be of social value, it should be followed by legislation correcting the difficulties which have been discovered."²⁹ Through its efforts to effect certainty the Institute may—strange fate—find itself initiating a movement to promote change.

MYRES S. McDOUGAL.*

PRINCIPLES OF CONFLICT OF LAWS, by George Wilfred Stumberg.¹ Chicago: The Foundation Press. 1937. Pp. xl, 441. \$5.00.

Seven years ago, Professor Stumberg published a programmatic article which made him known as one of the proponents of the so-called "functional approach" in conflict of laws.² Other members of this school have published casebooks and articles criticizing the methods of the Restatement, or dealing constructively with problems of detail. Now, Professor Stumberg has published the first comprehensive text on conflict of laws written in the functional method.

To survey the entire field of conflict of laws in an unconventional approach is no easy task. An author who undertakes to find the solution best suited to the peculiar requirements of every problem would seem to require much space for detailed discussion. Professor Stumberg has succeeded in condensing his functional treatment of the conflict of laws into slightly more than 400 pages. It seems that his purpose was not so much to write an exhaustive treatise, in which every question would be thoroughly weighed and discussed, but to present to teachers and students of the conflict of laws the appli-

cation of the functional method to the most frequently recurring problems. He has selected these problems so skillfully that a survey of the entire field is given. His style is terse, but well readable. Difficulties are not shunned, but courageously attacked.

In contrast to the "classical" school of conflict of laws, Professor Stumberg refrains from formulating hard-and-fast rules expressed in clear-cut concepts. He states the conflicting interests which are involved in a problem, and the policies which may or which should move a court to adopt one or another solution. In speaking, for instance, of the distinction between "substantive" and "procedural" law, the author makes it clear that "any classification, having as its objective demarcation of a definite dividing line for the purpose of categorically isolating through generalization, particular type situations, is apt to be dangerous." (p. 129). Hence he states that application of foreign rules concerning the methods of presenting the operative facts to a court "would require an almost impossible readjustment of local judicial machinery in the trial of a case." (p. 128). The policy of maintaining uniformity of procedure may conflict, however, as the author points out, with the policy that "business convenience and security demand that there be a minimum of variation, because of the forum selected by the plaintiff, in legal relations on given facts. . . . The balance to be struck is one between the requirements of nonvariation in legal relations because of the accidental forum and the justifiable unwillingness of any court to adopt in whole or in part foreign judicial machinery." (p. 149). Thus he reaches the conclusion that "to treat the measure of damages, the parol evidence rule, the statute of Frauds, and limitation of actions as substantive would not disturb the balance." (p. 149). Presented in such a way, the problem of distinguishing between substance and procedure no longer appears as a mysterious process of finding "correct" definitions, but as a conscious weighing of interests

²⁸ (1932-34) *The Am. L. Inst. Proc.* 146.

²⁹ Simes, *Fifty Years of Future Interests* (1937) 50 *Harv. L. Rev.* 749, 783.

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² *Conflict of Laws, Foreign Created Rights* (1930) 8 *Tex. L. Rev.* 173.