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## THE RESTATEMENT OF THE LAW OF CONTRACTS

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THE publication of the completed Restatement of the Law of Contracts makes officially available the first fruit of the gigantic project to "clarify, unify and simplify our common law" undertaken ten years ago by the leading figures of the American bar, organized in a wholly unique and original manner into "The American Law Institute." Beautifully bound in red leather in two volumes of clear type on a small page with 609 sections and 1129 pages, exclusive of index and table of contents, and with a price appropriate to its sumptuous setting, the "restatement" has been given every advantage which mechanical skill can afford. It appears with the acclaim of bench and bar, an acclaim justified by the ambitious nature of the project and the devoted labors which have gone into its making. Its appearance is an important event in our law, deserving of the most careful and intelligent appraisal of which the profession is capable. The very magnitude of the project and the number and professional standing of its protagonists do, however, tend to prevent such appraisal. One is tempted either to embalm it in words of general and fulsome praise or to indulge in humor at the expense of its more ponderous phases, depending upon one's previous emotional stimuli. In what follows I shall pay the sincerest compliment in my power by giving to it the best thought that is in me. Particularly am I anxious to approach it in this spirit because the first official volumes confirm a sincerely held opinion which I have shared with others, that in spite of significant accomplishments (of which the Chief Justice of the United States rightly selects as the most important the collaboration of all members of the profession in joint endeavor for law improvement)<sup>1</sup> the Institute, by reason of

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1. "No such cooperation has ever been known in the field of the common law, and valuable as is this first fruition of this collaboration, the method which

the narrow limits of an artificial formula of expression which it has chosen to respect, is rendering its main product of less value than its many important by-products and of less significance than its careful fabrication deserves.

The American Law Institute is outstandingly important in its ambitious objective, in its personnel and in the resources which it has secured for research in law. Its objective is nothing less than the restatement of our common law—"the most authoritative effort in two thousand years to summarize and state existing legal principles."<sup>2</sup> In fact its original objectives were even broader and it is to be hoped that they are still possibilities. Its charter states: "The particular business and objects of the society are educational, and are 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."<sup>3</sup> Its personnel is skilfully chosen to unite the bench, the bar and the law school world. With only rare exceptions, it has enlisted in its cause as either producers or consumers the outstanding, the interested and the informed members of the profession. The Reporters of its restatements are law school professors; judges, lawyers and professors constitute its Council and the advisory groups on the various subjects (four members of its council have been appointed justices of the United States Supreme Court); the chief justices of all the highest courts of the country,

has made it possible holds, I think, even a higher promise of benefit than that which will follow the immediate use of the Restatement. For this method not only leads to a better understanding and mastery of the principles of law and thus aims at diminishing confusion and uncertainty in their application, but it also points the way to success in dealing with a great variety of problems affecting the administration of justice. If we can get judges, members of the bar, and those who are devoting their lives to the study of the law and administration, to unite in a common endeavor to secure the most competent judgment as to practicable measures to attain simplicity, directness and promptitude, we shall be able to discharge the special obligations which rest upon our profession." Chief Justice Hughes (1932) 18 A. B. A. J. 775.

2. From "Radio Program of the American Bar Association" announcing President Wickersham's address on May '7, 1933, on "Restating the Law; an Attempt at Simplification."

3. 1 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE, Part II, 33 (1923). The report of the organizing Committee stated that there should be a Bureau of Research connected with the Institute and also that it should undertake legal surveys with the object of better adapting the law to existing needs. *Id.* at 53, 55. The model Code of Criminal Procedure would fall in this general field; also the federal court study referred to in note 5, *infra*. Compare papers by Messrs. Oliphant and Llewellyn on *The Relation of Current Economic and Social Problems to the Restatement of the Law* (1923) 10 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 323, 331.

the presidents of all state bar associations, the deans of all the schools which form the Association of American Law Schools and other important legal officials and representatives of societies and groups affiliated with the law are ex officio members while in addition there are about 700 elected members. Its wholly unique success in uniting professional and scientific personnel in one great endeavor is the source of its greatest power but naturally tends to silence criticism. At the same time it has secured donations adequate for its operation. The Rockefeller Foundation has provided \$147,000 for work in the field of Criminal Law and Criminal Procedure, and the Carnegie Corporation originally provided \$1,075,000 for the work of restatement. This sum was exhausted at the end of 1931 and the Carnegie Corporation is now appropriating \$155,000 a year for the restatements.

It is a commonplace made more striking by the Twentieth Century Fund's second annual survey of the grants by the 102 great American research foundations that while medical and physical sciences have been able to command extensive donations for their work, the social sciences in general, and the law in particular, have obtained comparatively little financial support.<sup>4</sup> The New York World-Telegram says editorially with reference to the facts revealed by this survey: "Bold in blazing new paths in the physical sciences, the donors and custodians of these funds appear timid and inadequate before social maladjustments and economic wrongs." To what use has been placed the first really substantial and still wholly unusual grant for legal research?

In preparing this paper I have found myself troubled with the dilemma of either an immoderate use of the personal pronoun or a loss in directness of statement by employing the usual thinly veiled grammatical inversions and evasions. Since I am aiming to be direct I have chosen the former alternative deliberately. Moreover I desire to avoid the possibility that my criticisms shall be taken as other or more extensive, in spirit and in content, than they are. I have done all in my power to further the objects of the Institute, as Adviser on Property since 1926, in assisting in the organization of the work on state annotations and in such other ways as I have found possible.<sup>5</sup> The collaboration with other law teachers and with lawyers in study of legal problems I prize, and I freely admit that I have

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4. AMERICAN FOUNDATIONS AND THEIR FIELDS, TWENTIETH CENTURY FUND (1932).

5. Compare the study of the business of the federal courts, now being conducted under the auspices of the Institute by a committee of which I am Chairman. A first report should be presented to the next meeting of the Institute. See T. W. Arnold, *Progress Report on Study of the Federal Courts, No. 7* (1931) 17 A. B. A. J. 799, 802.

received more in instruction in the fields of my interest than I have given. Yet when I see my own group so often turn in impatience if not disgust from the attempt to force a black letter sentence do what it can never do—state pages of history and policy and honest study and deliberation—and long for the freedom of expression which scholars should have, I am confident that far from casting any reflection upon the restaters I am trying to give their labors the outlet which they really deserve. Moreover, I should hesitate at pressing a purely personal opinion did I not know that large numbers of the workers themselves and certainly large numbers of law teachers if not of lawyers recoil from the “restatement” straitjacket. My own guess is that at least a majority share this feeling, but I know of no way in which this can be ascertained short of frank discussion. The particular problem I am considering has had little open consideration. It has been treated in a somewhat formal way in official pronouncements, to which reference is made hereinafter, but these lend support to the conclusion that it has not been canvassed with thoroughness. General endorsement and approval of Institute objectives, of which there has naturally and properly been much, does not reach this point. Hence the outspoken approach to the problem at the last meeting of the Association of American Law Schools (December, 1932) is both refreshing and wholesome.<sup>6</sup>

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6. At the meeting of the Round Table on Property and Status of the Association of American Law Schools, held on December 28, 1932, Professor Percy Bordwell of the State University of Iowa, read a paper entitled “Estates Tail and Determinable Fees in the Property Restatement,” of which the following sentences disclose the point of view: “But enough of criticism of the restatement. To me it seems a combination of ancient or rather early medieval history, analytic jurisprudence and reportorial legislation but not a statement of the positive law nor likely to be accepted as such.” A discussion ensued in which criticism of the form in which the restatement was cast was general.

At the last session of the entire Association on December 30, 1932, Dr. William Draper Lewis, Director of the Institute, initiated a symposium on “The Value and Use of American Law Institute Restatements in the Teaching of Law.” Professor H. L. McClintock, of the University of Minnesota, concluded his discussion by saying: “Therefore, my conclusion has been that while the restatement is a valuable tool for the practicing attorney and the judge and a tool whose use must be taught, in so far as it can be taught in the law school, its value as a pedagogical instrument, as a tool for training in law, is practically nil.” Dean Ira P. Hildebrand, of the University of Texas, spoke at some length in support of his statement, “that the explanatory notes are ninety per cent of the value of the restatement to me.” Among other things he said: “Therefore, I say this, if the restatements are published and prepared as I want them published and prepared, and as I have always contended that they should be prepared and published (I even did that in writing more than two years ago in an article I published), the restatements would be of untold value to the teaching profession and to the profession at large. But if they are published in the form that contracts was finally published, I say that they will be of value but not of untold

A legal audience need not be reminded that the question, though basically one of form of expression, is nevertheless (and perhaps for that very reason) a fundamental one. Lawyers live by words: here is their capital, their servant and too often their master. Word-magic is the bane and the life of the law.<sup>7</sup> With the Institute a formula as to the way in which words were to be used, briefly stated in its initial plan, has come to dominate its operations so as to press the fruitful activities of its scholars into the dry pulp of the pontifical and vague black letter generalities.

The general plan of operation of the Institute is now well known. The work of restatement has gone forward on seven subjects—Contracts, Conflict of Laws, Torts, Agency, Business Associations, Property, Trusts—and a model Code of Criminal Procedure has been prepared. The procedure is for the Reporter of the subject—a professor of law—to prepare a draft of a portion of his subject which he submits to various conferences of the Advisers on his subject—law professors with some judges and practising lawyers. Eventually the draft is submitted to the Institute Council and then to the Annual Meeting in tentative form. Ultimately it is approved for publication—the Contracts Restatement being the only one now so approved.<sup>8</sup> The drafts consist of black letter statement of prin-

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value. Why do I make this statement? Well, in the first place, I don't like the way the restatements are prepared. If the original purpose had been carried out and the excellent text had been followed up, I think the reporters and their advisers would have done a fine job." [Dean Hildebrand was apparently referring to his article, *Contracts for the Benefit of Third Parties in Texas* (1931) 9 TEX. L. REV. 125, 171] Professor Joseph H. Beale, of Harvard University, Reporter for Conflict of Laws, made this significant statement: "At the risk of delaying this body, I feel very much inclined to say what I have wanted to say for many years about the real nature of these restatements, what they mean, what they have gone through, and how they got to be what they are. If the discussions in the group of advisers, from the beginning to the end, could have been taken down in shorthand and published; if we had foreseen that there would be a group of discussions on law such as never existed in the world before, then we should have documents on the law that would be invaluable in every way. . . . We came in with a draft (now speaking of the conflict of laws) that I drew. I did not like to draw it like that. I fought tooth and nail, with one other man, Chief Justice Rugg, for a different form of restatement, but I think we all loyally accepted the opinion of the majority and tried to work the form that was adopted." From REPORT OF ASSOCIATION OF AMERICAN LAW SCHOOLS (1932, not yet printed).

7. A recent book which shows how Jeremy Bentham saw this problem as clearly as he did others in the law is C. K. OGDEN, BENTHAM'S THEORY OF FICCTIONS (1932) ix, xx, note 2; see also OGDEN AND RICHARDS, THE MEANING OF MEANING (3d ed. 1930) 223 *et seq.*

8. The Restatement of Contracts was approved at the Annual Meeting of the Institute, May 6, 1932. It is expected that the Restatement of Agency will be submitted for approval at the next annual meeting.

ciples with, in most cases, brief Comments of additional or modifying principles, and Illustrations drawn from hypothetical or anonymous cases. The Reporter usually supplies to his Advisers some explanatory notes with judicial citations on a limited number of the more important sections of the draft. Such notes are unofficial and do not appear in the final publication we now have before us. That consists only of Principles, Comment and Illustrations unmarred by the citation of a single authority. It is "the law" of the subject.

It is perhaps a far cry from this outcome to its beginning, now officially recognized as occurring in the stirring appeal of Professor Hohfeld of Yale to the Association of American Law Schools in 1914 for "A Vital School of Jurisprudence and Law."<sup>9</sup> That great scholar, it is true, was interested in and made his chief claim to fame through formal jurisprudence, but he envisaged that as but a part and a small part of the manifold activities of which he dreamed for his vital school of the future.<sup>10</sup> Even on the plane of formal jurisprudence, he would doubtless shudder at the first section of this restatement, wherein a formal hornbook definition of a contract violates his first principle of distinguishing between operative facts and the resulting legal relations.<sup>11</sup> It is perhaps also a far cry from a later step when in 1921 the "Committee on the Establishment of a Juristic Center" of the Association of American Law Schools was commissioned by the Association to invite the appointment of similar committees representing the courts, the bar associations and professional and scientific and learned bodies "for the purpose of jointly

9. REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS (1914) 76, 137, reprinted in HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 332, 382. See *Foreword to An Account of the Proceedings at the Organization of the Institute in Washington, D. C., on February 23, 1923*, 1 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1923) Part II, 1.

10. See *ibid* and compare HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 67, note 7; *cf.* also Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE L. J. 710, 713, note 7. ". . . in emphasizing for the time being the formal and analytical side of legal problems, the writer would not be thought to under-estimate the great importance of other phases of the law, both scientific and practical. He has had occasion elsewhere to discuss more comprehensively the fundamental aspects of the law, including historical, or genetic, jurisprudence; comparative, or eclectic, jurisprudence; formal, or analytical, jurisprudence; critical, or teleological, jurisprudence; legislative, or constructive, jurisprudence; empirical, or functional, jurisprudence" [Citing the address, *ibid*].

11. "§ 1. Contract Defined. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." See criticism by Professor W. W. Cook, 3 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1925) 167 *et seq.*

creating a permanent organization for the improvement of the law." <sup>12</sup> The change seems to have begun shortly after a meeting on May 10, 1922, of persons called together for organization purposes by this committee of the Law School Association. The persons present did form a temporary organization with Mr. Elihu Root as Chairman and the present Director of the Institute, Mr. William Draper Lewis, as Executive Secretary. Under the auspices of the committee thus organized, a report was completed by January 11, 1923, which sets forth the idea of a "Restatement of the Law." This report supplied the basis for the organization of the Institute at Washington, D. C., on February 23, 1923.

How did the restatement take its present form? This seems to have been a later development, and in large measure just to have grown. Though the plan of the law school teachers to form a juristic center was soon shaped by the organizing committee into the restatement project, yet that committee did not contemplate the divorcing of the restated law from the authorities upon which it was based. Quite the contrary, as is shown by their explicit statement. After a discussion of the "Form of the Restatement" the committee do state their plan of the black letter type, thus: "The chief characteristic of the form of presentation should be the separation by typographical or other device of the statement of the principles of law from the analysis of the legal problems involved, the statement of the present condition of the law, and the reasons in support of the principles as stated." They then discussed the statement of principles, arguing that it should be made with the care and precision of a well known statute, though it would not be advisable to adopt language appropriate for statutory enactment. "The adoption of a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended." <sup>13</sup>

But this same section of their report contains this significant pronouncement:

"As intimated, the statement of principles should be accompanied by a thorough discussion of legal theory. Principles cannot be properly applied without full knowledge of the legal theories on which they are based. While this discussion of legal theory should be separate from the statement of principles, to refer to it as notes or annotations will convey the erroneous impressions that the discussion intended is a mere explanation or expansion of the principles, rather than what we believe it should be—a thorough and scientific discussion of the legal theories underlying the principles made in the light of a full knowledge of the authorities." <sup>14</sup>

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12. REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS (1921) 116.

13. 1 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1923) Part I, 19.

14. *Id.* at 21. The report continues: "Finally, the work as a whole must actually be done and show on its face that it has been done with a thorough

From the beginning, the plan seems to have suffered from a vacillation between the two positions that the restatement should announce a more or less binding and final rule of law and that it should be an informed and informing statement of actual legal realities. On the former plane it is subject to the defects of a code with an added question as to the nature of the sovereign authority behind it, but at least it then has the opportunity of boldly forcing reform. On the latter plane it is bound by conditions as they are, but it is realistic and actual. The plan has swung more and more to the former position, but with the important limitation that the *now* law must be stated. In result this has meant the assumption of the chief defects of each position—the rigidity of a code (with the added unreality that it is a declaration unsupported either by a sovereign or by past precedent) and without the opportunity for reform and advance which a code affords.

It is interesting to see how this development occurred. In a conference of the Reporters, their Advisers and a number of the members of the Council held in June, 1923, it was decided that the publications of the Institute on a topic shall consist of the following parts, (a) the Restatement and (b) the accompanying Treatise, but that these parts *shall be separately printed*.<sup>15</sup> At an October conference of the same year it was decided that “the Restatement shall contain Principles of Law, Comment and Illustrations”; that “the Principles shall be direct and positive statements of law, and shall be printed in separate paragraphs before the Comment”; that “the Comment [or, as some prefer to call it, the Exposition] shall be confined” to “direct statements of law explaining the conditions under which a Principle operates in such manner as to facilitate its correct application” and “explanations of the reasons for the Principle and the direct statements of law in the Comment itself,” and

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examination and careful consideration of the present sources of the law. This means that the work should contain a complete citation of authorities, decisions, treatises and articles. The legal profession will never have confidence in the result unless those responsible for the work give this tangible proof of care and thereby also show that they know and have set forth any differences between the law expressed in the statement of principles and that found in the decisions of the courts in each State considered separately. In view of the present great volume of the sources of American law this examination and setting forth of authorities will entail much labor and materially affect the details of the organization necessary to carry on the work. If, however, the work is to be constructive respect must be shown to the sound instinct of the legal profession to distrust any statement of what is or what should be the law unless the statement is based on a careful study of the record of courts which administer justice, not in supposititious, but in real cases.”

15. 2 *id.* at 34 (1924). See also discussion as to the character of the treatise and statement by the Director, *id.* at 44 *et seq.*

that "the Illustrations shall be formal statements of cases introduced to fix upon the mind the operation of the Principle and the statements of law in the Comment."<sup>16</sup> Originally Treatises were prepared dealing with the preliminary sections of the Restatements of Contracts, Conflict of Laws and Torts. But the Treatises gave way to Commentaries and the Commentaries gave way to the brief Explanatory Notes. All this material was printed and freely circulated among the members of the Institute and made available for purchase generally. But it was marked and regarded as merely tentative. Not until the present volumes appeared, however, was it clear that all supporting material was to be discarded.

The subordination of everything else to the black letter Principles seems to have come from a complete absorption of the Institute activities in their preparation, and this in turn from the steady emphasis by its officials on the necessity of *simplification* of the law by an *authoritative* statement of it. If time and thought were to be devoted almost exclusively to the perfection of the black letter, it seems natural that other matters should be subordinated or neglected. Soon we find the Director complaining of the difficulty and expense of providing Commentaries and the apparent lack of interest in them by the members of the Institute.<sup>17</sup>

In 1927 President Wickersham recounted the history of the supporting statements in answering the criticisms of the form adopted made in an article, which still deserves careful consideration, by Mr. William W. Cook, the author of *Cook on Corporations*.<sup>18</sup> President Wickersham said: "In the light of this history, it must be apparent that criticism of the work of the Institute for failure to furnish with each restatement a complete citation of all the authorities upon which

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16. *Id.* at 35, 36 (1924). The following statement appears after the definition of the Comment: "While the majority of the Principles will be followed by Comment, there will be Principles to which it will be unnecessary to add Comment." And the following after the definition of the Illustrations: "The Illustrations shall be printed after the Comment only when the Reporter believes their introduction will be helpful. They may be taken from actual cases, or be supposititious cases; but if taken from an actual case, the report of the actual case shall not be cited."

17. See Statements of Director Lewis in 3 *id.* at 121-124, 405-410 (1925) and in Appendix to 4 *id.* at 47-50 (1926). The latter contains this illuminating statement, "If I may express a personal opinion, the impression which the Commentaries distributed, taken as a whole, make on me is that matters of doubt and difficulty are not always discussed with sufficient fullness."

18. W. W. Cook, *Legal Research* (1927) 13 A. B. A. J. 281. After stating his criticisms of the Institute plan, Mr. Cook advocated a combination of "the American Law Institute plan (with amplifications) and the Halsbury plan," *i.e.* the plan of Lord Halsbury's "Laws of England."

the propositions of law set forth are based is entirely premature."<sup>19</sup> Other references to the problem appear, some in answer to requests from members for a fuller statement of supporting material.<sup>20</sup> Meanwhile the Code of Criminal Procedure was prepared, filling 160 printed pages and with 876 pages of commentaries—commentaries of authorities so complete as to seem to many an outstanding achievement of the Institute.<sup>21</sup> But discussion of the problem seems to have died down, and attention was focussed on the new idea of local state annotations to the restatements (hereinafter considered). The draft now officially presented is apparently the final answer that the Word alone counts, and the long and tortuous way by which the Word was ascertained is to be forgotten. We have only the statement of the distinguished Reporter on Contracts, Professor Williston, that the Council "ultimately decided that increased clearness, brevity, consistency, uniformity and accessibility could best be achieved by putting the Restatement in the form of concise rules analogous to those in a carefully drawn statute."<sup>22</sup>

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19. Address of the President, 5 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1927) 106; 13 A. B. A. J. 247, 249 (1927). Mr. Wickersham also said: "A critic of the Institute, in an article in a current law review, lays great stress upon this point saying, 'The Courts and practitioners will be disappointed in the poverty of reference.' If the writer had familiarized himself with the records of the Institute he would have postponed this objection until the Institute shall have finally decided upon the form and content of the Treatises which are to follow and explain the Restatements. Quite possibly the temporary Commentaries which are published to aid in the discussion of the Restatements, in some instances may be too meagre, but, as the Director stated in his report above referred to, the numbers thus far appear to have been primarily concerned with the Restatements and to have given but little attention to the Treatises. At the proper time, of course, a decision must be reached concerning the Treatises." *Ibid.* Compare also Wickersham, *The American Law Institute and the Projected Restatement of the Common Law in America* (1927) 43 L. Q. REV. 449, 463-465.

20. See e.g., 6 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1928) 39, 233, 275.

21. But the publication of these commentaries is made with an apology. "Unlike the Restatements of the common law, which represent an effort to set forth in summary form the existing state of the law on given subjects, the Code embodies an effort at reform in criminal procedure, and, therefore, involves a considerable number of changes in the present law." *Id.* at 275. Moreover, the commentaries do not appear in the Official Draft of the Code published in 1930, but only in Tentative Draft, No. 1, (1928) pp. 89-509 (in part) and in Proposed Final Draft (1930) 161-617 (the residue.)

22. (1932) 18 A. B. A. J. 775, 777. Mr. Williston also said: "It seemed that the Restatement would be more likely to achieve an authority of its own that would to some extent, at least, free courts from part of the troublesome weighing cases and arguments if exact rules were clearly stated without argument." *Ibid.*

The result seems therefore one naturally following from the loyal pursuit of an ideal. What is this ideal of an authoritative statement of the law, which will simplify our legal problems? As anything more than a vague ideal, stating the general purpose of clarification and simplification—as a concept which assumes such a thing as “the law”—it is certainly fallacious, and it is to be doubted if any of the Reporters and their Advisers really believe it.<sup>23</sup> As an ideal I believe it has been only hampering and stultifying.

No one need quarrel with the objective of making such a clear statement of existing rules of law as is possible. It is a worthwhile and helpful purpose, though the present interest of the schools in a “realistic jurisprudence” and the present general concern of all as to the existence even, let alone the smooth functioning, of our economic order might perhaps suggest the possibility of other worthy objectives of legal research were the matter an open one. But we may properly content ourselves with the Institute as it was planned. Its emphasis from the beginning, however, upon the number and volume of the printed law reports—from Mr. Elihu Root’s opening remarks on down to the latest statement of Vice President James Byrne that “in twenty years from now there will be 3,500,000 and by the end of the century nearly 10,000,000 more pages than there are today”<sup>24</sup>—makes it seem as though the Institute’s chief function was to render it unnecessary for the tired lawyer or judge to acquaint himself with what is going on in the world today. Our civilization is complex and our law, if it is to keep abreast of business and social life, cannot be simple. The very welter of decisions serves some purpose in making us continuously aware of the everchanging organism with which we must deal. And if there are more decisions

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It is of course eminently fitting that Mr. Williston should state the official view in support of a work into which so much of his own devoted efforts have gone. Yet since his first drafts followed more the treatise form, it does not seem improbable that he shared doubts similar to those of Professor Beale (see note 6, *supra*). Moreover in view of the outstanding character of his great treatise on CONTRACTS (1920) no one should begrudge the enviable position in which he now finds himself, that this Restatement not only does not supersede his Treatise but makes it absolutely essential to the courts. See cases cited notes 45, 47, *infra*.

23. Thus Professor A. L. Corbin, Special Reporter on Contracts, has some good things to say about the limitations on restating “the” law. Corbin, *The Restatement of the Law of Contracts* (1928) 14 A. B. A. J. 602; *Some Problems in the Restatement of the Law of Contracts*, *id.* at 652; *The Restatement of the Common Law by the American Law Institute* (1929) 15 IOWA L. REV. 19, 24.

24. (1932) 18 A. B. A. J. 775, 778. See also Elihu Root, 1 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1923) Part II, 48; Report of the Organizing Committee, *id.* Part I, at 6, 66 *et seq.*; Wickersham, *op. cit. supra* note 19, 43 L. Q. REV. at 449-457, and the general literature of the Institute, including the yearly revision of the “Short Summary of Pertinent Facts.”

printed than we need, the answer would seem to be not to read the excess. A stiffening intellectual backbone which refuses to be stampeded by mere volume of printed matter is needed more than a delusive simplification.

Simplification as an end in itself is false. Simplification as a clarification and orderly statement of intellectual processes and conclusions is desirable. The idea that there is "the law"—the "common" *non-statutory* law—of our forty-eight states, our territories and our federal system, which can be stated, is the former kind of simplification. Actually the resulting statement is the law nowhere and in its unreality only deludes and misleads. It is either a generality so obvious as immediately to be accepted, or so vague as not to offend, or of such antiquity as to be unchallenged as a statement of past history.

The other part of the ideal, namely, the securing of authority (i.e., the authority of the Institute) to back up statements, seems equally fallacious. The Institute seems constantly to be seeking the force of a statute without statutory enactment. Bitter experience with code making in this country should have warned us of the dangers inherent even in statutes. So far as statutes can be made to say something quite definite (for example, to set a rate of interest) they may at least be understood though they may then be too inflexible for general use. When, however, they try to formulate rules which must apply to varying situations, difficulties are many. The code reform of procedure in this country is an outstanding example. Thus the attempt to state rules of joinder of parties in abstract general terms was a failure, and modern reform is in the direction of stating merely a standard and leaving its application to the discretion of the courts.<sup>25</sup> But after all a statute must mean something because the state stands behind it. Therefore the courts must construe it, and a body of statutory interpretation grows up, which is more important than the original wording of the statute. To this the restatements ought not and cannot look forward. There is no sovereign power behind them to compel the courts to breathe meaning into them. If they do not seem to have meaning the courts should turn to something else and are doing so.

The process of statutory interpretation, though inevitable, is difficult and full of pitfalls. The restatement interpretation is an un-

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25. This tendency is discussed in many places, some of which are collected in my book on CODE PLEADING (1928) c. 6, 7, and see also *id.* at 75 *et seq.* President Wickersham has well pointed out some of the difficulties of statutory interpretation. *Op. cit. supra* note 19, 43 L. Q. REV. at 454, 456. See also Corbin, *op. cit. supra* note 23, 15 IOWA L. REV. at 36-38.

reality.<sup>26</sup> And without interpretation, or *background* against which meaning can be discovered, the black letter statements are not understandable. The idea that words speak for themselves, without interpretation in the light of the circumstance under which they were composed or arranged, has been too often exploded with reference to wills, contracts and written instruments generally, to be believed again with respect to the restatements.<sup>27</sup>

A restatement then can have no other authority than as the product of men learned in the subject who have studied and deliberated over it. It needs no other, and what could be higher? Given freedom of expression to such men, it will stand or fall of its own strength or lack thereof. In such event, I would have no doubt of its survival. I would have such doubt, however, if their studies and deliberations are to be concealed as they are under the present plan. It seems designed to take away the intellectual strength which a collaboration of this kind should present.

What do we find in this final product on the law of contracts? The group of workers is outstanding and it is well known that in certain instances they have had sharp discussions and have reached results decidedly in advance of traditional contract views. No flavor of this appears in the Principles, Comments and mythical Illustrations of the present volumes.

There are a large number of purely bromidic sections, such as section 3 ("An agreement is a manifestation of mutual assent by two or more persons to one another.") and section 15 ("There must be at least two parties in a contract, but may be any greater number.") No one would wish to dissent from them. They cannot be used in deciding cases; nor are they now useful in initiating students into contract law, for the present teaching mode is to start with case study, not abstract definition. They may afford convenient citations

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26. Hence Professor McClintock was perfectly right in rejecting the suggestion of Director Lewis that the restatement might be used for student training in statutory analysis. See note 6, *supra*. The fact that the Director could make this claim, however, shows the direction of the official thinking of the Institute's officers.

27. This fallacy, that words speak for themselves or convey a clear meaning of themselves, is so often demonstrated (see for example the clear presentation of 5 WIGMORE, EVIDENCE (2d ed. 1923) §§ 2458 *et seq.*; §§2470 *et seq.*; also, the books cited in note 7, *supra*) and is thoroughly rejected in law as a rule of interpretation of written instruments, where the surrounding facts and circumstances are essential. It continually crops up again, however, and I believe it to be at the bottom of the Institute's insistence on the sanctity of the black letter. In another connection I have tried to point out how lack of appreciation of the historical background of a statute—thought to have a "clear meaning" of its own—may quite alter and distort its operation. Clark, *Trial of Actions under the Codes* (1926) 11 CORN. L. Q. 482.

to a court, but that is all. In a treatise such statements would also appear but in decidedly subordinate ways and mainly as mere starting points for discussion. Here each must be a separate section and thus appear as one of the six hundred.

The other sections cover up rather than disclose the problems they face. With no hint afforded by the text, the discussions and qualifications can only be guessed at. Moreover the black letter itself is, as must be expected, a compromise to cover various views. With one leg it steps forward; with the other it goes backward. It is caught between stating the law which should be and the law which is and often ends by stating only the law that was. Thus in section 381 dealing with election of remedies, subsection 1 in a negative fashion seems to favor the modern liberal rule, but subsection 2 states the older arbitrary view.<sup>28</sup> The necessity of agreement on black letter forces each participant to a choice of position which, when stated as a group result, must inevitably tend towards (a) the ancient historical rather than the modern rule or possible future trend, (b) the conventional safe and unoriginal point of view and (c) a compromise which goes only to the point whereon all are agreed.

Even those sections most deserving of praise for their forward-looking point of view show a like vagueness covering the inevitable compromise. Sections 90 and 372 are outstanding examples.

Section 90 has already become somewhat famous as representing some modification of the ancient rules of consideration. It states that

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

There would seem, however, to be left a large place for retreat in the final "if" clause and we do not know how far the restaters wish to go. Under the black letter are four formal illustrations, in three of which the promise is said to be binding. Certain law review

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28. "(1) When the alternative remedies of damages and restitution are available to a party injured by a breach, his manifested choice of one of them by bringing suit or otherwise, followed by a material change of position by the other party in reliance thereon, is a bar to the other alternative remedy. (2) The bringing of an action for one of these remedies is a bar to the alternative one unless the plaintiff shows reasonable ground for making the change of remedy."

It is difficult to see how the older view can be squared with modern liberality of amendment under code procedure. I have discussed this point in my *CODE PLEADING* (1928) 335, 501.

articles approve the advance made but regret that it goes no further.<sup>29</sup> It is understood that certain of the group desired to go further while others did not wish to go this far. Dean Hildebrand has cited this section as an outstanding example of places where publication of the explanatory notes is needed.<sup>30</sup> Even more than this we need a complete exposition of the various views of which this gives very little in the way of key.

Section 372 deals with the rule of mutuality of remedy in the law of specific performance. The first subsection states that "The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason to refuse it to the other party;" while the second states that the fact that the remedy is available to one party is not in itself a sufficient reason for making the remedy available to the other party, but is of weight when it accompanies other reasons, "and it may be decisive when the adequacy of damages is difficult to determine and there is no other reason for refusing specific enforcement." The first provision at least leaves the question quite at large and seems wholly to repudiate the strict rule. Lacking the background against which the section was framed, and partly because of the second provision, one is at a loss to know just how far the restaters intended to go.<sup>31</sup> Yet I doubt if there is anywhere a more adequate statement in brief form of the entire problem with relevant authorities than in Professor Corbin's explanatory notes, prepared for the final draft but here unavailable.<sup>32</sup>

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29. O. K. Patton, *Enforceable Promises in Iowa* (1929) 15 IOWA L. REV. 42; C. B. Whittier, *The Restatement of Contracts and Consideration* (1930) 18 CALIF. L. REV. 611. Compare Corbin, *op. cit. supra* note 23. As to section 90, see also notes 47, 48, *infra*.

30. Hildebrand, *op. cit. supra* note 6. For the explanatory notes, see CONTRACTS TENTATIVE RESTATEMENT, No. 2 (Am. L. Inst. 1925) § 88 notes and CONTRACT OFFICIAL DRAFT, No. 1 (Am. L. Inst. 9-15-28) § 90 Explanatory Notes.

31. It will be noticed how the necessity of stating law as an existing thing inevitably takes away life and vitality of the statement. Even such a black letter as "The oft asserted rule that the remedy of specific enforcement must be mutual to both parties is actually not a correct exposition of the decisions" would go much farther in giving the legal reader some hints as to what is aimed to be accomplished by the section. The effect of the necessity of compromise and agreement is obvious; it is discussed below in the text.

32. See CONTRACTS PROPOSED FINAL DRAFT, No. 12 (Am. L. Inst. 1932) Explanatory Notes to § 372. In preparing a casebook on procedure I asked for and obtained permission to reprint these notes. 2 CLARK'S CASES ON PLEADING AND PROCEDURE (1933) 269, 270. The answer to the question propounded by Director Lewis at Chicago in December, 1932, *supra* note 6, and subsequently by letter to law professors as to the value and use of the restatements in the teaching of law is, I believe with Dean Hildebrand, clear and easy. If the work of the experts is made available, there will be no question as to the law school use of the restatement.

Particular sections of the Restatement should not be emphasized, for these merely illustrate the continual difficulty which the required style causes. One can guess in most cases why the particular form came to be chosen. Given the limitations, I do not see how these results could have been avoided in any substantial degree. I do desire, however, to refer to a few other examples to make my point quite clear. With reference to the rights of third party beneficiaries of contracts there has been a striking departure in American law from the English authorities, and American law teachers by their writings have had an outstanding influence on the development of this law. This is not even hinted at in the individually unobjectionable sections on the subject (sections 133 to 147). The sections concerning assignment of contract rights likewise do not reveal the fighting issues underneath. Thus section 167 somewhat blithely states a desirable rule as to the defenses and set-offs to which an assignee's right is subject without revealing the conflicting rules and statutes with which the topic bristles.<sup>33</sup> The sections dealing with conditions (sections 250 and following) do not indicate the problems of pleading involved. And the sections dealing with actions on joint promises (*e.g.*, sections 118, 125) do not indicate how much the rules as stated have been changed by statutes.<sup>34</sup>

As to some of these sections it will be said that the restatement gives the *common* and not the statutory law. Here, however, is one of several problems which the Institute has caused for itself and is now not able to settle satisfactorily. Thus sections 178 to 225 deal with the construction of a statute, the Statute of Frauds (originally adopted in England in 1677) requiring a writing for certain types of contracts. When is a statute old enough or universal enough or otherwise worthy of being treated as common law? One cannot determine any actual policy from this and other restatements.

This problem and the kindred one of stating ancient history as modern law is strikingly illustrated by an example from the Restatement of Property. In the first section of actual restatement—after the two chapters of definition of terms—the old common law rule in all its fierceness is stated—that an estate in fee simple can be created by deed only if words of general inheritance (“and his heirs”) are used, and the statement is clamped down by illustrations that grants “to B forever” and “to B in fee simple” create only life

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33. Compare my book on CODE PLEADING (1928) 472-478.

34. Section 379 is a dogmatic statement of a negative that “a promise to render personal service or supervision will not be enforced by an affirmative decree,” without indication as to the extent to which section 380 dealing with negative decrees limits this rule. In general, however, chapter 12 dealing with remedies seems more successful than other portions of the restatement in suggesting that not all the law of the subject is covered by the black letter.

estates in B. From special notes both to this section and to an equivocal black-letter, thirty pages on, dealing with statutes<sup>35</sup> (special notes, I believe, do not survive to permanent publication) it appears that this rule has been abrogated in all but seven jurisdictions by statute and in three of these seven by judicial decision. This leaves at most only four jurisdictions to which the dogmatic black letter can apply.<sup>36</sup> Now this is not a result which the Property group desired. They all supported the statement of the Reporter: "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 of course undisputed."<sup>37</sup> A majority of them, however, felt themselves forced by the rules of the Institute to the stated conclusion—a conclusion, it is submitted, patently absurd.

Such a problem could hardly arise in this stark manner, anyhow, because it would be affected by other facts and circumstances such as entry in possession, payment of consideration, and the like. Moreover, the law now offers facilities for carrying out the obvious intent of the parties even where imperfectly or mistakenly expressed; and it is not conceivable that a deed would not now be reformed if necessary to achieve the purpose of both parties to it. In fact the Property advisers did insert a section stating that such a deed "may be reformed to carry out the intention of the parties"; but this was stricken out by the Council on the ground that this was Equity *and not* Property!<sup>38</sup>

The unreality resulting from attempting to divide up the law into small parts, each dogmatically stated apart from all other rules and apart from its actual operation in modern society, is illustrated in a critique of the Restatement of Trusts by Professor T. W. Arnold.<sup>39</sup>

35. RESTATEMENT OF THE LAW OF PROPERTY, T. No. 1 (Am. L. Inst. 3-25-29) §§ 30, 48.

36. In one of these four, however, (New Mexico) there are no decisions; in another there are only dicta (Connecticut, where I have yet to find a lawyer who believes the rule still exists); leaving only more or less direct decisions in Maine and South Carolina. (In the latter state the rule is referred to as "a thorn in the flesh.") See citations in the next note.

37. Explanatory Notes, PROPERTY P. No. 15 (Am. L. Inst. 12-10-28) 6. For the writer's dissent from the law as stated in the black letter see PROPERTY P. No. 15 (C. E. C. 11-15-28) and PROPERTY P. No. 15 (C. E. C. Supplementary 12-10-28). Compare Explanatory Notes, Property T. No. 1, 3-25-29, p. 5.

38. PROPERTY, P. No. 15 (Am. L. Inst. 11-12-28) § 32, omitted in PROPERTY T. No. 1 (Am. L. Inst. 3-25-29).

39. T. W. Arnold, *The Restatement of the Law of Trusts* (1931) 31 Col. L. REV. 800. In referring to the unreal examples used in the Restatement, Professor Arnold suggests that when in some of them A declares himself trustee of the next moose he should shoot, "the supposition is that he was

But after all the proof of the pudding is in the eating. Law professors may point out what they will as to what they wish of the restatement. The real test is what will the lawyers and the courts do with it? Here the answer seems already clear and significant. Two things stand out. One is the development of the idea of the state annotations and the other is the use already made of the restatements in the judicial opinions.

The idea that the restatements should be annotated to the reported decisions of each state seems to have come quite naturally from a felt need of the lawyers to know what the law as given forth by the Institute really meant in terms of practical application to their current problems. It seems to have been popular at once as shown by the expressions of approval from the profession and perhaps even more by the loyal response from local bar associations to the very considerable financial burden of their preparation. Now it is a settled and prominent part of the Institute project that for each restatement state annotations shall be prepared in each state at local expense and published by the Institute.<sup>40</sup>

This is surely interesting. It seems like a clear admission against interest on the part of the Institute, a going over to the treatise idea, a departure from that of a code. As matters now stand, the annotations are, of course, absolutely necessary to make the restatements useful to the lawyer. Without them he will be lost in a maze of generality; with them the sections will take on life and vitality against the local background. But if the Institute plan of declaring the law is sound, the state annotations are an anomaly. If the state decisions support a restatement section, then they are not needed and at most can only confuse by suggesting that support is needed. If they qualify or oppose the section, then surely they should not be brought forth, for unless they are either repudiated or ignored, the main objective of the Institute is rejected.

Even though invaluable as matters now stand, the state annotations are an expensive way of achieving the desired result. Already bar associations and law schools are groaning under the weight of their preparation which is actually breaking their backs. Not only

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simply practicing." The method of restatement forecloses any indication of why *A* was attempting to use the trust device.

40. Compare Goodrich, *The Institute's Restatement and the Michigan Law* (1927) 26 MICH. L. REV. 153 (an early if not the original attempt to examine a restatement in the light of local law); Goodrich, *The Restatements Locally Annotated* (1928) 14 A. B. A. J. 538. See also the 6 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1928) 303, 307 *et seq.* and the annual reports of Dean Goodrich as Adviser on Professional and Public Relations and the replies of the judges to the first draft of the Contracts restatement referred to in note 42, *infra*.

does this absorb attention which should be available for other lines of legal activity,<sup>41</sup> but I do not see how many associations and schools are going to meet the financial burden involved as successive restatements appear. Notwithstanding the greatest loyalty, it is proving an impossibility to carry the work through. Moreover many restatement sections are so obvious that careful annotation is not necessary. Then, too, it is difficult over the entire United States to secure competent editors and, unless critical analysis is secured, the bulk of the annotations are not greatly worthwhile. Probably a careful general discussion of moot points—a Williston and Corbin on the Restatement of Contracts—would after all be more helpful than purely local and wholesale annotations. The latter may be run down when needed; the former can only be obtained from the individuals named.

Perhaps even more important as showing the direction of the wind are the judicial citations of the various restatements. Parts of the published material have been in existence in printed form since early in 1925, and the personnel of the membership is such as to call it to the attention of courts at once.<sup>42</sup> There has already been a substantial number of citations to the several restatements, although not as many as one might suppose from the nature of the project.<sup>43</sup> But there have been enough to disclose the very definite trend. It is that the restatements are *furnishing the impeccable judicial citation* with which to garnish an opinion and that they are not affecting the course of decision in any material way, nor in a way comparable to texts and articles of law professors.<sup>44</sup>

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41. Thus the promising judicial council movement, which the state bar associations ought to be supporting, may die for lack of support.

42. Thus the membership not only includes the presiding justices of all the American high courts (see pp. 644, 645, *supra*), but in December 1927, all the judges of the higher Federal and State Courts were sent copies of the Official Draft of the First 177 sections of the Restatement of Contracts, the copies being accompanied by a letter signed by Mr. Root, the President, and the Director. Extracts from the replies of many judges appear in 7 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE (1928) 45-54.

43. "A Short Summary of Pertinent Facts", 1932 Revision, lists 127 citations of restatements to that date, of which 58 are to the Contracts restatement. There are duplications; one case appears under three headings. With this might be compared the citations of WIGMORE ON EVIDENCE or WILLISTON ON CONTRACTS (books in a single field) during the same period.

44. See note 45, *infra*. Of course many articles remain substantially unknown to the bench; but when known often a decision will turn substantially on a single article. Compare the weight given Professor Corbin's articles on third party beneficiaries by the Connecticut court in *Bauer v. Devenes*, 99 Conn. 203, 121 Atl. 566 (1923), and see also the references to WILLISTON ON CONTRACTS notes 45, 47, *infra*.

The use of the citation is apparently of two forms. The first is the general reference as a jumping off point for the opinion. It is here that the obvious and bromidic sections seem to come to their own. The second is as the last of a string of citations, usually of local cases, thus showing that the local rule has outside support. It is interesting, however, in these contract cases to see the use made of other authorities, notably of Williston on Contracts. It does not seem too much to say that while the courts cite the restatement, they quote, discuss and follow Williston.<sup>45</sup> One cannot read these cases without seeing the demonstration that the courts, *for the difficult points*, need and look to discussion and analysis, not formal statement.

For the rest the record is scanty. The courts show that they are willing to repudiate the restatement where it does not agree with local law, and the lead is taken in this position by that great court presided over for so many years by a vice-president of the Institute, Mr. Justice Cardozo now of the United States Supreme Court.<sup>46</sup> In

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45. *Barlow Grain & Stock Exchange v. Nilson*, 57 N. D. 624, 223 N. W. 700 (1929) (the Restatement cited with WILLISTON ON CONTRACTS); *Port Huron Machinery Co., Ltd., v. Fred Wohlers*, 207 Iowa 826, 221 N. W. 843 (1929) (with Williston, Corpus Juris, etc.); *Ross v. Leberman*, 298 Pa. 574, 148 Atl. 858 (1930) (with Hare); *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 146 Atl. 293 (1929) (discussing Corbin's articles); *Schulze Baking Co. v. Goodson*, 119 So. 353 (Miss. 1928) (with Williston); *Heens v. Byers*, 174 Minn. 350, 219 N. W. 287 (1928) (same); *Outlet Embroidery Co. Inc. v. Derwent Mills, Ltd.*, 254 N. Y. 179, 172 N. E. 462 (1929) (same); *Bromfield v. Trinidad National Investment Co.*, 36 F. (2d) 646 (C. C. A. 10th, 1930) (same); *People's State Bank v. Smith*, 120 Neb. 29, 231 N. W. 141 (1930) (same); *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 255 N. Y. 33, 173 N. E. 913 (1930) (long discussion of Williston); *Irmor Corp. v. Rodevald*, 253 N. Y. 472, 171 N. E. 747 (1930) (with Williston); *Tuttle v. Jockmus*, 111 Conn. 269, 149 Atl. 785 (1930) (same); *W. H. Caldwell v. W. D. Cline*, 109 W. Va. 553, 156 S. E. 55 (1930) (Williston quoted, Page cited); *Amies v. Wesnofske*, 255 N. Y. 156, 174 N. E. 436 (1931) (Williston cited several times); *Ryan v. Progressive Grocery Stores, Inc.*, 255 N. Y. 388, 175 N. E. 105 (1931) (Williston quoted); *In re People*, 255 N. Y. 428, 175 N. E. 118 (1931) (Williston cited); *Eric Transfer Co. v. J. Cutler Iron Works, Inc.*, 47 F. (2d) 1078 (C. C. A. 2d, 1931) (same); *Tillman v. Russo-Asiatic Bank*, 51 F. (2d) 1023 (C. C. A. 2d, 1931) (same); *Hudson v. Yonkers Fruit Co. Inc.*, 258 N. Y. 168, 179 N. E. 373 (1932) (Williston cited eight times). Only contract citations from "A Short Summary of Pertinent Facts," 1932 Revision, are considered; hence no cases where the Restatement is not cited, even though a textbook may have been, are included.

The citations to the Agency restatement are often accompanied by a reference to MECHEM on AGENCY. Compare *Charbonneau v. MacRury*, 84 N. H. 501, 153 Atl. 457 (1931) where the Torts Restatement is cited once and notes from the YALE LAW JOURNAL and the HARVARD LAW REVIEW each three times.

46. *Langel v. Betz*, 250 N. Y. 159, 164 N. E. 890 (1929) (Pound, J.); *Smith v. Morin Bros., Inc.*, 233 App. Div. 562, 253 N. Y. Supp. 368 (4th Dep't 1931); *Lingle Water Users' Ass'n v. Occidental Bldg. and Loan Ass'n*, 43 Wyo. 41,

certain cases, too, where the Court seems trembling on the verge of acceptance of a new doctrine, the restatement may be cited as a final weight inclining the court in the direction it wants to go.<sup>47</sup> This is worthwhile, as far as it goes, but again it seems that the courts are looking more for assistance in reasoning and argument than for mere statement. A single case is quoted in the Institute publications as showing a greater force to the restatement than is here indicated. This is a decision of an Ohio intermediate court with reference to section 90 (discussed above).<sup>48</sup> It should be noted, however, that Professor Ferson had analysed the Ohio cases to the same effect,<sup>49</sup> and the opinion only states "a burden of going forward" upon one who would not follow the restatement.

It may be agreed, since American habits of judicial writing are as they are, that the furnishing of citations is of value. Yet I can see nothing less than failure of the Institute purposes if that is its great accomplishment. Such citations, limited as they are to non-controversial points, will have no appreciable effect in unifying and clarifying our common law. Moreover the furnishing of such

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297 P. 385 (1931) (all *contra* to § 164 of the Contracts Restatement); *Cullings v. Goetz*, 256 N. Y. 287, 176 N. E. 397 (1931) (Cardozo, C. J.; *contra* to § 227 of the Torts Restatement). Compare *McClelland v. Climax Hosiery Mills*, 252 N. Y. 347, 169 N. E. 605 (1930) (Cardozo, C. J.); *Ferro v. Sinsheimer, Est., Inc.*, 256 N. Y. 398, 176 N. E. 817 (1931) (Hubbs, J., Torts Restatement, § 211).

47. This is possibly the situation in *Byram Lumber & Supply Co. v. Page*, *supra* note 45; *Greiner v. Greiner*, 131 Kan. 764, 293 P. 759 (1930); and *Wilson v. Oliver Costich Co.*, 231 A. D. 346, 247 N. Y. Supp. 131 (1931). Professor Patton (in *op. cit. supra* note 29) traces a *dictum* in *Port Huron Machinery Co., Ltd., v. Fred Wohlers*, *supra* note 45, to Section 90, though it is interesting that to this point the opinion cites *Williston* alone. With *Saunders Co. v. Galbraith*, note 48 *infra*, these seem to be all out of the 58 contract cases cited in the "Short Summary" (note 43 *supra*) where Institute influence on the result is indicated. Compare also *Weissman v. Banque de Bruxelles*, 254 N. Y. 488, 173 N. E. 835 (1930) (conflict of laws); *Indemnity Ins. Co. of N. A. v. Stamberger*, 37 Ohio. App. 263, 174 N. E. 629 (1930) (same, referring to support of "our views" by "Judge Beale"); *Kilmer v. White*, 254 N. Y. 64, 171 N. E. 908 (1930) (torts).

48. Mr. Justice Mauck, 40 Ohio App. 155, 158, 178 N. E. 34, 35 (1931): "By following the admirable notes of Professor Ferson it would not be difficult to sustain the soundness of Section 90 as the boiled-down essence of the law of Ohio. We are content, however, to take the Restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority. This is not to say that the Restatement is of necessity perfect and that in it is to be found the law's last word. We only hold that he who would not have it followed has the burden of demonstrating its unsoundness."

49. Compare M. L. FERSON, OHIO ANNOTATIONS TO SEC. 90 (Am. L. Inst.) 171-174 (Suppl. to Vol. V, U. OF CINN. L. REV. 171-174 1931), "The rule stated in this section, although broader than that generally laid down, seems to have the support of the Ohio decisions," citing Ohio cases.

citations is a by-product of any more ambitious attempt at analysis and clarification. The Institute, if it were assisting and moulding judicial opinion, would necessarily and incidentally supply authority which might be quoted on the non-controversial features of the law as well. Again such formal citations may be supplied by all sorts of other things such as encyclopedias and texts, and if the Institute desired to provide them alone it could do so at comparatively little expense by hiring lawyers to write them. The Institute throughout has professed to attempt more than this, its personnel of experts is so organized that it can accomplish more, and surely we all wish it to do so.

What then should be the steps taken to secure this more extensive result? It seems to me they are clearly indicated and are quite simple. They may be expressed as merely making available to the profession the real activities of the Institute experts, in which it has made such a considerable investment. This may be accomplished by two important steps: (1) such modification of the Institute's formula of expression of its restatements as will release the work of the experts, and (2) such encouragement and preservation of the writings of individuals concerning the Institute's work as may through careful planning be found feasible.

As to the first a great change may be made without very extensive modification of the *form* of publication merely by a shift in emphasis from stating the law to stating the conclusions of the experts as to the general situation in the country upon the topics considered. The plan, it seems to me, should be that the Comments should state this general situation with such citations as may be thought necessary, but without an attempt to exhaust all relevant authority, and should then set forth, where it is important, such division of opinion as has occurred among the experts, and finally, the ultimate conclusion of the group or of a majority thereof. Certain existing explanatory notes such as those above mentioned with reference to mutuality of remedy may be taken as somewhat of a model of the possibilities for the Comments. Nor need the black letter be rejected. If it be made to serve its proper subordinate function as a *summary*, an *index* and a *key* to the general material, and not be apotheosized as almost but not a code, then it may serve a proper function, setting forth as briefly as possible the final group conclusions.

The plan, I believe, will preserve the outstanding contribution of the Institute to legal research, but will avoid the serious difficulties of the present scheme. It will still provide for the collaboration of as informed a group of scholars and practitioners as can be secured in joint activity. But there will be a gain in the added intellectual effort secured, in the preservation of original views and vantage

points for future development now lost through compromise and in the saving of expense. At the present time an amazing amount of energy is spent on polishing and repolishing the black letter. The group advisers meet at conferences at southern resorts or at law schools, most enjoyable in their fellowship, but hours at a time will be consumed in consideration of a single phrase of the black letter only to have it reappear for discussion at later conferences. Such critical care over words defeats its own end, for it makes them of more importance than they deserve. The pressure for extreme accuracy leads to a statement so complete as to be really false in the picture it conveys to the reader. Moreover, it stifles effort on the part of the Reporter and especially on the part of the Advisers. One has to become quite aroused to spend much time in preliminary preparation for a conference when it is clear that the utmost effect one can have is a minor verbal modification of the black letter. Why not rely upon the Reporter's assistant for such digging in the cases as is necessary? If, however, one's point of view properly buttressed by authority is to be given currency by the Institute, there will be real incentive for activity. And the danger now present in the inevitable compromise that the law will be held back, even back of the point to which courts are now willing to go,<sup>50</sup> will be avoided, for compromise at the sacrifice of intellectual integrity will not be asked.

Fully as important is the saving of expense, and the release of funds for other activities, particularly for the treatises discussed below. The several conferences and the continual refurbishing of the sections make for extraordinary slow progress. The expense of each restatement is enormous. The Council chose the subject of Contracts as one of its first projects because Professor Williston had recently published an exhaustive treatise on the subject and this would make the task of restatement "far simpler than it would otherwise be."<sup>51</sup> Moreover it will be agreed that no clearer topic could be found in the law. Yet the cost of this restatement alone together with its state annotations will be, it seems, in excess of \$400,000 or

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50. This danger was suggested by Dean Roscoe Pound as early as 1931 in his lectures published as *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922) 282, 283:

"Projects for 'restatement of the law' are in the air. But a restatement of what has never been stated is an impossibility and as yet there is no authoritative statement of what the law of consideration is. Nothing could be gained by a statement of it with all its imperfections on its head and any consistent analytical statement would require the undoing of much that the Judges have done quietly beneath the surface for making promises more widely enforceable." Quoted by Patton, *op. cit. supra* note 29, 15 *IOWA L. REV.* at 38.

51. *I PROCEEDINGS AMERICAN LAW INSTITUTE* (1923) Part III, 62, 92.

\$650 per section.<sup>52</sup> If the plan is changed the time of the Reporter will be released and the conferences can be greatly reduced (by at least one-half if not more). A single topic should rarely if ever be considered at more than one conference. Preliminary study should have enabled each adviser to know the problem and the discussion should finally come to a vote without the necessity of agreement of all.

The funds thus released should be used in part to stimulate critical writings concerning particular portions of each of the restatements. Attack, defense and careful evaluation of the text and the attendant law should be encouraged. This will supply the need that the state annotations are now imperfectly filling and will make unnecessary the burden and expense that they entail. A certain amount of such material has already appeared, although there is grave danger that it will be buried in the pages of the law reviews.<sup>53</sup> The Institute should take pains to collect all such material where it is considered by proper authorities as being worthwhile for preservation and should develop means of thorough publication of it. It then should stimulate such production and printing for the future. The exact ways and means of developing this most important feature of the Institute's work may well be subjected to careful consideration and a committee representing the Institute might properly consider and prepare detailed plans to this effect.

In this connection it may be suggested that the Institute has already made quite an investment in the education of its experts and

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52. The annual reports of the treasurer of the Institute to the close of 1931 show an expenditure on the "Restatement of Contracts" of \$99,579.84 and for general overhead of \$710,881. Additional expenditure in 1932, with a proper allotment from the overhead in view of the prominence of the Contracts project, should bring the total to at least \$250,000; while the remainder would be accounted for by the state annotations costing from \$2000 to \$5000 per state.

53. Among articles now in danger of being lost, see the discussions of Messrs. Oliphant, Williston and Corbin on *Mutuality of Obligation in Bilateral Contracts* in 25, 26 and 28 COL. L. REV.; the discussions of Messrs. Green and Williston on an offer as a promise in 22 and 23 ILL. L. REV.; McDowell, *Risks of Assignee under Restatement of the Law of Contracts* (1929) 17 KY. L. J. 339; McDowell, *Effect of Pre-existing Legal Duties upon Consideration under the Restatement of the Law of Contracts* (1928) 16 KY. L. J. 306; Branch, *Common Passageways* (1931) 11 B. U. L. REV. 309; Warren, *Gifts Over on Death Without Issue* (1930) 39 YALE L. J. 332. Professor Warren's article is typically the kind in which the Institute has a direct stake, likely to be lost. It is a completely informative monograph prepared for the Property restatement, but not discussing the restatement itself. See also the discussions of Messrs. Bruton and Williston: Bruton, *The Requirement of Delivery As Applied to Gifts of Choses in Action* (1930) 39 YALE L. J. 837, and Williston, *Gifts of Rights Under Contracts in Writing by Delivery of the Writing* (1930) 40 YALE L. J. 1.

it ought to realize upon it. If it does not, they will do so themselves. It is obvious that text material is vitally necessary and that it will be supplied by the Institute's workers themselves if the Institute does not act. But the pressure of other engagements and of other interests and the chance of death or disability may prevent its being done in a thorough way. The Institute should foster this work and should itself reap the advantage of it.<sup>54</sup>

Some, perhaps all, of the developments here suggested are sure to come in any event. But there is gain of profiting by experience at the earliest possible moment. The labors to date have by no means been wasted. The education of bench, bar and professors in methods and effect of legal research is invaluable. Now, when the first product is at hand, is the time for critical estimate of accomplishment and envisagement of the future. The plan here suggested, which is in effect only a shift in emphasis, will give the courts the assistance they need in reaching toward new and original conclusions. It will shape the law of the future in the way that the present restatements will not and that only the Institute's by-products can now do in a very limited fashion.

In what I have written above I have from time to time spoken of the Institute's plan, but I am not sure that I do not owe an apology for thus speaking. On many of these points I cannot be sure that the entire Institute has an official plan and I have been forced to look to the statements of its officers. In view of this doubt as to an official position, and since we have all been asked to share in this project which is important and far reaching enough so that we should do so, is it too much to ask that the matter now be thoroughly recanvassed? Judgment on these points should come not from the officers of the Institute alone but the decision should be shared by at least the members of the Council and the Reporters and Advisers of the various groups, and in addition, so far as that is possible, by representatives of the entire membership of the Institute. Now is the time to make the project what so many people have fondly hoped, namely, the outstanding development in law in generations.

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54. The need of critical articles is pointed out by Professor Corbin, *op. cit.* *supra* note 23.