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Restatement of the Law of Contracts by the American Law Institute

Hugh E. Willis

*Indiana University School of Law*

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BOOK REVIEW


The publication of the Restatement of the Law of Contracts—the first Restatement published by the American Law Institute—is, in the words of Chief Justice Hughes, "an event of first importance." It offers a promise of giving to the law of contracts, so far as concerns the United States, a "clearness, brevity, consistency, uniformity and accessibility" which it has never had before. The bulk of case law was becoming so great that soon the task, which has now been accomplished, of summarizing the law of contracts would have become insurmountable. It has been summarized none too soon, but it has been summarized soon enough.

The Restatement is a product of the cooperative work of bench, bar and school. Chosen representatives of all three of these professional classes have joined, yes clashed, in friendly debate over the wording to be adopted for the various sections. In this sense, it is the product of the scholarship of the nearly one thousand carefully chosen members of the American Law Institute. Yet the Institute as a whole only debated; it did not finally formulate any of the sections. No other method was feasible. If the Institute had been given any such power as actual formulation, the final result would have been chaos. Appreciation of this fact doubtless was the reason for the carefully evolved technique for allowing the Institute to consider but not to decide; to be called the principal but to be maneuvered into the position of an agent. In another sense, it is a product of the Council of the Institute, consisting of thirty-three members, made up from the same three classes, who not only debated but took final action. But in the largest and truest sense, the Restatement is the work of one man, the reporter, not of one thousand or thirty-three men, for it was the reporter who, though accepting minor advice and suggestions, steadfastly opposed any theories contrary to his own and carried his ideas first through the advisers then through the Council, and finally battled for them before the American Law Institute as a whole.

It would be easy for this or any reviewer, as opponents in the sessions of the American Law Institute did, to quarrel with and pick flaws in many of the provisions in the Restatement, such as its definition of contract, treatment of the topic of consideration, rationalization of the performance of part of an act for which an offer has been made, classification of conditions and statements as to the law of necessity of offer and acceptance for
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agreements, of mutuality, of discharge by marriage, and of integration, interpretation and illegality of contracts under seal. It would also be interesting to speculate as to how the Restatement would have differed generally in phraseology and rationalization and specifically in a few substantive respects if a different group, which might quickly be suggested, had done the preliminary groundwork instead of the group which did do it. But the work now given to the public is so monumental in nature and, for the most part, so generally approved and acclaimed that all such speculations and criticisms should be forgotten. It is now a matter of this Restatement or none. The time for even constructive criticisms has now passed. Certainly, this is no time for carping criticisms.

The Restatement of Contracts is not a digest, or encyclopedia, or code, but a treatise, or textbook. Heretofore, codes (in the United States) have been inadequate, digests too bulky, and treatises either another form of digest or unreliable. The American Law Institute chose to put its work forth in the form of treatises. The Restatement of Contracts is a glorified textbook. Textbooks are generally classified as books of secondary authority. The American Law Institute expects its textbooks to become books of primary authority. Its “Contracts” ought to be given this rank, and courts which have been in the habit of quoting questionable statements from encyclopaedias and textbooks ought to be expected to make extensive and authoritative use of statements in the Restatement. The Supreme Court of Ohio has already set the example.

The Restatement does not purport to reform the law, even where a majority of those working on it may as individuals have believed in reform, but only to restate the common law. That is why, among other things, there is no recommendation of the abolition or essential change in the Statute of Frauds. Yet, in spite of this purpose, it has reformed many things in the law of contracts. Among those parts of contract law which it has so reformed may be mentioned the following: the law of consideration (by relegating moral consideration and injurious reliance as consideration to the limbo of “contracts without consideration”) (Sec. 85, et seq.); the Statute of Frauds (by reading in decisional law) (Secs. 180-191, 192, 198); the law of fraud and representation (Sec. 470); the effect of rejection (Sec. 39); the effect of performance without an acceptance (Sec. 63); delivery in escrow to the promisee (Sec. 105); contracts joint and several as to the promisees (Sec. 111); insolvency as a basis for specific performance (Sec. 362); contract not to sue, as a discharge (Sec. 405); definition of release (Sec. 402); oral renunciation (Secs. 410-416); accord (Secs. 417-421); cancellation (Secs. 432-3); and alteration (Secs. 434-42). Yet, in spite of these reforms, or perhaps because of these reforms, it is a faithful summary of the common law of contracts. It is a restatement, anomalous as it may seem, of the common law as it
is. This is due to the fact that the reforms it introduced were the result of the simplification and harmonization of the law as a whole in relation to all of its parts. Only inconsistent and antagonistic features have been ironed out. Certain parts have been changed; the law as a whole stands unchanged.

The Restatement purports also to be a working tool for the working practitioner and judge, and with all the fires through which it has gone it ought to be sufficiently tempered for this use. The reviewer has only one regret in this connection, and that is that it has not more frequently given the profession the rationalization of its rules. The “why” of it. By this he means, not the “pro” and “con” of decisions or arguments, but the true reason for the rules, that is, the net result of all the arguments. This surely would not have hurt the tool in the hands of the practitioner and judge.

The Restatement, then, is an accurate summary of the common law. It has brought the common law down to date. It has improved the law by following the best of conflicting authorities, and sometimes by following no authority at all except good sense and sound reasoning. It has unified the law of the United States and destroyed contrariety. It has simplified analysis and classification. It has stated the law in clear and unambiguous phrases. Henceforth, more and more, contract law in the United States is destined to be one United States law as formulated by the American Law Institute instead of the law of this or that state or federal district.

One question remains. What effect will this Restatement have upon the future growth of contract law? This is a serious question. If the result of having the common law of contracts summarized in this form is to be the checking of all future growth and crystalizing the law just as it has been restated, the result will be unfortunate. But if the result is only to bring all contract law up to the level of the Restatement but not to inhibit its being carried to higher levels (where perhaps there will be no Statute of Frauds and no consideration, at least for written promises), the result will be altogether good. Which one of these results is it likely to have? The reviewer believes the latter. The happy fact that the Institute put out its Restatement not as something to be adopted as a code, but as something to be followed only because of its own inherent authority, the reviewer believes, is what will insure this result.

Hugh E. Willis.

Indiana University School of Law.