

THE RESTATEMENT OF THE LAW OF PROPERTY

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All are agreed that the conception of the American Institute of Law was not less than splendid. Certainly not since Justinian's time had so impressive a plan for the formulation of the law of a great people been put in execution; and it is improbable that even the imperial government of sixth century Byzantium could have provided such munificent financial support for the jurists who compiled the *Corpus Juris Civilis* as that which has been provided for the work of The American Law Institute by twentieth century private benefaction. The plan, grandly conceived and supported with such princely generosity, was set in operation with vigor and skill. America's greatest legal scholars and the foremost among her barristers and judges were mustered and marshalled in the campaign against the error, uncertainty, confusion and conflict that have so long characterized American law. Surely no better ordered plan could have been devised for bringing to bear upon the restatement of American law the best that America could afford in scholarship, experience and ability. The administration of the enterprise has been vigorous, intelligent and efficient.

In the field of property law the mountainous machinery of the Institute has laboured long and painfully and now produces with official finality the first two of the five volumes that are planned. Of work done under such high circumstance the profession and the public naturally expect much. It is against these great expectations that it must be measured.

The reader quickly perceives that the black letter formulas are of relatively little value; that they are sometimes inaccurate, often obscure, and always ponderous and dull. But he also soon comes to see that the undoubtedly great merit and value of the work as a contribution to legal literature is to be found in those portions of the text that are printed as ancillary to the rigidly formulated rules that appear in black letter type. Hard pressed by their association with the black letter formulations, these ancillary writings assume an unfortunately fragmentary form. They bear such various labels as "Introduction", "Note", "Introductory Note", "Historical Note", "Special Note", "Scope Note", "Comment", with informative sub-labels almost without number, and "Illustration". But however labelled, these ancillary writings, together with the monographs,¹ reflect somewhat brokenly

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1. The successive tentative drafts were accompanied by pamphlets setting forth explanatory notes prepared by the Reporter, and sometimes attended by the dissenting views of groups of his advisers. Only a few of these notes, printed "unofficially" as appendices, appear in the two volumes now issued, having escaped the operation of the destructive belief that the

the vast amount of thorough research in American judicial precedent and legislation and the wide learning that have gone into the making of these books, as well as the Reporter's peculiar and puzzling ingenuity in classifying and arranging the immense mass of material used. These qualities are displayed quite as fully in Chapter 5, which deals with such archaic and unimportant interests as estates in fee tail and fee conditional, as in Chapters 7-17 (Division III), in which interests of vast importance are treated.

Yet despite the reader's cheerful recognition of the admirable scholarship and the extensive research that have entered into the making of this work, he lays down the volumes with a distinct sense of disappointment. He feels that they will afford little help either to the active profession or to the student of law. We shall attempt, as briefly as may be, to indicate why the work is disappointing.

In the first place it is unintelligible to all but the initiated. The terminology adopted is unfamiliar, esoteric. The style, particularly of the black letter rules, is ponderous, redundant, repetitious and therefore tiresome. The purpose was undoubtedly, following the argument of the late Professor Hohfeld,² to give a precise and fixed meaning to terms used, and to use such terms only in the fixed sense, so that formulas expressed in such defined terms would have a clear, unambiguous and constant meaning and be as interchangeable as the parts of a standardized machine. This purpose finds expression in the excessive use of cross references in the text of rules, a practice tolerable only in legislative drafting, and the strained effort to achieve precision in statement.³ The draftsmen adopted the Hohfeld sys-

formulas adopted as rules of law could stand upon their own black-faced type and needed no explanation. These survivals the reader of these volumes greets joyfully, for with rare exceptions they speak the lawyer's language and employ the technique which the lawyer's experience has taught him is the only one which will aid him in predicting judicial or administrative action.

2. See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

3. This straining for precision, so characteristic of the black letter formulations throughout these volumes, may be illustrated by quoting § 124, a reasonably brief declaration. Having occasion to state the familiar rule of modern property law that the owner of a life estate may transfer to others the whole or any part of that estate, and that an attempt to transfer a greater estate is operative to transfer only the estate which he has, the *Restatement* puts forth this wordy pronouncement:

"(1) Except in such cases as are described in Subsection (2), the owner of an estate for life has the power to create any interest in land which includes any or all of the rights, privileges, powers and immunities which constitute the estate for life. When a person, having only an estate for life, purports to transfer an estate greater than the estate for life, his conveyee acquires thereby, as against the owner of a future interest in such land, no right, privilege, power or immunity greater than those had by the conveyor.

(2) When the estate for life is limited to end upon some attempted alienation thereof, the power described in Subsection (1) is correspondingly curtailed."

Obviously the exception in subsection (2) is unnecessary, since any power whatever is subject to such lawful restrictions as may have been put upon it. And in fact it is not true that the "conveyee" cannot acquire any "right, privilege, power or immunity greater than those had by the conveyor." The lessee for years who holds under the life tenant, whose estate ends because of the voluntary termination by the lessor of his own life estate, has the privilege, and right, of harvesting the growing crops, while the life tenant has not. *Debow v. Colfax*, 10 N. J. L. 128 (1828) ; 2 BL. COMM. *124.

tem of correlative legal relations in toto, and then attempted in Chapter I, Definition of Certain General Terms, to define other frequently used terms with equal precision. This was unfortunate. The use of the Hohfeld terminology is greatly helpful in stating specific problems that require nice analysis, but it is not suited to descriptive or expository writing addressed to even such a specialized portion of the public as the members of the bar and the bench. Lawyers and judges do not in fact understand the Hohfeld system, and one suspects that even the restaters have their difficulties with it:⁴ the *Restatement of Torts* uses the terms "duty" and "interest" in senses quite remote from the meanings given them by the *Restatement of Property*.⁵ Incidentally, it is well to note that nothing so well gives the impression of futile pedantry as to see a long row of "rights, privileges, powers and immunities" set into a descriptive paragraph when some single word, such as "interest", will better express the meaning intended. In Section 124 we find two of these sonorous scales in one paragraph. So the other broader terms, especially those given specialized definitions unfamiliar to the profession, have confused readers and given the draftsmen an illusion of certainty which is harmful.⁶ This was clearly brought out during the discussion at the annual meeting of the Institute in 1936, where it was evident that some of the most active participants, including some of the Reporter's advisers, did not understand the meaning intended to be conveyed by the terms used.⁷ Words can have only such meaning as usage gives them; and words addressed to lawyers must carry the meaning that professional usage warrants. Esoteric expressions are used at peril. For example, the phrase "right of entry for condition broken" has been in familiar use by lawyers for upwards of three centuries.⁸ Its meaning, delimited by hundreds of judicial decisions, is as nearly clear and constant as the meaning of any legal term can be. But this useful and familiar expression is discarded for the wholly unfamiliar and inherently ambiguous "power of termination",⁹ used throughout the *Restatement*. The unconvincing reason given for this substitution is, in brief, that the interest in question is a

4. See, for example §§ 119-123, where "privilege" is used when "right" was intended although the correct term was used in §§ 117, 118. See also § 201 (2), where "privilege" is used for "power". In § 24, Special Note, grievous inaccuracy in applying the Hohfeld system may have induced one of the *Restatement's* gratuitous mistakes, the substitution of "power of termination" for "right of entry for condition broken".

5. See Director's Notes, pp. 4, 11.

6. See Division III, Introduction, p. 517, where this is written of the bewildering terms there defined: ". . . there is a definitive chapter . . . which establishes a clear terminology for the whole Division." "The exact rule stated in a Section employing one of these terms depends upon the meaning of that term." *Id.* at 519. Elsewhere the Reporter wisely said: "I find definitions difficult to frame and substantially useless when framed." 11 Proc. AM. L. INST. (1933) 122.

7. See 13 *id.* (1936) 159, 177.

8. See Division II, Introductory Note, p. 37, with reference to the term "freehold": "The continued use of a term derived from history so long past is justified by the persistent consequences of that distant past upon the framework of present law."

9. Defined in § 24, comment b, § 155.

“power” and not a “right”, and, secondly, that under modern law no entry is necessary.¹⁰ One need not be an expert Hohfeldian to know that a right of entry for condition broken, like most important property interests, is an aggregate of many legal relations. Some of them are rights.¹¹ Also powers other than that of terminating the possessory estate may be included.¹² The substitute phrase, “power of termination”, besides being artificial and unfamiliar, is also ineptly chosen in that it is equally descriptive of numerous other oft recurring powers, such as powers of appointment, or of revocation, or the power of a disseisee to terminate the interest of the disseisor by ouster.

With equal unwisdom the familiar expression “contingent remainder” is discarded for “remainder subject to a condition precedent”. The reasons given for the substitution are that the term “contingent remainder” has “become uncertain as to its exact meaning when used”,¹³ and that the substituted phrase makes more apparent the substantial identity of this variety of remainder and executory interests.¹⁴ Surely the term “contingent remainder”, which comes to us attended by some five centuries of history and defining precedents, and which is deeply embedded in the legislation and literature relating to property law, has a much more definite connotation than “condition precedent”, which is one of the most versatile and elusive terms of the law. The *Restatement* makes no attempt to define a condition precedent, and the one descriptive statement¹⁵ would seem to imply the adoption of the New York statutory definition,¹⁶ under which it was held by the New York Court of Appeals that a remainder clearly contingent was vested,¹⁷ quite contrary to the common law decisions.¹⁸ The concept which ordinarily bears the label “contingent remainder” is essentially a complex and difficult one, but it will not be made any simpler or less difficult by changing its label.

Such petty verbal misadventures, which so easily work themselves into errors of substance, are numerous in this *Restatement*, but space may be taken to refer to only one other, more petty still. That is the wholly needless substitution of “conveyor” and “conveyee” for the familiar grantor and grantee. Now lawyers might have used these terms, just as they might have used the Greek derivatives which are found in Professor Kocourek’s

10. See § 24, Special Note.

11. E. g., the right to be protected against equitable waste, § 193, comment *c*.

12. E. g., the power to release, or sometimes to transfer. On the latter power, see §§ 160, 161.

13. See § 157, Note on Terminology, p. 542.

14. *Ibid.*

15. “When a limitation creates a remainder and it is not possible to point to any person and to say such person would take, if all interests including a prior right to a present interest should now end, this remainder is subject to a condition precedent.” § 157, comment *u*.

16. See N. Y. CONS. LAWS (Cahill, 1930) c. 51, § 40.

17. *Moore v. Littel*, 41 N. Y. 66 (1869).

18. See *Smaw v. Young*, 109 Ala. 528, 546, 20 So. 370, 377 (1895).

Jural Relations,¹⁹ or they might have found appropriate words in Esperanto, but in fact they have not done so. Neither "conveyor" nor "conveyee" is to be found in any of the dozen law lexicons accessible to the writer. Neither is it to be found in that all embracing publication, *Words and Phrases*. The use of "convey"²⁰ as a colorless word is well enough, but the gratuitous use of these barbarous derivatives is a sin against the Holy Ghost that can scarcely be forgiven.

Another instance of the gratuitous infraction of that basic principle of public policy that no writer should use language in such a way as needlessly to injure his reader is the *Restatement's* "damnable repetition" of the phrase "otherwise effective" conveyance. The apology which is given²¹ for such unspeakably bad style cannot be accepted. Wherever the word conveyance is used, we are told, entirely unnecessarily, that it is "an otherwise effective" conveyance, save in a few instances where a blessed oversight of the draftsman has dropped it out.²² Occasional relief is found in the use of the word "transfer"²³ in the sense of "effective conveyance". Even the legislatures are maligned with this dreadful phrase. Thus in Section 39 we read "Where a statute provides that an otherwise effective conveyance creates an estate in fee simple" Then follow references to the statutes of some thirty-seven states. Now one would scarcely set up the ordinary American statute as a model of style, but he is glad to do the statutes the justice of saying that not one of them says anything about "otherwise effective conveyances". Legislative draftsmen are often prodigal in the use of superfluous words, but, after all, there is a limit.

We must not continue with these petty complaints regarding the style in which these volumes are written, although it is well for even restaters to remember that much of the reputation of Maitland, Holmes and Cardozo is due to the charming style that graces their writings; and, furthermore, one naturally wishes to explain why the reading of this *Restatement* is so tiresome. But the reader does wonder, in view of the fact that the *Restatement* must be selective, many important topics being omitted, why so much space is used in elaborating the obvious. For example, is it necessary that we be told that there is no dower in a life estate;²⁴ or that "a future interest created as an estate for life measured by the life of the owner ceases on his death";²⁵ or that a defeasible fee that ceases to be defeasible

19. This book, published in 1927, propounds a new system of legal terminology which is separated from the Hohfeld system by what is admittedly a wide gap. See KOCOUREK, *JURAL RELATIONS* (1927) x.

20. See § 11.

21. See § 11, comment c, § 107, comment b.

22. See, for examples, § 29, comment f, § 31.

23. This term is defined in § 13.

24. See § 128.

25. Ch. 9, Scope Note, p. 605. In § 90 we are told with portentous formality that one having an estate terminating with his life has no power to devise his interest. Also, the fol-

becomes infeasible;²⁶ or that the owner of a legal life estate is liable to have his interest taken by his creditors,²⁷ or by the state in eminent domain?²⁸ Finally, the reader should be told that if he will read the *Proceedings* of the Institute for the year 1933²⁹ he will learn that the strange term "escrow deliverer"³⁰ does not mean the person to whom the deed is delivered in escrow as one would suppose, but the grantee to whom it is not delivered.

In appraising the quality and value of this work it is necessary to take into the account the handicaps under which it was produced. In the manner of the work itself, these will be neatly catalogued.

1. The task undertaken was impossible from its inception. There is no "American law of property", and there can be none so long as the present federal system of government persists.

2. The plan of the *Restatement* is based upon the misconception that "the law" is static and capable of formulary statement; that it is subject to still photography.

3. Such misconception wrought confusion in the minds of the draftsmen. They do not have any objective clearly in mind. They admit they are not legislating, and yet approach their task as would timid code draftsmen, with resulting inconsistencies and repugnancies.

First, then, as to the feasibility of restating, or even of stating, "the living American law" of property. One sufficiently learned might state the English law of property of Coke's day, but he could not state the law that governed the contemporary Pilgrims as they took up their land at Plymouth. He might state the property law of modern England, or of Massachusetts, or even of New York or California, but there is no property law of the United States to be stated.³¹ A commercial transaction streaming across state lines may perhaps carry with it some part of the law and customs of the state of its origin. There is even a general commercial law recognized by the federal courts. But not so of property law. That stops at the border. The state court determines the property law of the state. This rule goes so far that when the Supreme Court of the United States had passed³² upon a title to land in Nebraska before the question at issue had come before the state court, in a subsequent case³³ involving the same title it was com-

lowing statement found in § 124, comment *c*, seems fairly obvious: "When the estate for life is limited in duration to the continuance of the life of the owner, any attempted testamentary disposition by him is of slight significance." No less obvious are §§ 105, 106.

26. See § 58.

27. See § 147.

28. See § 148.

29. See 11 PROC. AM. L. INST. (1933) 124.

30. See Division III, Introduction, p. 517.

31. In § 162, comment *a*, mention is made of "the American law" (p. 587), and later (p. 588) "The American law" is contrasted with "The English law".

32. *Giles v. Little*, 104 U. S. 291 (1881).

33. *Roberts v. Lewis*, 153 U. S. 367 (1894).

pelled to repudiate its own previous decision and follow the Nebraska Supreme Court, which had not seen fit to approve the judgment of the federal court.³⁴ Therefore the restaters were confronted at the very outset with a hopeless dilemma. They must either gather up the residual fragments of Coke's common law or of some less worthy forms of local unwritten law which they might find lying around in the various states, and attempt from these fragments and some handy statutes to construct a system of American law, or they must, with some regard for common law precedents and statutory trends, construct a system of rules which in their judgment as to desirable social policies "ought" to be enforced by the American courts, even if in fact they are not. Either course would seem to be rather silly; but in fact the restaters have attempted to do both with the result that the "restatement" as formulated does not either state or restate the law of any place in the world, or even of Utopia.

Secondly, this confusion of mind, this split purpose, has produced some strange results. For example, take the treatment of entails and fees conditional. In a few of the American states³⁵ the fee tail is still afloat, but quite out of commission, while the fee conditional is but a museum piece. It has about the same relation to "living American law" as has a dinosaur's skeleton to the American cattle industry. Yet we find no fewer than ten sections³⁶ given exclusively to the statement of the American law of fees conditional and nine others³⁷ jointly treating of fees conditional and fees tail, a total of 70 pages, or nearly seven per cent of the text so far issued. Now in fact this treatment of fees conditional is based almost exclusively on cases from South Carolina, which quite early discovered that it had never adopted the Statute De Donis,³⁸ which abolished the fee conditional in England six hundred and fifty years ago. It is true that a few cases in Iowa, one in Oregon and some dicta in Nebraska³⁹ have recognized the fee conditional as an existing estate, but these were cases in which the application of this resurrected rule afforded an easy rationalization of solutions which the courts regarded as just and in harmony with the intent of the grantor. The same results might easily have been attained by construction without reference to fees conditional.

There can be no question but that the treatment of this bit of juristic archaeology on exhibit in South Carolina is scholarly, ingenious and interesting. As an article in a legal periodical it would merit high praise, but

34. See *Little v. Giles*, 25 Neb. 313, 321 (1889).

35. These are Delaware, Kansas, Maine, Massachusetts, Rhode Island, Wyoming. In Special Note 2, p. 203, the present status of estates tail in the American states is admirably described.

36. Sections 68-77.

37. Sections 59-67.

38. Stat. De Donis Conditionalibus, 1285, 13 Edw. I, c. 1.

39. All cases are cited in Special Note 1, p. 202.

as a statement of an integral part of the modern American property law it is ridiculous to the point of incredibility.

The extended and excellent treatment of American estates in fee tail, by far the most thorough and scholarly yet published, has more justification because of the volume of case and statute law involved. But even so, it is badly overdone. As an element of modern American law the estate tail is wholly outmoded, but there are some half dozen states in which it must occasionally be taken into account, while the skeletal remains of the dead estate not infrequently turn up in other states. But even so it could be regarded as an element of "living American law" only if the restaters considered their function to be to gather up common law remains wherever found, or to restate the law of particular states. Surely they could not restate the law as they think it ought to be in the form it now takes in Sections 59, 68 and 78. These sections declare, in effect, that if a conveyance to a person and the heirs of his body comes up for construction in a state which has not by statute or judicial decision changed the common law rule, it must hold that the grantee takes a fee tail or a fee conditional, according to whether the court of the state is or is not of the opinion that the state's pioneers brought the Statute De Donis with them in their covered wagons along with the rest of the applicable common law. But whatever purpose may have been in the minds and hearts of the restaters, the net result of the rules laid down in the sections cited is that if the six states which have not yet been called upon to determine the effect of such a limitation⁴⁰ are really awaiting the guidance of the Institute they must find that a fee tail or a fee conditional has been created and go back into the common law of England either two centuries or six centuries, in order to determine the incidents of the estate selected. One doubts such action, and entertains the suspicion that if and when such a case arises in one of these states, it will give little heed to the *Restatement*, but decide the issue raised in such a manner as to carry out what the court understands to be the expressed intent of the parties, rationalizing the decision probably in terms of fee simple, as has already been done in Maryland⁴¹ and New Hampshire,⁴² or possibly in terms of fee conditional or fee tail, if these concepts be found better suited to their purpose.⁴³

Chapter 5, dealing with Fees Tail and Related Estates, illustrates better, perhaps, than any other in these volumes the impossibility of mummifying the living rules of law by wrapping them about with formulas. The narrative, descriptive, and expository portions of this chapter, appearing

40. These are Alaska, Idaho, Louisiana, Nevada, Utah and Washington. See Ch. 5, Introductory Note, p. 210.

41. Posey's Lessee v. Budd, 21 Md. 477 (1864) (decided under statute).

42. Jewell v. Warner, 35 N. H. 176 (1857).

43. Cf. Ewing v. Nesbitt, 88 Kan. 708, 129 Pac. 1131 (1913).

in the Introductory Note,⁴⁴ the excellent special notes, and some of the comments, are interesting and admirable, exhibiting the highest type of careful research and clear exposition. But the pontificating black letter formulas, purporting to declare the law, are worthless, and even misleading. If a black letter formula needs must be written, it would be far better to substitute for Sections 59, 68 and 78 some such simple statement as this: "Any limitation in a proper conveyance, which under the rules of the common law was held to create an estate in fee tail, general or special, is deemed to create an estate in fee simple absolute." Of course this is not a statement of a uniform rule of American property law, for there is no such rule and no such law to be stated; but it expresses much more accurately the prevailing present practice and the modern trend in America than do the black letter sections cited above. And it would also have the advantage of not forcing an innocent court, like that, say, of the state of Washington, to make a hard choice between a fee conditional and a fee tail.

This schizophrenic attitude of the restaters in regard to the objective sought in formulating the rigid rules in black letters causes vacillation and confusion elsewhere in the *Restatement*. Sections 159 and 160 deal with the assignability of possibilities of reverter and of rights of entry for condition broken, respectively. Now it is clear that, for reasons good enough in Coke's time, neither of these interests was assignable at common law. It is equally clear that the reasons given for prohibiting their assignment are no longer operative, and the change of policy is indicated by statutes in a dozen states⁴⁵ declaring, expressly or implicitly, that such interests are assignable. The slender list of pertinent non-statutory judicial decisions found in this country follows the English common law rule as to both interests. And yet in Section 159 it is declared that possibilities of reverter are freely assignable, while in Section 160 the right of entry for condition broken is declared to be non-assignable except as stated in Section 161. Now why do the restaters act this way? The question puzzles the restaters themselves.⁴⁶ In Tentative Draft No. 4, Section 201 (now 160), comment *a*, they followed judicial precedents as to the non-assignability of such rights of entry, but balked when it came to the half dozen or so cases in four or five states which uniformly hold or assert that an abortive attempt to assign such rights operates to extinguish them. It was declared that such an attempt did not destroy the right. The Reporter stated on the floor of the annual meeting of the Institute in 1933 that the case law was all to the contrary, but the draftsmen thought the law "ought" to be as stated. A

44. Pp. 201-211. The introductory notes to Division III, pp. 505-518, and Ch. 11, pp. 649-654, are also especially illuminating and valuable.

45. See § 160, Special Note, for a list of these states.

46. See Leach, *The Restatements as They Were in the Beginning, Are Now and Perhaps Henceforth Shall Be* (1937) 23 A. B. A. J. 517, 519.

motion made to strike out the "not" in comment *c*, so as to bring it into accord with judicial precedent, such as it is, precipitated one of the most interesting and extended discussions yet held in the Institute meetings. The members found themselves face to face with the question of what the Institute was really trying to do. The Institute lawyers are distinctly not of the defeatist type. They could scarcely be expected to admit that in the *Restatement of Property* the Institute was attempting the impossible. But what? The reporter admitted that he thought the rule announced by Section 201 (160) was anachronistic and rather absurd.⁴⁷ "But after all," said the President, Mr. Wickersham, "our business is to state the law" for "we are not legislating."⁴⁸ He even thought "It may be helpful to state what is a recognized principle of law in such clear and distinct form that its bad nature may become apparent."⁴⁹ The Director was of opinion that the Institute should function as a sort of supernal court. He said it was "trying to decide what would be decided by a court today, not several years ago, or several years in the future"⁵⁰ if the question were well presented by competent counsel. A distinguished judge from Kansas was troubled by the absence of moral judgments from the text of the *Restatement*. "Unless", said he, "it is made more clear [that the Institute does not approve some of the rules formulated as the law] than it is now, the Restatement we now have before us will mislead future generations of lawyers and judges" ⁵¹ At the conclusion of the discussion, the draftsmen were reversed by a vote of 41 to 35,⁵² and the rule as now stated on page 577 of the official publication became "the law".⁵³ That the smart of this reversal carried over is indicated by the language used by the Reporter three years later in expressing his opinion of the rule and of the method by which it was adopted: "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".⁵⁴ It is not really quite so bad as the Reporter declares; but the whole incident is highly illuminating as to the nature and quality of the *Restatement*.

47. 11 PROC. AM. L. INST. (1933) 152. He went on to say that to state the rule as it now appears in § 160 would be to "crystallize worn out rules and perpetuate them in jurisdictions that have not yet been foolish enough to adopt them."

48. *Id.* at 142.

49. *Id.* at 146.

50. *Id.* at 147.

51. *Id.* at 148.

52. *Id.* at 158. It will be noted that the ratio of the majority to the minority is much less than 5 to 4. How long will a formula so made stand alone?

53. The law making illusion is very insidious. Thus in the Explanatory Note accompanying Tentative Draft No. 4 (1933), at p. 116, we read: "It is material whether the formalistic reasoning of five American states is to be crystallized in this Restatement as the present American law for forty-eight states." The Reporter should comfort himself, for the dozen states that have enacted statutes rendering rights of entry assignable are probably quite safe. Only thirty-six remain exposed; and it is possible that if and when the question is presented, they may not follow the *Restatement*.

54. 13 PROC. AM. L. INST. (1936) 198.

Only one other illustration of this split purpose may be given. Section 27, somewhat ambiguously, declares that, with reference to deeds of conveyance, the same rule prevails in modern American law as in Littleton's time, the fifteenth century; that no fee simple is created unless the magic word "heirs" is used in the limitation. That such is the meaning of Section 27 is made clear by the illustrations in comment *b*, where we are told that such limitations as "to B forever" and "to B in fee simple" give B no more than a life estate. As if this remarkable statement were not sufficiently stated when once stated, it is restated in obverse fashion, but with greater ambiguity, in Section 109: "An estate for life is created in an existent person by an otherwise effective conveyance to one or more natural persons, when such conveyance fails to specify effectively the type of estate which the conveyor intended to create." By the aid of Illustration 2 in comment *b* we learn that this means that a limitation in a deed "to B in fee simple" gives the poor wretch but a life estate. The Reporter admitted that the rule was absurd,⁵⁵ but he felt bound by certain quite positive statements in judicial decisions⁵⁶ so to declare "the law", and in this position he was upheld by a vote of the Institute in annual session.

But after thus setting "the living law" upside down in conscientious regard for a shadowy showing of obsolescent and doubtful precedents, the *Restatement*, in Section 240, without benefit of statute, forthwith abolished the common law doctrine of the destructibility of contingent remainders. It could not be denied that the doctrine flourished in England until abolished by statute,⁵⁷ or that many of the American States had found it desirable to enact statutes changing the common law rule, while some half dozen other states hold the rule to be still operative and yet others have, more or less unnecessarily, declared it to be in force. The non-statutory authority supporting the *Restatement* is fairly slender,⁵⁸ but there the black letter rule stands as the law, because to state the rule otherwise would be the "embalming and preservation of an anachronism".⁵⁹ Well enough; but why preserve those other anachronisms, the non-assignability of rights of entry for condition broken (Section 160), and the magic quality of the word "heirs" (Section 27)?

However, it was in formulating Sections 54 and 84 that the natural tendency of all good men to engage in wishful law-making broke all bounds, completely discarding the slogan "We state the law as we find it." It all

55. In the Explanatory Note printed in Tentative Draft No. 1 (1929), at p. 5, the Reporter says "That such a rule is at the present time a socially undesirable one, that it represents a survivorship of the formalism of the earlier days of the common law, is undisputed."

56. The cases cited do not convince the author that the rule announced in § 27 would be accepted as "the living law" in a single one of the American states unless it harmonized with the found intent of the grantor. See Tentative Draft No. 1 (1929), Explanatory Note, pp. 5-30.

57. 8 & 9 VICT. c. 106 (1845).

58. The authorities and statutes are admirably set out in Tentative Draft No. 6 (1935) 186-200.

59. *Id.* at 192.

came about because of those obsolescent life estates, dower and curtesy.⁶⁰ In dealing with life estates, the restaters refrained from discussing dower and curtesy because they are failing estates, and adequate treatment would require an excessive amount of time and space.⁶¹ But when they came to treat estates in defeasible fee simple, in fee conditional and in fee tail, they could not keep their hands off these failing estates. Hence we have Sections 54, 75, 84, and 93, together with an explanatory note, or monograph,⁶² to justify them. The thesis of all these sections, which are too long and too repetitious to be quoted within the limits of an article such as this, is that logically dower and curtesy are necessarily derivative estates, being provisions made for the surviving spouse from the assets of the deceased spouse. It therefore follows by a necessary logical process, so the restaters think, that any condition inherent in the original creation of an inheritable estate which operates to terminate the owner's interest will also terminate the dower or curtesy interest of the surviving spouse. Hence we are told (Section 54) that the dower or curtesy interest of a surviving spouse cannot survive the defeasance of the deceased spouse's defeasible fee, or (Section 75) the termination of his fee conditional, or (Section 84) the termination of his estate in fee-tail, by his death without surviving issue. We shall take the space to discuss Section 54 only as it applies to fees defeasible by the vesting of a shifting executory devise or use, and Section 84 as it applies to estates in fee tail terminating by the tenant's death without surviving issue. We need not discuss Section 75, dealing with fees conditional, for in this aspect of the rule stated it is purely the product of the restaters' imagination. There could be no English common law precedents, and none are to be found in South Carolina or elsewhere.⁶³

Among other things Section 54 declares that if a gift of land be made to *A* and his heirs, with the proviso that if *A* shall die without issue him surviving, the land shall pass to *B* and his heirs, and *A* dies leaving no issue, his widow is not entitled to dower. For such a statement there exists scarcely a shadow of support, while a considerable mass of decisions from eleven states is unequivocally opposed to it.⁶⁴ The Reporter says that Alabama, Georgia and Ohio support the rule stated,⁶⁵ but he is mistaken. Of the three cases cited by him in support of his statement, the only one that

60. In the interest of brevity, reference is hereafter made to dower only, although some of the cases cited involved curtesy.

61. See Ch. 6, Scope Note, p. 330.

62. See Appendix, p. 1.

63. See Appendix, p. 12. "Upon the foregoing state of authority there seems to be no adequate reason for stating the law other than as it is stated in § 75. The Institute found its position not bound by authority and has stated the rule required by the closest available analogies." Thus § 93 need not be discussed. There are no decisions supporting the rule stated, which is of extremely small importance.

64. See Appendix, p. 7, note 18. A twelfth state, Alabama, might well have been added. See *Carter v. Couch*, 157 Ala. 470, 47 So. 1006 (1908).

65. See Appendix, p. 7, and cases cited in note 19.

considers the problem is *Edwards v. Bibb*.⁶⁶ This much cited case, decided by the Alabama Supreme Court in 1875, was shortly afterwards repudiated in another case involving the construction of a different provision of the same will.⁶⁷ A comparatively recent Alabama decision⁶⁸ followed the general rule allowing dower. *Edwards v. Bibb* was not even cited. In the other two cases cited from Georgia⁶⁹ and Ohio⁷⁰ the widow claimed as statutory heir and not as dowress. The Georgia court made no mention of dower but denied the widow's claim as statutory heir to any interest in the divested fee of her deceased husband. The opinion in the Ohio case, *Smith v. Hankins*, barely mentioned dower, and counsel seem not to have claimed it; in the only other reported decision found in that jurisdiction, rendered by a nisi prius court sitting in Cincinnati,⁷¹ no reference was made to *Smith v. Hankins*, and though the Court denied the widow's claim of dower in a divested fee, it remarked that a different result would ensue if the fee were divested by the shifting of the estate upon the husband's death without issue.

This very shadowy support in judicial precedent is somewhat strengthened by the disapproval of the prevailing rule by several text writers of recognized authority.⁷² They criticized the rule applied by the courts, as does the Reporter, on the ground that it was illogical and inconsistent with the rule of decision in analogous situations. The Reporter also seeks to weaken the authority of the substantially unbroken array of precedents opposed to the rule adopted in Section 54 by disparaging the legal education of Lord Mansfield, who decided the case of *Buckworth v. Thirkell*,⁷³ in which the prevailing rule was first announced. He urges that we remember "That Lord Mansfield was a Scotch lawyer whose training had stressed the Civil Law."⁷⁴ Little is known about the legal education of the Scotch youth, William Murray, who later went to London to become the leader of the English bar, and later to rule, as primate of English judges, for over thirty years, but it is extremely unlikely that his early exposure to Scotch law had anything to do with his decision of *Buckworth v. Thirkell*. While Scotch law recognizes an interest similar to dower, which the Scotch call "terce", it is improbable that any Scotch lawyer in William Murray's Edinburgh days had ever heard of the problem presented in the *Buckworth* case. Indeed, an examination of the *Scots Digest* seems to show that the widow's

66. 54 Ala. 475 (1875).

67. *Bibb v. Bibb*, 79 Ala. 437 (1885).

68. *Carter v. Couch*, 157 Ala. 470, 47 So. 1006 (1908) (see also *supra* note 64). The *Restatement* appears to have overlooked this case.

69. *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167 (1897).

70. *Smith v. Hankins*, 27 Ohio St. 371 (1875).

71. *Myers v. Moore*, 12 Ohio Dec. (N. P.) 805 (1884).

72. See Appendix, pp. 8-11, where quotations are printed.

73. Reported in note in *Doe ex dem. Andrew v. Hutton*, 3 B. & P. 643, 652 (C. P. 1804).

74. Reporter's monograph, Appendix, p. 5.

claim of terce in a defeasible fee subject to an executory interest has not even yet been considered by a Scottish court. It is probable that any one seeking to approach the decision of *Buckworth v. Thirkell* on the pedagogic level would do better to look into the legal education of counsel who argued that case. An even better course for the restaters would be to forget about Lord Mansfield's legal education and look to the social and economic function of the dower device itself.

If the authority supporting the rule declared to be law in Section 54 is thus seen to be shadowy, there is no authority at all to support the rule stated (by no stretch of the imagination could it be said to be restated) in Section 84, denying dower to the widow of the tenant in tail who dies without surviving issue. The English practice and case law is all opposed to the *Restatement*, as is the limited precedent and practice in this country.⁷⁵

The Reporter explains this astounding feat of restating such law as never was in this fashion. "We have proceeded generally in this country upon the belief that dower and curtesy are derivative estates and we shall be performing the proper function of the Institute in frowning upon a departure from symmetry when such departure serves no discoverable present objective and is not so heavily imbedded in American decisions as to demand perpetuation as a rule of property. Sections 84 and 93 of this *Restatement* embody the views thus explained and justified."⁷⁶ Even if it be admitted that the settled rules set aside by Sections 54 and 84 offend the restaters' sense of symmetry and logical consistency, their attention should be called to the fact that after all law can be no more logical than life. But these rules set up by the precedents are not illogical. An additional factor enters into the case when the dower claim is in a fee defeated by the vesting of an executory gift conditioned upon the tenant husband's death without issue. So long as dower is continued as a device to provide for widows, its assignment from land that has shifted over to another because of the unexpected death of the husband without issue seems quite in harmony with its general social function and also with the donor's reasonably inferred intent. The primary gift in fee shows unequivocally the donor's intent to benefit the primary donee's issue, if any. It is only in the absence of such natural dependents that the property shifts over to the secondary donee, who has rarely, if ever, paid value for such uncertain interest as the law accords him. The inference that the donor's intent includes the customary providence for any widow the primary donee may leave is overwhelming. There is usually long wisdom in these century-old rules which the *Restatement* should not idly disturb. Whatever may be the right way to make a restatement of property law, it is clear that Sections 54, 75, 84 and 93 illustrate how not to make it.

75. This is freely admitted in the Reporter's monograph. See Appendix, pp. 14, 15.

76. Appendix, p. 15.

In laying out the scheme for the *Restatement* the restaters have very naturally attempted to make a classification of the vastly numerous and complex relationships with which they must deal that would permit the fashioning of a fixed pattern in which every relationship would have its proper place and always be properly found in that place; or, to shift the figure to one less formal, the restaters have looked upon the law of property as a huge picture jig-sawed into thousands of variant pieces and they have busily set to work to fix every piece in its appropriate place. But inasmuch as the law of property grew up very much as did Topsy, and not according to any fixed pattern or jig-saw puzzle plan, the restaters have found that many of the pieces did not fit, necessitating a deal of whittling and planning, and some smashing, as we have seen. If we assume that we must have a fixed and orderly pattern, then we must expect and accept the whittling and reshaping process described above. But this pattern-making process, when carried to the vigorous extreme which characterizes this *Restatement*, involves other distressing consequences. These are the too frequent statement of the obvious, since otherwise a gap would appear in the pattern, tiresome repetition, and fragmentary treatment of important topics that would much better have been treated as a whole and completely. This becomes more clearly apparent if an illustration is given. The first six chapters of the *Restatement* rest upon Blackstone's classic classification of estates. Under each estate as a heading are treated in orderly succession its "creation" and its "characteristics". The latter term is not very aptly substituted for "incidents", in customary use among lawyers and law writers, but it will do. Now it is obvious that many of these "characteristics" of the several estates will be very much the same, and sometimes too obvious for profitable comment. Yet the pattern requirement demands that they be set out in ponderous particularity. For examples, alienability, waste and dower are set down as characteristic or not characteristic of each of the freehold estates. This not only induces solemn declarations, such as have been previously mentioned, so obvious that they are rather ludicrous; but, more significantly, this pattern-writing causes dower rights to be treated in a fragmentary and quite inadequate manner in some half-dozen different places,⁷⁷ while the treatment of waste, a highly important and fairly well integrated topic, is found scattered about in some twenty-three different and often widely separated sections.⁷⁸ It is to be regretted that the restaters did not placate their pattern by the use of cross references as is occasionally done,⁷⁹ and state the law of dower and the law of waste as integrated topics. If this had been done, possibly they would not have ignored homestead rights.

77. See §§ 54, 75, 84, 93, 128, comments *a, b*, § 134, comment *a*, § 153, comment *d*. Cf. TIFFANY, REAL PROPERTY (2d ed. 1920) 725-849.

78. See §§ 49, 73, 91, 117, comment *c*, 138-146, 149, 187-194. Cf. TIFFANY, *op. cit. supra* note 77, at 949-994.

79. See Note at end of Ch. 3, p. 115.

These plebeian interests did not come over in the Mayflower but sprung from the Texas revolution, yet they constitute a very significant element of "the living law" of property in the United States.

What then is the significance of these two volumes of the *Restatement of the Law of Property* viewed as a contribution to the literature of the law? And what will be the influence upon the future development of the law of property in America of the completed *Restatement* if the pontifical approach is retained in the remaining volumes? The answer must be: very little. The black letter rules have no literary merit, and as declarations of law, supported only by their own authority, they are absurd. The judge who would base his decision of any question of law upon these black letter declarations would be worse than lazy; he would be incredibly stupid. Even when accurately stated, which is too often not the case, and applicable in the jurisdiction, as they often are not, their language is too general to determine specific issues arising out of particular fact situations. These declarations of legal principles, like other non-legislative formulations, can rise no higher than their source in the juristic experience of the race, as evidenced by judicial precedents. These are almost wholly lacking in the *Restatement*, which generally discards even such collections of authorities as supported the tentative drafts.

As already stated, the ancillary material attending the black letter rules, called notes and comments, while lacking continuity in form and rounded completeness of substance, has much greater value. In fact the treatment of the mutual rights and duties of owners of future interests and of the possessory interests⁸⁰ upon which the future interests are expectant, which one finds scattered through Chapter 6, entitled Estates for Life, and Chapters 12-15, entitled Protections of Different Kinds from Diverse Perils and Misfortunes, is quite the most satisfactory and complete treatment known to this writer. If the matter here presented in this unfortunately fragmentary form were presented as an integrated topic and given reasonable support in authority cited, it would have undoubtedly great value for all students of the law, whether at the bar, on the bench, or in academic cloisters. Is it too much to hope that from the vast labors expended in the preparation of the rigidly patterned and inflexible *Restatement* there will come a treatise in a form that can be profitably used, adequately supported by cited authority and with a terminology integrated with the literature of the law and the customary usage of lawyers, a treatise on the law of Property comparable to the great works, published and pending, that crown the labors of the group who restated the law of Contracts?

80. Here again the restaters discard the long used and familiar term "possessory interest" and substitute for it "present interest". They seem to be caught by the lure of the easy contrast of *present* and *future* interests, although they recognize (see § 153, comment *e*) that a vested future right, with enjoyment only postponed, may be as truly a present interest as the more immediate and obvious possessory right.