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## The Work of the American Law Institute

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## THE WORK OF THE AMERICAN LAW INSTITUTE\*

HERBERT F. GOODRICH\*\*

I have no doubt that there comes to all of us in the legal profession at times, regret that the things which we do in the line of professional progress do not show themselves conspicuously and convincingly to the lay public. A designer of automobiles, when confronted with the necessity of a radical change, will modify the lines of a car body and the results of his work will show themselves on every public highway within a few months. An architect or engineer will contrive an ingenious device for maintaining uniform temperature in a building, and the results of his effort show themselves in a way that even the most technically ignorant of laymen can appreciate and understand. Our friends in the medical profession share with us the difficulty in that their work concerns human beings and in many instances the results of the physician's application of scientific methods will be modified or blurred by the lack of scientific response from the human being he treats. But even with this disadvantage, our medical friends have a great margin over us in the law, in the demonstrability of the results of their efforts. I have no doubt that you have enjoyed, as I have, the thrilling descriptions of medical victories given by Dr. deKruif in the volumes called "Microbe Hunters" and "Men Against Death". The discovery of insulin as a complete means of victory over the dread horror

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\* An address delivered before the Indiana State Bar Association at Indianapolis, January 19, 1934.

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of diabetes, the banishment of anemia, the victory over syphilis—all are fascinating tales of adventure in which the object to be gained is clear and the result certain. A medical friend of mine was telling me the other day of a new method of treating pneumonia, which seems likely to rob that dread disease of its terror. The method is simple, as all really great things seem to be. Instead of dosing the patient with medicine, the physician collapses the lung through injection of oxygen. The results are immediate, clear and final. Once a correct diagnosis is made, the solution of the problem becomes clear, even to the neophyte.

We in the law have no such criterion to guide us, as is available to the man who works with things, or even the physician who fights disease. If an engineer's bridge falls, his lack of success is quite obvious. If a patient dies, the doctor has not succeeded. But if a judge upholds a provision establishing a spendthrift trust, the judge cannot prove whether his decision is going to be helpful or harmful to the individual involved, or the public welfare. We deal with rules which govern people in their affairs with each other. We cannot in most instances subject our material to anything comparable to laboratory examination, either as a basis for knowing what rules to make or as a test to determine how well they work. We shall always have that trouble in our activities in many departments of human endeavor. I know of no way of finding out by a demonstrable test whether the rule of contributory negligence is on the whole desirable or undesirable. I have some opinions about it, and doubtless you do also; our opinions may or may not coincide, but neither of us can prove the other is wrong. I believe that the extension of the liability of a manufacturer of a chattel to the ultimate consumer is a growth of the law in the right direction. Likewise, I believe that the rule referring the validity of a sale of a chattel to the law of the place where the chattel is, instead of the domicile of the owner, is good sense. But I know of no way of establishing it with the clearness with which my friend, Dr. Stengel, can cure a patient suffering from pneumonia with two or three injections of oxygen.

Because we cannot have complete certainty in the law, either as to rules or ends to be attained, there is no excuse for not working for as much certainty as we can get. Surely all of us will agree that various studies and surveys which have been made the last few years to find out how our law actually works in day to day operation are highly desirable and highly illuminat-

ing; especially are these studies valuable in the field of adjective law. We ought to know how long it takes cases to come to trial; we ought to know what the cost of litigation is; we ought to know the percentage of litigated cases in which the plaintiff actually gets in hand a substantial amount as a result of his lawsuit. We also ought to know how much of the estates of deceased persons is used up in fees and administration expenses, and how much the creditors of a defunct business concern get in the way of payment, both in the process of bankruptcy or handling of affairs through receivership proceedings. Such surveys as the Johns Hopkins Institute of Law made in the operation of divorce machinery in Maryland and Ohio, should go far in removing a discussion of that problem from opinion and prejudice and allow it to proceed on the basis of established fact. Surely we cannot overlook the significance of the fact that divorce becomes a contested matter in only about one case out of fifty. In another field, a careful fact-study has revealed equally startling things about the legal consequences of automobile accidents. If one is hit by a motorist who carries insurance the chances are almost nine to one that regardless of legal liability, some payment will be made. If one is hit by a car which does not carry insurance, the chances are about one in four of receiving any payment. And the chances are three or four to one that if you are hit it will be by a driver who is carrying no insurance. Facts of this type are surely going to play an increasingly large part in the basis of both our Statute and judge-made law, but the gathering of such facts is slow, difficult, and exceedingly expensive. It will be a great many years before we have an accumulation large enough to become a substantial factor in lawmaking policies. Furthermore, I take it that in many difficult problems of law, no type of factual study of which we can now conceive can aid us materially. Certainly we in the profession ought to be interested and open-minded with regard to new facts. If we learn that our rules of law have been proceeding on erroneous assumptions, we ought to be willing and ready to help for a change in whatever direction is desirable.

Meantime there is an immense field in which the lawyer has the sole responsibility for the state of affairs. That is in the state of the substantive law itself. We all realize the law must grow, but in order for the law to grow it does not have to start from the state of chaos. Our present situation, with printed

decisions of courts covering more than 30,000 each year and comparatively simple problems resulting in divergent solutions in neighboring states whose economic and social order is almost identical, has produced confusion in the minds of lawyers and judges which has been expensive and disappointing for clients. It recalls the description of the law given by the candidate for admission to the bar who was asked to state the two types of law. He replied, "The known and the unknown," and that the unknown greatly exceeded the known. This situation furnishes a background to the project undertaken by the American Law Institute.

The chief business of the American Law Institute, so far, has been its work in the preparation of a Restatement of the common law. In addition to the Restatement it has prepared a Model Code of Criminal Procedure; that I want to say something about a little later. The main outlines of the Restatement project can be easily and simply stated. The purpose is to make an orderly, accurate and carefully considered statement of the rules and principles of the common law in its various branches. It is hoped that a statement can be made which is intrinsically so well done and so authoritative that judges and lawyers can take a statement out of the Restatement as settling the law upon any given point today. We hope that if this work is as well done as we intend to make it, that the profession can be saved the enormous and inextricable labor of going back over the tremendous mass of decisions prior to the time of the Restatement. We want the Restatement to be the kind of book which the lawyer can taken down with the consciousness that its statements represent today's law upon the subject covered.

The Restatement is thus something quite different from a statute prepared by the National Conference on Uniform State Laws. Many of those statutes, especially in the commercial field, are based in the main upon common law. But they do not have, nor are they expected to have, any authority until enacted by the Legislature. The Restatement is not intended as a code; no legislation is asked to give it the force of law. In that respect it differs wholly from the Codification of the Roman Law under Justinian or the Codification of the French Law under Napoleon. Some people say that we shall eventually have all of our law codified in the United States. That may or may not be true. If we do, I take it the most essential prerequisite to such

codification is a thorough study of the existing common law such as the Restatement represents. But I am very sure that the usefulness of the Restatement is in no way dependent upon its use as one of the steps in codification. The Restatement of present day rules is made as a working tool for the lawyer and judge here and now. Even if courts accepted it 100%, it obviously would not settle new problems not covered by it, although we hope that its discussion of legal principles will give courts and lawyers help in those new problems.

The Restatement cites no authorities. It is not meant as a textbook, even an extraordinarily good textbook, nor as a substitute for an encyclopedia or digest. The statements are based upon a thorough consideration of American and English cases by legal scholars who have devoted their lives to the field in which they are here writing. The Restatement will have received, before it is approved by the Institute, examination from judges, officers and members of the Institute, committees from State Bar Associations, and law teachers. It is to represent, therefore, not the opinion of a legal scholar, however eminent, but the consensus of opinion of the legal profession upon the points stated.

The Restatement is thus a new animal in the legal menagerie. It is not a statute, it is not a court decision, it is not a textbook nor a digest. It purports to state the law, but on its own authority. No such type of thing has ever been placed in the hands of the profession before.

Have we any reason to think that the Restatement will be accepted by a profession schooled in the tradition of citing a case or a statute for the most simple proposition of law advanced? I think we may, and for a number of reasons. The profession is receptive to any good piece of legal work which attacks boldly and intelligently problems with which it is confronted, and offers a reasonable solution therefor. Think of the authority of Blackstone's Commentaries on the Law of England. Think of the hundreds of instances where courts have relied on the works of Greenleaf and Wigmore on Evidence, Sedgwick on Damages, Story on Conflict of Laws, Williston on Contracts. Think also of the reliance upon many texts, of the paste pot and shears type, which are used and cited simply because no other help is available. Without special reference to the merits which we hope the Restatement has, any respectable piece of legal writing which offers a reasonable solution of a problem which

a judge must settle will secure a friendly and favorable response.

The Restatement of the law is sponsored and participated in by an immense number of the leaders of the profession. It is not without significance that the last four members of the Supreme Court of the United States were all, when appointed, members of the Institute Council. The Chief Justice, and Justices Stone, Cardozo and Roberts were all active in Institute affairs prior to their elevation to the Supreme Court. On the Council are other judges from many State and Federal Courts, Circuit Judges Hand and Hutcheson, Judge Birch of Kansas, Judge Rugg of Massachusetts, Judge Rosenberry of Wisconsin, Judge Parker of Washington—are all in the Council of the Institute. Our membership includes Chief Justices from every State Supreme Court and the presidents of all the State Bar Associations. Heading the work of the Restatement in the various branches are well-known legal scholars—Williston on Contracts, Bohlen on Torts, Beale on Conflict of Laws, Scott on Trusts.

One should not go too heavily on the presence of great names. We in America know too well the custom of an imposing list of prominent persons as window-dressing for an undertaking, with which the persons on the advisory, sponsoring committee have little knowledge and little participation. Such is not the case with the Institute enterprise. The lawyers and judges who serve on the Council are called upon for attendance at least three meetings a year, each several days in length; they are called upon for attendance at conferences and a large amount of individual work between meetings. A great majority of the members have given a large amount of time and thought to the project. The Institute carries on its work therefore, with the help and active participation of a large body of members whose position in the profession is beyond doubt of the possibility of dispute.

The work has from the start been done with very great care. The scholar chosen to head up each branch of the work is in every instance a man of learning and experience in that field of law. He is surrounded by a group of advisers who come from law teachers, judges and practitioners, and who are called in, not to approve what the Reporter does, but to help him get his work right. They are selected because they have critical faculties and are expected to exert them. They do. Before a draft of any material gets as far as the Council of the Institute, it has been worked on over and over both to secure an accurate state-

ment of the rule of law and to express that statement in the most careful way possible.

The Institute has worked very hard upon this question of accurate use of words. We all know the difficulties into which we get by using a word in one sense in one place and carrying the same word over to use it in a different sense in another place. We hope a substantial contribution which this Restatement work is to make will be in expression of ideas in careful language. We hope to do it without introducing new-fangled terms to the profession. Mr. Williston has pointed out that lawyers are much more ready to accept a new idea in the terms with which they are already familiar than accept an old idea couched in strange language. We are making every effort to use in general the terms with which the profession is familiar, but to avoid using the same term in a half dozen different senses.

Before work is put out as a product of the Institute, it must not only be approved by a draughtsman and his adviser, and the Council, but it is submitted to the members of the Institute and the Bar Association Committees in the various states and again amended and revised. Work on Contracts took ten years, even though Mr. Williston had worked in that field all his life and two members of his committee, Corbin of Yale and Page of Wisconsin, had already published books in that field themselves. If painstaking, careful effort by those who know the law will produce a result which will command respect and authority, the Restatement is that book.

The final reason for confidence that the Institute's Restatement will realize its ambition to produce something which will improve the law is the evidence of its success so far. Ten years ago we had nothing but hope that the ambitious ideals of the founders and the confidence of the Carnegie Corporation in financing the work of the Restatement would produce a result commensurate with the time and money put into it.

The work has now passed the stage where it must rest on hope. We have found that that Restatement of the law can be made by cooperative group work. Indeed, we see the tendency stronger and stronger to make the Restatement a cooperative work of a group rather than a writing of the law by a single scholar, however eminent. In 1932 Contracts was finished, approved and published. In 1933 the Restatement of Agency was likewise completed. In 1934 we shall have finished Conflict of Laws, and two volumes of Torts that will comprise a volume



on Intentional Injury such as Assault, Battery, Trespass to Land, etc., and a volume on Negligence. Those who are familiar with it, high authorities, have called the volume on Negligence the best work in that difficult field ever produced. In the following years the volumes on other subjects will be forthcoming. In other words, the work is now at the stage where we can foresee its completion with certainty and within reasonable time.

Courts and lawyers are using both the completed Restatements and the tentative material in others as it appears. Senior partners in large city offices tell me that the office memoranda and briefs prepared by the juniors are dotted with Restatement citations. Our Law Reviews have cited and discussed the Restatements so many times that the omission of Restatement references is more conspicuous than their presence. Most important of all, the Appellate Courts have cited the Restatement more than two hundred and fifty times. Some of these citations are to the tentative drafts. Other courts have not cared to make tentative draft citations, thinking it more advisable to await completed work. The United States Supreme Court, however, has cited both tentative and final drafts. Several courts are making it a practice to ask counsel in every case where subject matter is covered by the Restatement, for the Restatement view. The Chief Justice of one State Supreme Tribunal has declared his intention of following the Restatement in the future whenever his own local law differs from that expressed therein. The Court in my own state, Pennsylvania, while not making any such sweeping declaration of policy, did overrule a previous line of cases last summer, and adopted the view on a difficult point of Contract law as expressed in the Restatement.

There is one highly important phase of the Institute work which must be mentioned before this discussion is closed. I have said that the Restatement does not cite cases. It is to stand on its own authority as a statement of existing law. But the Institute is not so naive as to believe that lawyers will immediately depart from centuries-old traditions in the use of case material. It is realized that a lawyer trying a case or advising a client, or a trial or appellate court deciding a legal point ought to have available for himself not only the Restatement but some knowledge of decisions of the court in his own state and of the legislation in his own state. Furthermore, we know it will be of help to the user of the Restatement in any state if he can have the advantage of a comparative study

of his own decisions and the Restatement. Frequently both speak to the same effect, but in somewhat different phraseology. We believe the Restatement to be the best possible statement of the general rules of the common law, but we believe that the user of the Restatement will be helped by an intelligent and careful setting out of his local authorities, comparing them with the Restatement rule. Consequently the Institute asked the Bar Associations, after the Restatement work was pretty well advanced, if they would cooperate by supplying, each for its own state, state annotations of the respective subjects which the Institute was working upon. The financial difficulties in the way of such scientific work by Bar Associations was well realized. They are not rich organizations. Some of them have barely enough in the treasury to meet the deficit of the annual dinner, so the Institute told the Associations that if they would somehow or other do the legal work of preparing the annotations, we would take the responsibility to see that they were printed and made available to the Bars in the several states. This too, was a rather bold undertaking. We were confronted with the certainty of substantial loss in the printing of the annotations. Furthermore state bar associations or similar local groups had never gone in for technical legal work in any such way as this. We feel that the response has been wholly successful. Fifteen annotations of Contracts from fifteen commercially important states are now in the hands of the lawyers in those states. Others are in course of preparation and will appear during the year. In only two or three states has there been any lack of response to the request for cooperation. Indiana annotations are now in the hands of the Indiana lawyers. They are a fine piece of scholarly work, and should prove of great help to the users. With the increased production of the Restatements by the Institute, it is clear that we are asking a great deal of our friends in the various Bar Associations. Some Associations have ample funds to finance the work on a rather elaborate scale, and in those states where such effort has been made, the production of local annotations has become one of the major activities of the Bar Associations. I think it the uniform experience that the doing of this work has proved a great source of satisfaction to the Bar Associations as well as to the Institute. Such a scholarly and critical survey of state law is of great value to the state irrespective of its value in increasing the usefulness of the Institute's work.

Upon the question of aiding the Bar Associations to effect an organization which will increase the efficiency and rapidity of this annotation work, we have done and are still doing considerable thinking. The law schools and their faculties are giving great help. In quite a number of states there are no law schools, in many others the faculties are already doing a great many other public things, and even for a law professor, the number of hours in a day are limited. It does seem to us that in annotation work there is a fine opportunity for a well trained young lawyer, even if he works with little or no pecuniary compensation, to perform a valuable public service and at the same time do some very useful things for himself. Intensive work in one branch of the law in his own state, combined with a thorough mastery of the Restatement in one branch, will certainly teach him a great many things valuable in his own professional life. Furthermore, the doing of a first rate piece of legal work should be of very great professional advantage to the lawyer who does it. In any situation where the faculty of a local law school cannot alone carry the entire burden of production of local annotations for the various Restatements there is an opportunity for fine professional work. These men ought not to work alone, but ought to have the help of an interested group of seniors who will examine the product and make suggestions. A combination of the two types of effort ought to produce something which is very good and which should be a satisfaction to all who participate therein.

Not the least of the results of the American Law Institute and its work is the remarkable cooperation which has been developed among law teachers, judges and practicing lawyers. Each has become better acquainted with the other, and in so doing has gained mutual respect. Each has learned that the other has something to give him, and each has profited by the friendly contact. All have devoted an immense amount of time without remuneration to what is, in the main, an unexciting and certainly unsensational type of public service. The Restatement of the common law, when successfully accomplished, is not going to settle all legal problems. There are dozens of things in the law which will not be affected either for good or evil by the Restatement. There are hundreds of new problems which will arise in ten years which are totally outside its scope. Nor does the Institute for a moment claim it is the only organization which is doing good things in the

law nor which is worthy of support. Those who have been engaged in or following its work for the last decade are convinced it is doing a valuable service and that it is making a substantial contribution to the improvement of the law. Such a contribution is as much as any man or group of men can accomplish in a lifetime, but in that accomplishment there is enthusiasm and satisfaction of work well done.